

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 APPROVING SUBPOENAS
AND GRANTING AMAZON’S MOTION TO COMPEL**

THIS MATTER is before the Copyright Royalty Judges (Judges) on motions of Amazon.com Services LLC (Amazon). Amazon filed a [motion](#) seeking approval to issue deposition subpoenas and subpoenas *duces tecum* to third party musical works licensees that are not participants in the captioned proceeding. Amazon also filed a [motion](#) to compel the Copyright Owners to produce further responses to its discovery requests. Subject to the terms of this Order, the Judges **GRANT** both motions.

Issuance of Subpoenas

Under section 803(b)(6)(C)(ix), title 17, United States Code (Copyright Act), the Judges may issue subpoenas for participant or non-party witness testimony, or document production, if the Judges’ resolution of the proceeding would be “substantially impaired by the absence of such testimony or production.” Amazon filed a motion (Subpoena Motion) asking the Judges to issue deposition subpoenas and subpoenas *duces tecum* to four non-party entities, *viz.*, Tik-Tok, Snap Inc., Equinox, and Echelon Fitness (together, Licensees).

The Licensees have agreements with music publishers to use musical works in audiovisual and virtual fitness platforms. The Copyright Owners cite the agreements with these Licensees as viable benchmarks to support their proposed rates for section 115 licenses with music streaming services participating in this proceeding, including Amazon. *See* Subpoena Motion at 4. Amazon characterizes these licenses as a “central part” of the Copyright Owners’ Written Direct Statement (WDS).

Amazon seeks narrow discovery from the third-party Licensees: valuations of the license agreements and alleged litigation threats from music publishers. Amazon asserts that the Judges need the information they seek because, otherwise, the Judges’ ability to resolve the captioned proceeding will be “substantially impaired.” Subpoena Motion at 2. Amazon contends it and the Judges are unlikely to get the necessary information any other way. *Id.*

Amazon disputes Copyright Owners’ standing to contest the subpoena requests, but Copyright Owners filed a timely opposition to the Subpoena Motion ([Subpoena Opp.](#)), which the Judges reviewed and considered. In their opposition, Copyright Owners did not dispute that the

audiovisual licenses are directly related to their WDS. Copyright Owners objected to issuance of the subpoenas because of alleged bad faith on the part of Amazon. Subpoena Opp. at 3. Copyright Owners contend that (1) Amazon approached the licensees without notice to Copyright Owners, Subpoena Opp. at 1; (2) made unnecessary inquiry because Copyright Owners had already agreed to produce the documents Amazon seeks with these subpoenas, Subpoena Opp. at 2; (3) violated the Protective Order governing this proceeding, Subpoena Opp. at 2; and (4) had no purpose in seeking these license agreements directly from the third parties other than to “compromise[e Copyright Owners’] relationships” with the Licensees. Subpoena Opp. at 3.

Copyright Owners’ claims that Amazon’s contact with non-parties preliminary to a subpoena *duces tecum* is a violation of the Protective Order in this proceeding is not well-founded. The Protective Order limits disclosure of restricted information from potential business rivals and the public. The Protective Order also limits use of any restricted material for any purpose other than the requirements of this proceeding. Nothing in the language Copyright Owners cited would prohibit Amazon or any other party from seeking a fuller record by inquiring of non-participants whose contracts have been put at issue in the proceeding. Amazon could have signaled to Copyright Owners its intent to find the documents it was unsuccessful in receiving through participant discovery, but such signaling was not necessary. But Amazon properly sought subpoenas on motion, affording Copyright Owners an opportunity for response, in order to actually obtain those documents. The producing parties are not prohibited from redacting the documents they produce to the extent they believe necessary to protect their own proprietary or confidential business information.

Copyright Owners also assert that, if the deposition subpoenas are issued, any resulting depositions should be counted in, or prohibited by, deposition limits in the statute. Subpoena Opp. at 4, n.5.

The Judges need not determine Copyright Owners’ standing to oppose the Subpoena Motion, as they find, for all the reasons articulated by Amazon, good cause to authorize issuance of the subpoenas. The Judges also reject Copyright Owners’ request that the Judges count these non-party depositions toward the statutory deposition limit. That limit is contained in *subsection (vii)* of 803(b)(6)(C). The Judges’ authority to approve deposition subpoenas though is set forth in *subsection (ix)* of this statutory section. Moreover, the Judges grant subpoenas under *subsection (ix)* because they believe the requested testimony will avoid *their* substantial impairment in resolving the proceeding, not merely because the moving party would like to take the requested depositions in furtherance of its own case.

Discovery Motion

Amazon’s Motion to Compel (Discovery Mot.) concerns the same audiovisual licensing agreements at issue in the Subpoena Motion and the same information. In particular, Amazon seeks information relating to Copyright Owners’ pre-contract valuations of the licensing agreements and information regarding alleged litigation threats preceding execution of the licensing agreements. Discovery Mot. at 6.

In the Discovery Motion, Amazon sounds a familiar refrain: Copyright Owners agreed to produce information, but have failed to produce enough to make their responses credible.¹ Discovery Mot. at 3-4. Copyright Owners respond with their own refrain, *i.e.*, that they have conducted “reasonable and proportional” searches and have produced many documents. Copyright Owners’ Opposition ([Discovery Opp.](#)) at 2. Copyright Owners assert that the music publishers consulted with “individuals knowledgeable about each ... license.” Discovery Opp. at 3. They searched the mailboxes of those responsible for negotiating the licenses. *Id.* In their searches, they sought “direct communications” and “internal communications.” Opp. at 4.

Unconvinced, Amazon seeks an order compelling further discovery along with a detailed declaration of all efforts the Copyright Owners have made to find discoverable material. Amazon Reply ([Discovery Rep.](#)) at 7. As added pressure, Amazon asks for an order compelling a manual search for discoverable materials that are not forthcoming pursuant to Copyright Owners’ claimed electronic records searches. *Id.*

The audiovisual license agreements are undeniably directly related to the Copyright Owners’ WDS. Copyright Owners’ assertion that they have conducted reasonable and proportional searches are belied by the fact that, in response to one request for pre-contract information, the publisher set a starting time parameter later than the date of information the Copyright Owners produced in a subsequent effort. Amazon Discovery Reply at 6. Amazon also challenges the search terms employed by the publishers. *Id.*

Copyright Owners contend that litigation discovery should be a “cooperative and iterative process.” Discovery Opp. at 2. In response to discovery motions, including the present one, Copyright Owners engage in the “yes, but” approach, alleging that they have produced more pages of responsive documents than the moving party. What matters in discovery is not the volume of the production, but the responsiveness to opposing parties’ requests. Amazon has highlighted deficiencies in Copyright Owners’ production, at least as of the date of the Discovery Motion.²

To assure full availability of information that is uncontroverted to be directly related to the Copyright Owners’ WDS, the Copyright Owners must produce a declaration detailing all efforts undertaken by relevant parties to comply with this Amazon discovery request. If no further information is within the possession or control of responding parties, the Copyright Owners must file an affirmative statement to that effect.

Order

Within ten days of the date of this order, Copyright Owners shall provide to Amazon a declaration detailing the exact parameters of search efforts addressed to responding to the

¹ Amazon has used several descriptors in this and other motions when seeking to compel further discovery from Copyright Owners. They have called Copyright Owners’ claims to having made full discovery production “implausible,” “inconceivable,” “dubious,” and “unpersuasive.” Amazon asserts the Copyright Owners’ efforts and their report of those efforts “strains credulity.”

² Given the passage of time, the Judges asked participants to review all outstanding discovery motions and to report any motions or parts thereof that might be moot by virtue or agreement of passage of time. This motion was not on the parties’ joint submission.

Discovery Motion. Within ten days of the date of this order, Copyright Owners shall comply with the Amazon discovery requests, to the extent they have not already done so. Concurrent with the deadline for production of any additional documents or information, Copyright Owners shall submit an affirmative statement that no further responsive documents exist within the possession or control of the responding parties.

Within two business days of the date of this Order, Amazon shall file revised forms of subpoenas and subpoenas *duces tecum* in editable format for signature by a Copyright Royalty Judge.

SO ORDERED.

Suzanne M. Barnett
Chief Copyright Royalty Board

Dated: May 16, 2022.