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May 18, 2022

Via eCRB

United States Copyright Royalty Judges
Library of Congress
James Madison Memorial Building
101 Independence Ave, S.E.
Washington D.C. 20559-6000

Re: *Copyright Owners’ May 12, 2022 Emergency Cross-Motion in Determination of Rates and Terms for Making and Distributing Phonorecords, Docket No. 21-CRB-0001-PR (2023-2027)*

To the United States Copyright Royalty Judges:

We write on behalf of the National Music Publishers’ Association (“NMPA”) and the Nashville Songwriters Association International (“NSAI”) (together, “Copyright Owners”) in connection with Copyright Owners’ May 12, 2022 Emergency Cross-Motion to Vacate the May 9, 2022 Interim Relief and Stay the May 20, 2022 Supplemental Submission Deadline (the “CO Emergency Motion”).

Yesterday morning, the Services filed their combined opposition to the CO Emergency Motion and reply on the Services’ own emergency motion, which they had filed after hours on Friday, May 6 (the “Service Emergency Motion”).¹ The CO Emergency Motion and the Service Emergency Motion are ripe for an immediate ruling denying the Services’ improper and purely tactical efforts—on the eve of depositions, days before the May 20, 2022 date for supplemental written rebuttal statements, and as the participants prepare for trial—to prevent Copyright Owners’ counsel of choice from accessing key documents that the Judges recently ordered the Services to produce. We respectfully request that the Judges immediately vacate the May 9, 2022 Order Granting Services’ Interim Relief (the “Interim Order”), deny the Service Emergency Motion, and grant the CO Emergency Motion to prevent further injury to Copyright Owners. The unwarranted

¹ As we noted in the CO Emergency Motion, the timing of the Services’ Emergency Motion was tactical. They waited until a Friday evening to file and, contrary to the consistent prior practice of the parties, did not provide Copyright Owners a courtesy copy by e-mail, assuring that the Copyright Owners would not know of the Services Emergency Motion until Monday, May 9, 2022 (mere hours before the Judges granted the interim relief) and thereby preventing Copyright Owners from having any chance to address the issue before the Judges reacted to the motion.

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stay that the Services secured is causing significant prejudice to Copyright Owners in litigating this case.

In yesterday's filing (the "Service Opposition") the Services failed to meaningfully address the CO Emergency Motion. They do not address, for instance, Copyright Owners' cited authorities regarding the right of parties to counsel of their own choosing (and resulting prejudice of being deprived of such counsel); the substantial burden that a party seeking to modify a protective order that it agreed to must demonstrate; the effect of belated efforts (such as the Services') to modify protective orders; or the delay that may result from the practical (or actual) disqualification of counsel. (*See* CO Emergency Motion at 5, 6, 6 n.5, 14, 15.) They cite no case law that could possibly support the extraordinary relief they seek or justify the due process violation that would result, and they fail to address the case law cited by Copyright Owners.

Among the key failings of the Services' application is their presumption that this proceeding's protective order (the "Protective Order") that they agreed to and proposed is ineffective and their scurrilous implication that it will be violated by Pryor Cashman attorneys. (*See e.g.*, Service Opposition at 3-4 (speculating Pryor Cashman attorneys may "abuse their direct access and representation of the MLC"), 5 (claiming Pryor Cashman has "carte blanche" to use information subject to the Protective Order), 9 (stating there will be a "sharing of detailed accounting information between these proceedings and the MLC audit").) Under that agreed Protective Order, Copyright Owners' counsel cannot use restricted information obtained in this proceeding in connection with work outside of this proceeding. The Services do not show how the Protective Order is insufficient. They have not articulated any colorable argument as to their purported "risk" or "prejudice." (*See id.* at 3-6.) Their only speculative theory of harm, namely the "subconscious deployment" of information learned in this proceeding in violation of the Protective Order, seems abandoned and is not even mentioned in the Service Opposition.²

Instead, the Services now simply ignore the existence of the Protective Order while misleadingly name-calling Copyright Owners' counsel as "dual-role" attorneys. (*E.g.*, *id.* at 2, 9.) "Dual-role" is sometimes used to reference in-house attorneys who also play business roles, but not outside litigation counsel who have other matters in the same industry. By the Services' use of the term, their counsel serve in competitively sensitive "dual roles" when they advise their clients (whether participants in this proceeding or other clients in the space) on licensing negotiations with copyright owners, strategy, and the like. The tactical nature of the Services' motion is shown by the fact that no Service has raised any issue with counsel for any of its Service competitors having access to its "highly sensitive financial information." Nor has any Service raised any issue with any counsel for any of its Service competitors having access to the rates and terms in its agreements with licensors. Through this proceeding those attorneys still, pursuant to the terms of the Protective

² In their Emergency Motion, the Services argued that there was some risk ("subconscious deploy[ment]") created by Pryor Cashman seeing the very information that the MLC is entitled to see under the statute. (*See* Service Emergency Motion at 3.) In their opposition to the CO Emergency Motion, the Services shift gears and argue that there is a risk created by Pryor Cashman seeing information that the MLC is not entitled to see, which they speculate without basis Pryor Cashman will provide to the MLC.

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Order, gain access to vast amounts of sensitive information about copyright owners and competitor services in the music space, and the Judges have consistently found that this far more competitively sensitive threat is adequately addressed by the Judges’ standard protective orders—and the Services have consistently agreed with the Judges.

Disqualifying Copyright Owners’ counsel from accessing evidence on the eve of depositions and trial on vague speculation of Protective Order breaches, let alone in the non-competitive context of the MLC, causes tremendous prejudice to Copyright Owners’ ability to prepare for submissions, depositions and the hearing, and would be arbitrary and capricious given the Judges’ longstanding position on *agreed* Protective Orders and longstanding acceptance of the Services’ counsel’s competitive conflicts in accessing the sensitive information of copyright owners and other services (including non-participants).

The Services also have not supported their attempts to downplay the prejudice of the Interim Order. They claim their relief is “narrowly focused” on a “specific set of individuals” (*see id.* at 6), yet they do not identify the scope of individuals. Virtually all of the senior members of Pryor Cashman’s legal team involved in this proceeding, including myself, provide counsel to The MLC. If those attorneys are unable to access the Service discovery to which Copyright Owners are entitled pursuant to the Judges’ Orders, Copyright Owners cannot effectively litigate this case. And, unlike the Services, Copyright Owners are represented by a single law firm—one that is substantially smaller than most of the firms representing the Services. The relief the Services seek is thus tantamount to forcing Copyright Owners to choose between their counsel not seeing documents that the Judges held that Copyright Owners are entitled to see or replacing their chosen legal team at this late stage in the proceeding.³ We respectfully request that the Judges promptly reject this improper, tactical effort by the Services to prejudice Copyright Owners.

Respectfully submitted,



Mona Simonian

³ Furthermore, as addressed with citation to case law in the CO Emergency Motion, and unaddressed in the Service Opposition, the due process concerns would not be mitigated by providing an option of depriving the non-participant MLC of its right to choose counsel in connection with its audits.

Proof of Delivery

I hereby certify that on Wednesday, May 18, 2022, I provided a true and correct copy of the Letter regarding Copyright Owners' May 12, 2022 Emergency Cross-Motion to the following:

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

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

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

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

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

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

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

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

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

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

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

Johnson, George, represented by George D Johnson, served via E-Service at

george@georgejohnson.com

Signed: /s/ Maryaneh M Simonian