

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)

COPYRIGHT OWNERS' STATEMENT OF SEARCH EFFORTS

Pursuant to the Copyright Royalty Judges' (the "Judges") April 26, 2022 Order conditionally Granting in Part Google's Motion to Compel the production of Documents and Information from Copyright Owners, conditioned on whether the Copyright Owners would "voluntarily" withdraw evidence that Copyright Owners believe will be material and relevant to the Judges' determination in this case – and which, based on the evidence submitted by the Services in their written direct statements and written rebuttal statements, the Services agree is relevant and material - (the "Order"), the National Music Publishers' Association and Nashville Songwriters Association International (together, "Copyright Owners") submit the following statement concerning Copyright Owners' search efforts complying with the Order.

As argued by Copyright Owners in their Opposition to the Motion, consistent with applicable law and prior decisions of the Judges, yet which were overlooked and unaddressed by the Judges in the Order,¹ the production of documents called for by RFP 2 and RFP 3 are massively

¹ See, e.g., Nov. 7, 2006 Order Granting in Part and Denying in Part Services' Motion to Compel Discovery Related to the Promotional Activities and Expenditures of its Member Companies, *In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings ("Web II")*, Dkt. No. 2005-1 CRB DTRA, at 1 (denying a motion to

and extraordinarily voluminous, and Copyright Owners have been (and continue to be) substantially, unduly and completely disproportionately burdened by the efforts necessary to comply with the Order. As of the date of this Statement, Copyright Owners will have produced at least 523,600 documents pursuant to the Order, totaling over 1,397 GBs and at least between 275 million to over 300 million pages. And the vast bulk of the hundreds of millions of pages of documents will have been assembled and will be produced within the 10 days allotted by the Judges' Order.

As discussed herein, just managing the transfer and download of the data produced has itself required days of effort. But that is the least of the burdens imposed by the requirements of the Judges' Order. To locate and assemble the information has required not only manual efforts by some of the affected music publishers, including the manual review of thousands of license agreements to determine responsiveness to RFP 3, a process which remains ongoing as of the date of this Statement but also, in some instances, creating programs in order to isolate responsive

compel various requests as unduly burdensome); Mar. 28, 2006 Order Granting in Part and Denying in Part The Motion of Digital Media Association and its Member Companies[] to Produce Discovery Relating to the Promotional Value of Airplay, *Web II*, at 2 (denying motion to compel additional interrogatory responses “insomuch as the request is overly broad, unduly burdensome and expensive relative to the amount of evidentiary benefit anticipated “); Jan. 15, 2015 Order Granting in Part and denying in Party Joint motion by Pandora, iHeart, NAB, NRBNMLC and Sirius to Compel SoundExchange to Produce Negotiating Documents, *In re Determination of Royalty Rates and terms for Ephemeral Recordings and Digital Performances of Sound Recordings (“Web IV”)*, Dkt. No. 14-CRB-0001-WR (2016-20), at 4 (denying request to compel production, finding a request for production of the “countless communications” with SoundExchange members to be unduly burdensome); Jan. 15, 2015 Order on iHeartMedia’s Motion to Compel Sound Exchange to Produce Documents in Response to Discovery Requests and On Issues Common to Multiple Motions, *Web IV*, at 3 (addressing - and rejecting – claims in burden in response to a motion to compel, but holding “an assertion that a request is overly burdensome should weigh the claimed burden against the potential impact of the requested information on the significant amount of royalties to be paid and received”); Aug. 26, 2016 Order Granting in Part and Denying in Part Services’ Motion to Set Specific Discovery Deadlines and Compel Copyright Owner Participants’ Adherence to their Discovery Obligations, *In re Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and “Preexisting” Subscription Services (SDARS III)*, Dkt. No. 16-CRB-0001 SR/PSSR (2018-2022) (ordering the parties to meet and confer to tailor requests concerning more than 1400 agreements over a period of three and a half years because “the Opposing Parties have provided a reasonable basis for the Judges to anticipate that a full production of data for all these agreements *might* constitute an undue burden”) (emphasis added).

documents that otherwise would have to be individually reviewed (a process that itself would take months, not 10 days).

The search efforts of each of the music publishers whose documents are subject to the Order are described below.

BMG Rights Management (US) LLC (“BMG”)

RFP 2

BMG personnel queried BMG’s royalty systems to identify the top 10% of clients for each year from 2009 through 2021. BMG then collected from its systems the royalty statements corresponding to those clients for the appropriate periods. As a result of these efforts, BMG has identified and collected approximately 350,000 client royalty statements for production in response to RFP 2. The records total approximately 800GBs of data and are maintained on a server located in Belgium. In order to effectively and efficiently provide the data for production, it needs to be exported manually to physical media (*i.e.*, hard drives) and delivered to Copyright Owners’ vendor for processing and production, a process that is underway and is expected to conclude in approximately one week’s time. Based on the size of the raw data, it is conservatively estimated that this production will total at least 30 million pages of client royalty statements.

RFP 3

BMG maintains a network shared drive containing all of its license agreements. Members of BMG’s legal and business affairs department manually reviewed the license agreements on that shared drive to identify any that contained a revenue-based royalty. Those license agreements have been provided to counsel for further review, including for responsiveness and confidentiality restrictions and notice requirements to licensees. Where required, notices are being sent out to

licensees of the imminent production of the license agreements pursuant to the Order. As those notice periods expire, licenses will be produced.

Kobalt Music Publishing America, Inc. (“Kobalt”)

RFP 2

Kobalt personnel queried Kobalt’s royalty systems to identify the top 10% of clients for each year from 2009 through 2021. In order to obtain the royalty statement files delivered to a Kobalt client (which includes a PDF summary, CSV royalty list, and potentially custom detailed royalty lists), Kobalt personnel would have to manually and individually query Kobalt’s client portal for each top 10% client per year, approximately 650 queries per quarter for a 12-year period, for a total of 31,200 queries. Each query would require the user to download and store the resulting statements in a secure location. Assuming that each client portal query, download and transfer could be completed in five minutes, it would take approximately 2600 man-hours – nearly 109 *days of nonstop* work by a single person - to complete the process of collecting Kobalt royalty statements, underscoring the unreasonable burden placed on Kobalt by the Order. Kobalt has been able to bulk extract client royalty data from its system into CSV files, with a single master file produced for each year at issue containing all royalty data appearing on the top 10% client royalty statements for that year. In total, Kobalt has collected and produced 21GBs of client royalty data responsive to RFP 2, representing information that it is estimated would appear on *at least* 100 million pages of client royalty statements.

RFP 3

Kobalt’s licensing personnel are manually reviewing its licenses to identify those in which licensee revenue is a basis for the royalty calculation. Those license agreements will be provided to counsel for further review, including for responsiveness and confidentiality restrictions and

notice requirements to licensees. Where required, notices will be sent out to licensees of the imminent production of the license agreements pursuant to the Order. As those notice periods expire, licenses will be produced.

peermusic

RFP 2

peermusic personnel searched peermusic’s royalty accounting system, IRIS, to identify the top 10% of clients for each year from the second half of 2011 to 2021. Client royalty statement data prior to the second half of 2011 is not reasonably accessible. peermusic personnel then retrieved the royalty statements for the identified clients from its records. In response to the order, peermusic has produced 15,267 royalty statements, totaling 464,645 pages and over 35 GBs.

RFP 3

Three peermusic departments are responsible for the issuance of license agreements – the legal and business affairs department, the synchronization department (which also covers grand rights & merchandising) and the classical department. Personnel in each department were consulted in identifying license agreements that would need to be produced pursuant to the Order.

The classical department confirmed that it does not employ revenue-based licensing and thus had no responsive documents.

The synchronization department identified potentially responsive licenses in two ways – the use of search terms (e.g., revenue) across its repository of licenses and the personal recollection of personnel responsible for negotiating licenses. The repository of licenses maintained by the synchronization department in digital form dates back to April 1, 2014, prior to which records are only available in paper copy in offsite storage with the exception of a repository of a limited number of scanned, pre-2014 synchronization licenses, which are being manually reviewed by the

synchronization department. Such pre-April 1, 2014 paper records are not readily accessible and would be unreasonably burdensome to recall and then search (a manual process).

Finally, the legal and business affairs department searched its digital repository of license agreements using keywords (e.g., revenue) and a second, manual review of each digital file, which are maintained for license agreements dated on or after September 2013. License agreements prior to September 2013 are maintained in paper only and would require retrieving boxes from offsite storage and a manual review and sorting of license agreements. In addition, the legal and business affairs department consulted its opt-in records with HFA and MRI for responsive license agreements.

As a result of the foregoing efforts, peermusic personnel identified approximately 180 license agreements that are potentially responsive to RFP 3. Those license agreements have been provided to counsel for further review, including for responsiveness and confidentiality restrictions and notice requirements to licensees. Where required, notices are being sent out to licensees of the imminent production of the license agreements pursuant to the Order. As those notice periods expire, licenses will be produced.

Round Hill Music

RFP 2

Round Hill Music, founded in 2011, is the smallest music publisher affected by the Order and, accordingly, has the fewest resources to dedicate to the identification and collection of responsive information. Moreover, the collection of client royalty statements at Round Hill Music is a completely manual process – i.e., an individual will need to manually identify and collect each statement for each client responsive to RFP 2. Round Hill Music personnel have queried their royalty systems and have determined, for the period 2011-2021, that there are as many 11,520

statements that would need to be collected (2,800 top 10% clients over the 11-year period with many (if not most) receiving quarterly statements). Assuming Round Hill personnel can identify and collect a single client royalty statement in two minutes, it would take up to 384 man-hours – *i.e.*, 16 days of *nonstop* work for a single person – to collect the royalty statements responsive to RFP 2, underscoring the undue burden of this request. Notwithstanding that burden and in light of the Judges’ Order not addressing it, Round Hill Music is undertaking the effort to identify these statements and is collecting them as expeditiously as it can.

RFP 3

Round Hill Music’s licensing personnel are manually reviewing its licenses to identify those in which licensee revenue is a basis for the royalty calculation. Those license agreements will be provided to counsel for further review, including for responsiveness and confidentiality restrictions and notice requirements to licensees. Where required, notices will be sent out to licensees of the imminent production of the license agreements pursuant to the Order. As those notice periods expire, licenses will be produced.

Sony Music Publishing (“SMP”)

RFP 2

The accessibility of SMP’s client royalty data varies depending upon the time period and the SMP publishing entities at issue. Specifically, client royalty statements for the entities that were formerly part of the EMP Music Publishing group of companies for 2009-2013 were from a legacy royalty system for which no readily accessible means to exist to reproduce the statements called for by RFP 2. The remaining responsive client royalty statements (EMI’s 2014-present data and SMP’s 2009-present data) are accessible via SMP’s operative royalty platforms. To respond to this request, an SMP employee queried SMP’s active royalty platforms to generate a list of the

top 10% of clients for each relevant year. Next, an SMP consultant queried SMP's systems to re-generate client statements for the identified clients. The result is a staggering 70,490 client statements totaling over 330GBs of data and estimated to total in the range of 50 to 100 million pages of royalty data.

RFP 3

SMP's business and legal affairs department, which is generally responsible for the negotiation of SMP's responsive license agreements, is searching its records to identify license agreements to be produced pursuant to the Order. As additional licenses are identified, they are then reviewed by counsel for confidentiality and notice provisions and, where required, notices are being sent out to licensees to notify them, as is contractually mandated, of the imminent production of the license agreements pursuant to the Order. As those notice periods expire, responsive licenses will be produced.

Universal Music Publishing Group ("UMPG")

RFP 2

The 2009 – 2021 royalty statements of the top 10% of UMPG clients totals over eighty million pages (80,269,309 pages to be exact). There are 85,188 statements for that time period. To identify and collect these statements for production, UMPG personnel first queried their royalty reporting platform, Intel, to identify the top 10% of clients each year from 2009 through 2021. Those client identifiers were then provided to UMPG IT personnel, who then had to create a script for UMPG's royalty platform to generate the client royalty statements *en masse* because UMPG does not maintain the client royalty statements on its servers, but rather the data appearing on client statements resides in UMPG's royalty reporting systems and statements can be generated as requested on an *ad hoc* basis. In simple terms, to comply with an Order that never addressed

burden or proportionality, UMPG was required to actually write a program that would enable it to comply and that compliance, with this one request alone, totaled nearly 100 million pages and 200 GBs.

RFP 3

UMPG maintains licenses issued from 2016 to present in electronic form, and such licenses are therefore electronically accessible for manual searching and individual review (which, as discussed below, must be done as some licenses have confidentiality provisions and some require that notice be given and UMPG must therefore individually examine the licenses for such provisions). As described herein, there are thousands of such licenses that were/are being evaluated for production pursuant to the Order. UMPG's license agreements issued from 2009 through approximately 2015, however, are not stored electronically but instead are stored in hard copy in an offsite storage facility and are therefore not readily accessible.² It is estimated that there are over 600 boxes of license agreements would have to be recalled from UMPG's offsite storage. But recalling the boxes is only the start. Then every single box would have to be opened and the licensed contained therein would have to be manually examined and sorted for responsiveness, underscoring the fact that these records are not readily accessible and unduly burdensome to consider in UMPG's response to the Order.

To identify additional license agreements responsive to RFP 3, personnel in UMPG's contract administration, film and television licensing, and business affairs departments searched UMPG's licenses for those in which licensee revenue is at least one basis for the royalty calculation.

²In the course of its productions in *Phonorecords III* and *Phonorecords IV* to date, UMPG has produced all of its revenue-based mechanical licenses from 2012 to present with the exception of certain licenses with [REDACTED]. Those licenses were not produced given objections from [REDACTED], one of which is now being produced pursuant to the Order.

UMPG's contract administration, film and television licensing, and business affairs departments are together responsible for the negotiation and administration of UMPG's licenses. UMPG personnel knowledgeable with UMPG's licensing identified responsive licenses, using a combination of their own personal knowledge (*i.e.*, knowledge of licenses agreements for which UMPG typically negotiates revenue-based royalties) and keyword searching or manual review.

License agreements are then reviewed by counsel for confidentiality and notice provisions and, where required, notices are being sent out to licensees of the imminent production of the license agreements pursuant to the Order. As those notice periods expire, licenses will be produced.

Warner Chappell Music ("WCM")

RFP 2

Since the third quarter of 2017, WCM's domestic royalties have been handled by its TANGO royalty system. WCM's prior system, AS400, is no longer used in the normal course of WCM's business and not amenable to bulk querying for client royalty statements. WCM was, however, able to develop a process to extract the data that would appear on client royalty statements in bulk from TANGO and AS400 in comma-separated value (CSV) format. In the case of either TANGO or AS400, WCM personnel queried WCM's royalty systems to identify the top 10% of clients. Then, data was collected for each royalty period for the identified clients in bulk into CSV files. In total, WCM has identified and produced approximately 10 GBs of CSV files (265 files in total) containing in excess of 60 million records responsive to RFP 2. The total number of pages is estimated at approximately 18 million pages of material.


RFP 3

WCM maintains its license agreements in a SharePoint database with entries maintained in Monday.com concerning the substance of the agreements. Personnel with WCM's legal and

business affairs and digital licensing departments manually reviewed the license agreements maintained in WCM's SharePoint database for responsiveness to RFP 3. Those license agreements have been provided to counsel for further review, including for responsiveness and confidentiality restrictions and notice requirements to licensees. Where required, notices are being sent out to licensees of the imminent production of the license agreements pursuant to the Order. As those notice periods expire, licenses will be produced.

Dated: May 12, 2022
New York, New York

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Before the
COPYRIGHT ROYALTY JUDGES
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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)

**DECLARATION OF MARION R. HARRIS
REGARDING RESTRICTED INFORMATION**

1. I am a partner at Pryor Cashman LLP, counsel for the National Music Publishers’ Association (“NMPA”) and the Nashville Songwriters Association International (“NSAI” and, together with the NMPA, the “Copyright Owners”) in the above-captioned proceeding (the “Proceeding”).

2. Pursuant to Section IV.A of the Protective Order issued in the above-captioned Proceeding on July 20, 2021, as amended (the “Protective Order”), I submit this declaration in connection with the Copyright Owners’ May 12, 2022 Statement of Search Efforts.

3. I have reviewed Copyright Owners’ Statement of Search Efforts. I am also familiar with the definitions and terms set forth in the Protective Order. Each of the redactions that the Copyright Owners have indicated and will make to the publicly-filed version of the Statement of Search Efforts is necessitated by the designation of that information as “confidential information” under the Protective Order by either a Producing Participant in this proceeding or in the Phonorecords III proceeding or by a Producer, as those terms are defined in the Protective Order, or pursuant to one or more of the Orders of the Copyright Royalty Judges dated August 9, 2021, August 25, 2021, and September 2, 2021 in this proceeding (eCRB Docket Nos. 25574, 25630,

and 25639). Because the Copyright Owners are bound under such orders to treat as “Restricted” and to redact information designated “confidential information” by Participants and Producers, they are doing so. Copyright Owners reserve all rights and arguments as to whether any such information is, in fact, “confidential information.”

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: May 12, 2022
New York, New York



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Counsel 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' Statement of Search Efforts to the following:

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

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

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

UMG Recordings, Inc., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

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

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

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

Warner Music Group Corp., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Powell, David, represented by David Powell, served via E-Service at davidpowell008@yahoo.com

Zisk, Brian, represented by Brian Zisk, served via E-Service at brianzisk@gmail.com

Johnson, George, represented by George D Johnson, served via E-Service at george@georgejohnson.com

Sony Music Entertainment, represented by Steven R. Englund, served via E-Service at

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Signed: /s/ Marion R Harris