

UNITED STATES COPYRIGHT ROYALTY JUDGES  
The Library of Congress

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)

**COPYRIGHT OWNERS' EMERGENCY CROSS-MOTION TO  
VACATE THE MAY 9, 2022 INTERIM RELIEF AND STAY  
THE MAY 20, 2022 SUPPLEMENTAL SUBMISSION DEADLINE  
AND  
OPPOSITION TO SERVICES' EMERGENCY MOTION FOR LIMITED  
MODIFICATION TO PHONORECORDS IV PROTECTIVE ORDER**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

DISCUSSION.....3

    I.    The Services’ Motion Should Be Denied and the Interim Relief Vacated .....4

        A.    The Services Seek Relief Contrary To The Law And Violative  
            Of Due Process .....4

        B.    The Motion Fails Under Every Aspect Of The Governing Legal Standard .....7

            1.    The Balance Between Impairment Of Counsel and Risk Of  
                Inadvertent Disclosure Is The Reverse of The BMI Motion.....8

            2.    The Timing Of The Motion Further Precludes The Relief .....13

CONCLUSION.....15

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Ambush v. Engelberg</i> , 282 F. Supp. 3d 58 (D.D.C. 2017).....	5
<i>Bottaro v. Hatton Assocs.</i> , 680 F.2d 895 (2d Cir. 1982).....	5, 6
<i>Davis v. Stamler</i> , 650 F.2d 477 (3d Cir. 1981).....	5
<i>Doe #1 v. Am. Fed'n of Gov't Emps.</i> , 554 F. Supp. 3d 75 (D.D.C. 2021).....	5, 13
<i>Fairchild Semiconductor Corp. v. Third Dimension Semiconductor, Inc.</i> , No. CIV. 08-158-PH, 2009 WL 1210638 (D. Me. Apr. 30, 2009).....	15
<i>Helperich Pat. Licensing, L.L.C. v. New York Times Co.</i> , No. 10 C 4387, 2013 WL 3177605 (N.D. Ill. June 21, 2013) .....	6
<i>In re Payment Card Interchange Fee &amp; Merch. Disc. Antitrust Litig.</i> , MDL No. 05-1720 (JG)(JO), 2006 WL 6846702 (E.D.N.Y. Aug. 7, 2006) .....	6
<i>SmartSignal Corp. v. Expert Microsystems, Inc.</i> , No. 02 C 7682, 2006 WL 1343647 (N.D. Ill. May 12, 2006) .....	6, 14, 15
<i>Sonix Tech. Co. Ltd. v. Yoshida</i> , No. 12cv380-CAB (DHB), 2014 WL 11878353 (S.D. Cal. June 30, 2014) .....	7
<i>U.S. Steel Corp. v. United States</i> , 730 F.2d 1465 (Fed. Cir. 1984).....	10
<b>Statutes</b>	
17 U.S.C. § 115 .....	12

National Music Publishers' Association and the Nashville Songwriters Association International (collectively, "Copyright Owners") respectfully submit this opposition to the Services' *Emergency Motion For Limited Modification To Phonorecords IV Protective Order*, eCRB Docket No. 26637 (May 6, 2022) (the "**Motion**"), and emergency cross-motion to vacate the Judges' May 9, 2022 *Order Granting Services' Interim Relief Pending Resolution Of Emergency Motion For Limited Modification To Phonorecords IV Protective Order* (the "**Order**") and stay the May 20, 2022 supplemental written rebuttal statement ("**Supplemental WRS**") deadline.

The Supplemental WRS deadline was set in place to provide the participants with an opportunity to address additional direct discovery following the resolution of pending discovery motions.<sup>1</sup> However, the deadline is now in 8 calendar days, and Copyright Owners have not received virtually any of the additional discovery. Of the discovery motions decided, the main deadline for Service production was May 10, 2022, but the Order's interim relief precludes Copyright Owners' outside counsel from reviewing this "outside counsel eyes only" discovery pending the Motion. And while with this filing, Copyright Owners accelerate their response, the Motion, which is baseless and tactically aimed at obstructing Copyright Owners, will not even be fully briefed until the day before the current Supplemental WRS deadline.

Copyright Owners thus have not meaningfully received the productions from May 10, 2022, and will not until the interim relief is vacated. Moreover, even if the interim relief is lifted now,

---

<sup>1</sup> See *Order Following April 7, 2022 Status Conference*, eCRB Docket No. 26435 (April 8, 2022), p. 2 (May 20, 2022 submissions shall relate only to "new evidence obtained as a result of a ruling on a written direct statement or amended written direct statement discovery motion or otherwise revealed in direct discovery obtained, or witness depositions taken, after the filing of the original written rebuttal statement.").

one Service has already notified Copyright Owners that the productions due May 10, 2022 will not be completed for potentially two more weeks. Further, although the majority of the Services' discovery motions have been decided already, half of Copyright Owners' discovery motions remain pending.<sup>2</sup> Productions pursuant to orders on these motions would not even arrive until after the current Supplemental WRS deadline. Indeed, one discovery motion was decided today and contained a production deadline of May 26, 2022—six days after the current Supplemental WRS deadline

For the reasons discussed herein, Copyright Owners respectfully request that the Judges (1) immediately vacate the interim relief in the Order; (2) deny the Motion in its entirety; and (3) stay the Supplemental WRS deadline until a date that is at least two weeks beyond Copyright Owners' receipt of Service productions pursuant to the existing and pending discovery orders.

Given the numerous discovery issues, and the need to plan for a hearing set to begin in less than two months, Copyright Owners also respectfully request a telephone conference with the Judges to discuss these matters. Copyright Owners also welcome the opportunity for argument on the Motion and this Cross-Motion as well, if the Judges believe that this might expedite addressing these matters.

---

<sup>2</sup> These include *Copyright Owners Motion To Compel Production From Amazon And Google Of Documents And Information Concerning Eligible Digital Music Service Costs*, eCRB Docket No. 26279 (March 8, 2022); *Copyright Owners' Motion to Compel Production of Documents and Information Google Agreed to Produce*, eCRB Docket No. 26364 (March 22, 2022); *Copyright Owners' Motion to Compel Amazon to Produce Documents and Information*, eCRB Docket No. 26373 (March 22, 2022); and *Copyright Owners' Motion to Compel Amazon to Produce Unredacted Documents and Challenge to Amazon's Clawback Notice*, eCRB Docket No. 26407 (March 30, 2022).

## DISCUSSION

The Services' Motion presents a new low in opportunism and gamesmanship in these proceedings, and the Order's interim relief rewards and encourages that gamesmanship. The Services precipitated a fake "emergency" by waiting until the last minute to file the Motion to modify the *agreed* Protective Order in connection with discovery that was requested by Copyright Owners in October and November 2021. Throughout discovery, the Services never raised their newfound, baseless objection that Copyright Owners' counsel might "subconsciously deploy" "opinions, or worse misinterpretations," about their data to the MLC. Motion at 3. Along the way, the Services made numerous productions in response to the very requests at issue without any objection concerning this contrived risk. Instead, the Services delayed filing the Motion until last Friday, thereby ensuring that briefing would not conclude until after the deadline for supplemental submissions relating to the discovery, and on the eve of depositions and hearing preparation. The Services' Motion further seeks to preclude the *only* law firm representing licensors from accessing the information, effectively precluding its access by Copyright Owners in the proceeding.<sup>3</sup> In support of their Motion, the Services offer only baseless arguments that directly contradict other arguments they have made in this proceeding, and with no legal or factual support.

Knowing how objectionable the Motion was, the Services filed it just after the close of business on a Friday night and broke with the practice of serving courtesy copies of motion papers

---

<sup>3</sup> The effect of the Order is not materially mitigated by the notion that attorneys at the firm *other than* the current lead partners might be able to access the evidence (assuming they are willing to accept a prohibition on counseling the MLC), as those counsel are not in a position, especially at this late stage in the case, to get up to speed and effectively utilize the evidence in the proceeding. The legal implications of a deprivation of the right to choose counsel, as discussed below, are not lessened by allowing new counsel to step in, whether that new counsel is at the current firm or a new firm.

by email, giving the Judges the illusion that Copyright Owners had notice when they did not. As a result, the certificate of service generated by eCRB is incorrect. Copyright Owners did *not* receive a copy of the Motion papers on May 6. Copyright Owners were not apprised of the Motion’s existence until it posted on eCRB less than two hours before the Judges effectively granted the Motion. The Order provides interim relief that prevents Copyright Owners’ counsel from accessing evidence until *after* the deadline for incorporating that evidence into a Supplemental WRS, effectively granting the ultimate relief sought. Discovery that is “outside counsel eyes” only, but that outside counsel is precluded from accessing until after the deadline for its use, is not discovery in any meaningful sense.

**I. The Services’ Motion Should Be Denied and the Interim Relief Vacated**

**A. The Services Seek Relief Contrary To The Law And In Violation Of Due Process**

The substantive lack of merit of the Motion exceeds even its procedural unreasonableness. The Services cite no legal support or precedent for their relief except the BMI Order, yet the relief they seek is profoundly more sweeping than that in the BMI Order.<sup>4</sup> Moreover, while BMI was a third party that had not agreed to the Protective Order, the Services did agree to the Protective Order, and vehemently opposed the BMI Motion as “totally unworkable,” arguing that it “would have a broad and highly prejudicial impact on the Services’ chosen counsel for this proceeding,” and “would turn this proceeding—and every future CRB proceeding—into an unwieldy mess” and

---

<sup>4</sup> BMI filed its *Motion For A Limited Modification To The Protective Order In The Phonorecords Iv Proceeding*, eCRB Docket No. 25669 (September 15, 2021) (“**BMI Motion**”), which the Services (except Apple) opposed in their *Opposition To Broadcast Music, Inc.’s Motion For A Limited Modification To The Protective Order In The Phonorecords IV Proceeding*, eCRB Docket No. 25683 (September 21, 2021) (“**Service Opp. to BMI Motion**”). The Judges granted the motion in part in the *Order Granting In Part Broadcast Music, Inc.’s Motion For A Limited Modification To The Protective Order*, (March 23, 2022) (“**BMI Order**”).

impose a “logistical nightmare.” Service Opp. to BMI Motion at 2, 6, 8. Apparently what the Services failed to advise the Judges in connection with the BMI Motion is that *they* intended to be the protagonists of the logistical nightmare, as they have now opportunistically attacked their agreed Protective Order at the eleventh hour with a blatantly tactical Motion that is far more objectionable and “totally unworkable” than the BMI Motion.

As the Services argued in their opposition to the BMI Motion, these types of orders interfere with the right to counsel of one’s choosing. Yet, the Services’ Motion takes that interference to a far higher level. The right to counsel of one’s choosing is deeply enshrined in our judicial system, and may not be interfered with absent a substantial showing that is entirely absent here. *See, e.g., Davis v. Stamler*, 650 F.2d 477, 480 (3d Cir. 1981) (“The right to counsel of one’s choice also derives from the due process clause.”); *Bottaro v. Hatton Assocs.*, 680 F.2d 895, 897 (2d Cir. 1982) (reversing trial court disqualification of counsel, noting that all litigants have “a right to select their own counsel”); *Doe #1 v. Am. Fed’n of Gov’t Emps.*, 554 F. Supp. 3d 75, 88 (D.D.C. 2021) (motions to disqualify counsel are “subject to particularly strict judicial scrutiny” because disqualification “negates a client’s right to freely choose his counsel” and can be sought “to advance purely tactical purposes”); *Ambush v. Engelberg*, 282 F. Supp. 3d 58, 62 (D.D.C. 2017) (disqualification of a party’s chosen counsel is a drastic measure that is disfavored by the courts, as it negates a client’s right to freely choose its counsel).

The Order’s interim relief, which precludes Copyright Owners’ chosen counsel from reviewing the core discovery related to the Services’ rate proposals, has a practical effect similar to disqualification of counsel, as it leaves counsel unable to access core evidence and thus render effective representation. Indeed, federal courts have held that modifications of a protective order to prohibit counsel from accessing evidence can be tantamount to disqualification of counsel and



implicate the same high standard. *See, e.g., SmartSignal Corp. v. Expert Microsystems, Inc.*, No. 02 C 7682, 2006 WL 1343647, at \*2 (N.D. Ill. May 12, 2006) (holding that modification of protective order to bar attorney from accessing confidential information, “would ultimately deny Plaintiff the counsel of its choosing, which is disfavored in our judicial system and requires a strong showing in and of itself.”)<sup>5</sup>

Yet the Order does not address the fallout from its preclusion of access to evidence. As courts have noted, motions to disqualify counsel cause delay. *See, e.g., Bottaro*, 680 F.2d at 896 (noting disruption and months of delay); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, MDL No. 05-1720 (JG)(JO), 2006 WL 6846702, at \*6 (E.D.N.Y. Aug. 7, 2006) (citing *Bd. of Educ. of the City of New York v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir.1978) (noting delay of proceedings by nearly a year). Litigation cannot just continue on while counsel for one side is obstructed from reviewing core evidence or preparing and prosecuting their case. Copyright Owners are deprived of due process while the interim relief cuts off their counsel from access to the evidence in the proceeding on the eve of submission deadlines, depositions and preparation for the hearing.

---

<sup>5</sup> To be clear, the Services’ proposed option of instead disqualifying Copyright Owners’ counsel from providing counsel to the MLC is also unworkable. The Judges do not have authority to preclude the MLC from its counsel of choice, and trying to force such an effect through the threat of disqualifying counsel in this proceeding at this late stage would be arbitrary and capricious and unsupported by *any* legal precedent. Even in the context of patents and prosecution bars, the unique and specialized situation where such types of orders issue, the courts have been clear that courts must consider the prejudice in denying a party access to counsel of its choosing *both in the proceeding and in the outside matters*. *See, e.g., Helferich Pat. Licensing, L.L.C. v. New York Times Co.*, No. 10 C 4387, 2013 WL 3177605, at \*3 (N.D. Ill. June 21, 2013) (denying prosecution bar of a competitive decisionmaker because movant did not seek bar at the outset but “seek to modify the protective order to add a prosecution bar at the most critical stage of these proceedings and when a modification to the protective order currently in place would create an unfair tactical advantage for Defendants and be severely prejudicial to HPL,” and particularly noting the prejudice in depriving the party *in the outside matter* of counsel of its choosing).

Copyright Owners' Cross-Motion thus seeks to immediately vacate the Order's interim relief which, as shown below, runs counter to the law and the Services' own arguments. Only after the interim relief is vacated will Copyright Owners be able to access evidence that the Judges found to be directly relevant and effectively prosecute their case.

B. The Motion Fails Under Every Aspect Of The Governing Legal Standard

The Judges explained their "proper path" deciding whether to bar counsel's access to evidence in the BMI Order, which "is to balance the risk associated with disclosure with the risk that a party will be impaired in its ability to litigate claims." (BMI Order at 3) This standard was attributed by BMI in its motion to *Sonix Tech. Co. Ltd. v. Yoshida*, No. 12cv380-CAB (DHB), 2014 WL 11878353, at \*2 (S.D. Cal. June 30, 2014). BMI Motion at 4. *Sonix* explained that a "crucial factor in determining whether there is a risk of inadvertent disclosure is whether counsel is a competitive decisionmaker." *Id.* at \*2. *Sonix* also explained that "[t]he court must also consider other factors including: "[1] the level of risk of inadvertent disclosure of proprietary information, [2] the hardship imposed by the restriction, [3] the timing of the remedy, and [4] the scope of the remedy." *Id.*

The Services do not even *argue* that the competitive decisionmaker standard is met here, which *alone* calls for denial, and the other factors all cut against the Motion and the Order's interim relief. The balance of risk between impairment of counsel and risk of inadvertent disclosure is *alone* fatal to the Motion, as the impairment is drastic while there is no material risk of harm from the contrived "subconscious deployment." The eleventh-hour timing of the Motion is also *alone* fatal under the law, as the Services were well aware that Copyright Owners' counsel also provides counsel to the MLC and raised no objection when they agreed to the Protective Order, submitted discovery objections and produced restricted documents in connection with the same discovery

requests at issue here. Indeed, in their opposition to the BMI Motion, the Services pointedly stated that: “*Only BMI* thinks the Judges’ Protective Order is not good enough.” Service Opp. to BMI Motion at 4 (emphasis in original).

1. The Balance Between Impairment Of Counsel and Risk Of Inadvertent Disclosure Is The Reverse of The BMI Motion

To begin, the BMI Motion dealt with an extremely limited set of documents—a handful of specifically described agreements—that were far from central to this proceeding. Indeed, it does not appear that a single Service actually discussed any BMI agreements from another Service in their rebuttal submission. Nor is this surprising, as the Services are in a *common interest group*, and are not rebutting each other’s proposed benchmarks in this proceeding, no matter how inapt those benchmarks may be. The Services’ rate proposals were largely contrived to present the Judges an echo chamber with the illusion of diversity, as the proposals would all accomplish similar results in setting royalty rates without adequate protections and leaving the Services substantial discretion to decide their own *effective* royalty rates.

Moreover, BMI’s concern involved providing “competitive decisionmakers” with sensitive information about their competition, as BMI sought to ensure that “individuals involved in negotiating license agreements with BMI do not have access to BMI’s agreements with direct competitors.” (BMI Motion at 5) The BMI Motion thus involved a third party who did not agree to the Protective Order expressing a concern about individuals negotiating across the table from it obtaining a handful of agreement that reflect the confidential terms negotiated by their direct competitors. The words “competition” or “competitive” do not even appear in the Services’ Motion here, however, because their inscrutable theory of “subconscious deployment” of “opinions, or worse misinterpretations,” about audit-related data has nothing to do with

competitive concerns. The Motion accordingly offers no legal basis for the relief sought given this absence of competitive concerns.<sup>6</sup>

The BMI Motion thus presented an entirely different calculus under the Judges’ “proper path.” There was *no* effective material impairment in the Services’ ability to litigate claims, because the Services as a common interest group retained access to every BMI agreement, and there was no basis to think that one Service attacking another Service’s benchmarks was a real litigation possibility (as confirmed by their actual rebuttal submissions). Moreover, the BMI Motion implicated information that ostensibly carried a risk of harm to BMI from disclosure, as it addressed the possibility of competitors sharing information about their BMI licensing terms with each other and then using that competitor information against BMI in license negotiations.

That balance is completely flipped in the Services’ Motion. The Order, which granted the relief sought in the Motion on an interim basis, drastically impairs Copyright Owners ability to litigate this proceeding. Unlike the Services, Copyright Owners are represented by counsel at *one* law firm, and the Order effectively precludes that counsel from accessing core discovery concerning the Services’ royalties and their rate proposals at the center of the proceeding. Even putting aside the punitive expense that would come if Copyright Owners had to retain new counsel for this evidence on the eve of trial, there is no meaningful ability for new counsel to come into a

---

<sup>6</sup> If any Service were truly concerned about the competitive risk of inadvertent disclosure of information despite the Protective Order, it would be seeking to restrict counsel *for the other Services with whom they compete* from seeing their sensitive licensing agreements, financials, forecasts and other confidential information produced in these proceedings. No Service has raised such a concern for the reasons that they elucidated in their opposition to the BMI Motion, namely that they “cannot point to a single instance in which the protections of a governing protective order failed to adequately protect its confidentiality interests. Nor can [they] point to any adverse consequence for any participant or other third party,” and the restrictions in the agreed Protective Order “remain satisfactory” to every participant, and “[o]nly BMI thinks the Judges’ Protective Order is not good enough.” Service Opp. to BMI Motion at 4. (emphasis in original)

case of this complexity at this late stage, with supplemental submissions due in a matter of days or weeks, and on the eve of depositions and then trial, and get up to speed on the issues and effectively address the new evidence in time to meet deadlines. Nor is there a workable way for Copyright Owners to utilize the evidence in depositions or at hearing when Copyright Owners' chosen counsel is precluded from even seeing the evidence. *See U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984) (reversing trial court's denial of access to confidential information by party's in-house counsel, noting *inter alia* that the litigation was "extremely complex and at an advanced stage," and that requiring the party "to rely on newly retained counsel would create an extreme and unnecessary hardship.") The impairment is further heightened because, instead of a few discrete documents as with the BMI Motion, the Order covers everything being produced in connection with numerous document requests and interrogatories. Amazingly, the Services did not even *describe* to the Judges the documents at issue with any detail, and yet obtained a complete prohibition on Copyright Owners' chosen counsel accessing *anything they produced on May 10, 2022*.

In contrast with the impairment of counsel, the supposed risk associated with inadvertent disclosure is nonexistent in this situation, as the Services' argument is that Copyright Owners' outside counsel might counsel another client *who has the right to obtain the same documents from the same Services through a statutory audit*. To see this, one need look no further than the Services' own statements. The Services' papers in opposition to the motion to compel the discovery at issue referenced the discovery as being "audit" discovery *more than 50 times*, and *explicitly argued that it is the MLC that should receive the information (not Copyright Owners)*.

Spotify perhaps best encapsulated the baseless nature of the Motion in its opposition to the motion to compel.<sup>7</sup> Spotify argued that the Judges should deny the motion to compel because:

Rather than address the issues in this litigation, [Copyright Owners] effectively seek an audit of every aspect of Spotify’s revenue reporting under the *existing* regulations... **Section 115 anticipates and addresses such concerns by allowing Copyright Owners, via the Mechanical Licensing Collective (“MLC”), to audit digital music providers.** Spotify’s proposal to largely carry forward the current rate structure thus does not entitle Copyright Owners to onerous and audit-like discovery into Spotify’s compliance with the existing regulations. That is not the purpose of *this* proceeding.

Spotify MTC Opp. at 2-3 (bold emphasis added; italics in original).<sup>8</sup>

Each of the other Services made the same, central argument in their oppositions to the motion: that the discovery at issue is “audit” information properly for the MLC. Google argued that it is “only the MLC” that has a right to this discovery.<sup>9</sup> Pandora argued that *an MLC audit is the “proper place” for this discovery.*<sup>10</sup> Amazon opposed the motion to compel on the grounds that it was “an improper attempt to use discovery in this ratesetting proceeding to audit Amazon,” and that “there are statutory provisions governing such audits, and they assign the *MLC* audit rights,

---

<sup>7</sup> *Spotify USA Inc.’s Opp’n to Copyright Owners’ Mot. to Compel Regarding Rate Proposal* (“**Spotify MTC Opp.**”), eCRB Docket No. 26112 (February 3, 2022).

<sup>8</sup> Copyright Owners clarify that statutory audits of services are conducted by the MLC directly, not by Copyright Owners, although Spotify’s assertion is an acknowledgement that there is no apparent conflict of interest between Copyright Owners and the MLC that would justify disqualification, nor do the Services have standing to assert such. 17 U.S.C. § 115(d)(4)(D).

<sup>9</sup> *See, e.g., Google’s Opposition to Copyright Owners’ Motion to Compel* (“**Google MTC Opp**”), eCRB Docket No. 26109 (February 3, 2022) at 3 (“COs’ use of discovery in this proceeding to audit Google’s prior royalty calculations and payments is inappropriate. . . . **[I]ndividual copyright owners have no audit right of a statutory licensee and it is only the MLC that has the right to initiate an audit...**”) (emphasis added)

<sup>10</sup> *See, e.g., Pandora’s Opposition to Copyright Owners’ Motion to Compel* (“**Pandora MTC Opp.**”), eCRB Docket No. 26107 (February 3, 2022) at 11 (“The proper place to ‘test and challenge’ how Pandora ‘calculated and reported its revenues’ in prior periods is an *audit*, not a rate proceeding, which is a forum to test and challenge Pandora’s *rate proposal*, not its reporting compliance.”) (emphasis in original)

not the Copyright Owners.”<sup>11</sup> (Amazon MTC Opp. at 9, Appendix A at 5, 6) Apple’s opposition to the motion to compel this discovery *began* with the sentence: “[t]he COs are improperly treating discovery as an opportunity to audit the services’ past royalty payments.”<sup>12</sup>

As these statements demonstrate, the Services’ contrived theory of risk of harm through “subconscious deployment” of opinions about audit data to the MLC is frivolous. The Services’ argument against the discovery in *this* proceeding was that it is instead *properly* a part of statutory audits *by the MLC*. Put another way, they argued on the motion to compel that: *Copyright Owners cannot have this information; only the MLC has a right to this information*. Now, after losing the motion to compel, they argue the reverse: that the risk is somehow with the MLC obtaining subconsciously deployed opinions about this same information. To make it even more frivolous, the information does not involve a handful of key licensing terms from a few agreements as in the BMI Motion, but rather gigabytes and according to some Services *terabytes* of data. The Services offer not even speculation as to how voluminous audit data that the MLC is concededly entitled to under the governing statute can be “subconsciously deployed” to their harm through opinions by counsel, let alone how such speculation could be reasonable when their own argument is that the MLC can obtain the data directly in an audit.

These statements show the meritlessness of the Services’ newfound speculative risk of inadvertent harm from “subconscious deployment” of data through opinions of counsel to the MLC in connection with an audit. Yet the Services make no case for the Motion beyond such rank

---

<sup>11</sup> *Amazon’s Opposition to Copyright Owners’ Motion to Compel* (“**Amazon MTC Opp.**”), eCRB Docket No. 26103 (February 3, 2022) at 9, Appendix A at 5, 6.

<sup>12</sup> *Apple’s Opposition to Copyright Owners’ Motion to Compel*, eCRB Docket No. 26098 (February 3, 2022) at 1.

speculation. When combined with the dramatic impairment of Copyright Owners' ability to prosecute the case, the Motion and the Order's interim relief are not sustainable under the law.

2. The Timing Of The Motion Further Precludes The Relief

Many courts have noted that motions to obstruct opposing counsel are often brought for tactical purposes, which is plainly the case here. *See, e.g., Doe #1*, 554 F. Supp. 3d at 88. The discovery at issue was requested in October and November 2021. The Services were well aware that Copyright Owners' counsel also provides legal services for the MLC since before the proceeding began. The Services raised this fact in a motion in this proceeding in August 2021,<sup>13</sup> and Spotify's counsel in this proceeding also represents the MLC's counterpart, the DLC (Digital Licensee Coordinator), and has regularly interacted with Pryor Cashman as counsel for the MLC, including in the 2019 MLC administrative assessment proceeding before the Judges. *See* CRB Docket No. 19-CRB-0009 AA.

Yet the Services did not raise any objection to the discovery requests at issue on any theory of "subconscious deployment" of information through opinions of counsel to the MLC, either in their written objections or discovery conferences. Moreover, the Services argued on the motion to compel that they had *already* produced voluminous documents responsive to the requests at issue. *See, e.g., Pandora MTC Opp.* at 8 ("Pandora has already produced a great deal of detailed data on revenue reported and payments made to its music licensors."); at 11 ("Pandora has already produced" information "showing how revenues for the Services' respective offerings have been reported"); at 12 (discussing detailed royalty calculation data produced); *Amazon MTC Opp.* at 2

---

<sup>13</sup> *Services' Motion For Protective Order To Prevent Circumvention Of Discovery Rules With Respect To Data In The Possession Of The Mechanical Licensing Collective*, eCRB Docket No. 25609 (August 16, 2021)



(“Had the Copyright Owners reviewed the productions Amazon has already made, they would have realized they now have virtually all of the information they claim to want.”); at 15 (“Amazon has already produced extensive information about the *fees* it has paid.”); Spotify MTC Opp. at 12; Apple MTC Opp. at 4; Google MTC Opp. at 1, 7.

All of these productions were made *without any objection based on a risk of “subconscious deployment” to the MLC*. And any attempt by the Services to distinguish what they produced on May 10, 2022 from what they produced earlier only highlights that the Motion *does not even clearly describe the information at issue*, let alone provide details to justify disqualification of counsel here. There is no coherent explanation of the risk of harm to the Services, let alone how such unarticulated and speculative risk was not foreseeable and did not exist for all of the other productions to date, and yet now justifies disqualification of counsel with respect to the May 10, 2022 production.

Moreover, unlike BMI, *the Services agreed to this Protective Order*, and the Copyright Owners have relied upon it. At the time they agreed to the Protective Order, the Services knew full well that Copyright Owners’ counsel also provided counsel to the MLC. “It is the burden of the party seeking to modify the protective order to demonstrate good cause. This burden is especially high where a protective order is agreed to by the parties before its presentation to the court. When deciding whether to modify a protective order, courts consider the nature of the protective order, foreseeability at the time of issuance of the modification requested, parties’ reliance on the order, and whether good cause exists for the modification.” *SmartSignal Corp.*, 2006 WL 1343647, at \*2 (emphasis added; internal citations omitted). The Motion and the Order’s interim relief are unsupportable under these factors as well.

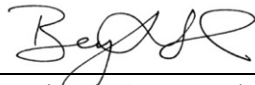
In sum, the Motion provides no explanation as to how all of a sudden, towards the end of the proceeding and on the eve of supplemental submissions, depositions and hearing, there is now a vague risk of “subconscious deployment” that requires obstructing the *only* law firm for Copyright Owners from effectively litigating against the five law firms representing the common interest group of Services. *See, e.g., Id.* (where movant unreasonably waited several months before filing its motion, “the doctrines of laches, equitable estoppel, and waiver operate to bar” the motion); *Fairchild Semiconductor Corp. v. Third Dimension Semiconductor, Inc.*, No. CIV. 08-158-PH, 2009 WL 1210638, at \*12 (D. Me. Apr. 30, 2009) (denying modification of protective order to exclude counsel where movant had already produced similar discovery without objection, and had known of the position of counsel since filing of the action).

### **CONCLUSION**

For the reasons explained above, Copyright Owners respectfully request that the Judges immediately vacate the Order on an interim basis, deny the Motion in its entirety, and stay the Supplemental WRS deadline until a date that is at least two weeks beyond Copyright Owners’ receipt of Service productions pursuant to the existing and pending discovery orders.

Dated: May 12, 2022  
New York, New York

PRYOR CASHMAN LLP

By:   
\_\_\_\_\_  
Benjamin K. Semel  
Frank P. Scibilia  
Donald S. Zakarin  
7 Times Square  
New York, New York 10036  
(212) 421-4100  
bsemel@pryorcashman.com  
fscibilia@pryorcashman.com  
dzakarin@pryorcashman.com

*Attorneys for Copyright Owners*

# Proof of Delivery

I hereby certify that on Thursday, May 12, 2022, I provided a true and correct copy of the Copyright Owners' Emergency Cross-Motion to Vacate the May 9, 2022 Interim Relief and Stay the May 20, 2022 Supplemental Submission Deadline and Opposition to Services' Emergency Motion for Limited Modification to Phonorecords IV Protective Order to the following:

UMG Recordings, Inc., represented by Steven R. Englund, served via E-Service at [senglund@jenner.com](mailto:senglund@jenner.com)

Amazon.com Services LLC, represented by Joshua D Branson, served via E-Service at [jbranson@kellogghansen.com](mailto:jbranson@kellogghansen.com)

Zisk, Brian, represented by Brian Zisk, served via E-Service at [brianzisk@gmail.com](mailto:brianzisk@gmail.com)

Powell, David, represented by David Powell, served via E-Service at [davidpowell008@yahoo.com](mailto:davidpowell008@yahoo.com)

Sony Music Entertainment, represented by Steven R. Englund, served via E-Service at [senglund@jenner.com](mailto:senglund@jenner.com)

Google LLC, represented by Gary R Greenstein, served via E-Service at [ggreenstein@wsgr.com](mailto:ggreenstein@wsgr.com)

Warner Music Group Corp., represented by Steven R. Englund, served via E-Service at [senglund@jenner.com](mailto:senglund@jenner.com)

Spotify USA Inc., represented by Joseph Wetzel, served via E-Service at [joe.wetzel@lw.com](mailto:joe.wetzel@lw.com)

Pandora Media, LLC, represented by Benjamin E. Marks, served via E-Service at [benjamin.marks@weil.com](mailto:benjamin.marks@weil.com)

Johnson, George, represented by George D Johnson, served via E-Service at [george@georgejohnson.com](mailto:george@georgejohnson.com)

Apple Inc., represented by Mary C Mazzello, served via E-Service at [mary.mazzello@kirkland.com](mailto:mary.mazzello@kirkland.com)

Joint Record Company Participants, represented by Susan Chertkof, served via E-Service at [susan.chertkof@riaa.com](mailto:susan.chertkof@riaa.com)

Signed: /s/ Benjamin K Semel