

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
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)

**AMAZON’S EMERGENCY MOTION FOR THE JUDGES TO ORDER SNAP, INC. TO
COMPLY WITH THE JUDGES’ MAY 18, 2022 SUBPOENAS OR ALTERNATIVELY
TO SEEK ENFORCEMENT OF THE SUBPOENAS**

On May 18, 2022, the Judges issued document and testimony subpoenas to four nonparty audiovisual services, including Snap, Inc. (“Snap”). The Judges’ May 16, 2022 Order found “good cause to authorize issuance of the subpoenas” because the requested documents and testimony “will avoid *their* substantial impairment in resolving the proceeding.” Subpoena Order¹ at 2. The Judges set the compliance date for the document subpoenas as May 31, 2022.

The other three nonparty audiovisual services have produced documents and/or testimony responsive to the subpoenas. Yet more than two months after the Judges issued the subpoenas — despite Amazon’s significant efforts to avoid unnecessary burden on the nonparties — Amazon has not received a single document from Snap, or a schedule for production, and Snap has refused to commit to producing some important categories of documents.² With the

¹ Order Approving Subpoenas and Granting Amazon’s Mot. to Compel (May 16, 2022) ([eCRB 26657](#)) (“Subpoena Order”).

² Snap has agreed to produce a witness for a deposition. In return, Amazon has agreed that it will not take more than 2 hours to conduct the deposition so long as the witness is prepared and non-evasive.

September 6 trial fast approaching, any further delays will prejudice Amazon and risk interfering with the Judges’ schedule. Amazon therefore respectfully requests that the Judges set an August 16, 2022 deadline for compliance with the document subpoena and an August 23, 2022 deadline for compliance with the testimony subpoena. Alternatively, or if Snap does not comply with that order, Amazon requests that the Judges seek a court order enforcing the subpoenas under the Administrative Procedure Act (“APA”), 5 U.S.C. § 555(d).³

1. The Copyright Owners’ benchmarking analysis relies heavily on several agreements that license musical-works rights for audiovisual use on social-media platforms or in virtual fitness classes. Their lead expert characterizes these licenses as “powerful economic evidence” supporting the Copyright Owners’ rate proposal. Eisenach WDT ¶ 110. And the Copyright Owners’ fact witnesses discuss these licenses at length, with one characterizing “audiovisual streaming” licenses as “particularly relevant to this proceeding.” Brodsky WDT ¶ 80. Nonparty discovery is critical to testing the Copyright Owners’ assertion that audiovisual licenses are useful benchmarks in this proceeding. This is particularly true given that the Copyright Owners have produced essentially no discovery about these licenses, even after Amazon successfully moved to compel them to do so.⁴

On March 4, 2022, Amazon filed a motion asking the Judges to issue document and testimony subpoenas to Snap and three other nonparties, each of which has [REDACTED] [REDACTED].⁵ Amazon’s proposed subpoenas

³ Amazon is serving this motion on counsel for Snap contemporaneously with filing it.

⁴ See Subpoena Order at 3-4.

⁵ Amazon.com Services LLC Mot. to Issue Subpoenas with Mar. 21, 2022 Return Dates to Nonparty Audiovisual Licensees (Mar. 4, 2022) ([eCRB 26269](#)) (“Motion” or “Mot.”).

identified targeted information concerning the Copyright Owners’ proposed audiovisual benchmarks, including information about: (1) the nonparties’ [REDACTED]; (2) differences between the audiovisual services and interactive streaming services; (3) any litigation threats made to the nonparties in connection with the license agreements; and (4) basic information about the nonparties’ sound-recording royalties, including the [REDACTED] [REDACTED] and their royalty payments as a percentage of revenue. *See* Mot. at 6-10.

Amazon’s Motion showed that this information is necessary to create a balanced evidentiary record concerning the Copyright Owners’ proposed benchmarks. For example, the Judges have explained that the “‘thick’ market of license agreements” they consider in setting rates “consists not only of the agreements themselves, but also of evidence regarding the parties’ valuations of the licenses and their bundled components.” *Web IV* Subpoena Order⁶ at 6. Thus, valuation information reflecting the nonparties’ own analysis is “probative of the value the Judges are required to determine.” *Id.* Similarly, documents concerning differences between the nonparties’ audiovisual services and interactive streaming services are critical to testing the Copyright Owners’ assertion that such differences do not “affect the *relative* value of sound recording rights and musical work rights.” Eisenach WDT ¶ 108. The nonparties’ sound-recording royalty payments are also necessary to put that ratio in context.

The Copyright Owners objected to Amazon’s Motion, even though they lacked standing to do so. *See, e.g., Washington v. Thurgood Marshall Acad.*, 230 F.R.D. 18, 21 (D.D.C. 2005). But none of the nonparties filed an opposition, even though Amazon provided them months of advance notice of the discovery requests and served the Motion immediately after filing it. The

⁶ Order Granting in Part Licensee Services’ Mot. for Expedited Issuance of Subpoenas to Apple, Inc., Dkt. No. 14-CRB-0001-WR (2016-2020) (*Web IV*) (Apr. 10, 2015) (“*Web IV* Subpoena Order”).

Judges considered the Copyright Owners' objections, but found good cause existed to issue the subpoenas under the Copyright Act "for all the reasons articulated by Amazon," Subpoena Order at 2, and because their resolution of the proceeding would be "substantially impaired by the absence of such testimony or production." 17 U.S.C. § 803(b)(6)(C)(ix). The Judges issued the document and testimony subpoenas to the nonparties on May 18, 2022.

2. When the Judges issued the subpoenas, Amazon immediately notified Snap's counsel and offered to meet and confer to address any concerns Snap had regarding the scope of the subpoenas. *See* Jones Decl., Ex. A at 4-5 (May 16, 2022 Email from B. Jones to J. Bredrup). Snap's counsel declined numerous requests to confer in advance of the document subpoena's compliance date and instead served boilerplate burden objections to both subpoenas on May 31, 2022. *See* Jones Decl., Ex. B (Non-Party Snap's Obj. to Subpoena *Duces Tecum* to Produce Docs., Info., or Objects; Non-Party Snap's Obj. to Subpoena to Testify at a Dep.). Snap's objections state that each of the five document requests is "overbroad, unduly burdensome, and [seeks] information that is not proportional to the needs of the case," but Snap does not explain why any particular request imposes any specific burden. *Id.* at 3-8.

Over the last two months, the parties have met and conferred several times. In the spirit of cooperation, Amazon narrowed the scope of the document subpoena to five core categories of documents: (1) Snap's [REDACTED]; (2) any litigation threats Snap received from publishers; (3) internal valuations/projections relating to [REDACTED]; (4) a pitch deck (or like document) explaining how Snap's app incorporates musical works; and (5) documents sufficient to show aggregate royalties Snap paid to labels and publishers as a percentage of gross revenues. *See* Jones Decl., Ex. C at 7 (July 14, 2022 Email from B. Jones to P. Hammon). Amazon also stated it was willing to accept deposition testimony

instead of documents concerning Snap’s revenues, and proposed limiting itself to two hours of deposition time with Snap’s witness (provided the witness is prepared and not evasive). *Id.*

Notwithstanding Amazon’s concessions, Snap refused to commit to complying with the subpoenas until Amazon stated its intent to seek relief from the Judges, and even now has not committed to producing three of the core types of documents Amazon seeks: internal valuations, a pitch deck, and documents sufficient to show Snap’s aggregate royalty payments. *See id.* at 1-3 (Aug. 3, 2022 Email chain between B. Jones and P. Hammon). Nor has Snap committed to a production schedule or agreed that it will finish compliance in a timely fashion. Snap has never articulated why producing this limited set of documents is burdensome, much less unduly burdensome. Nor would such a claim be plausible for Snap, a billion-dollar company. Indeed, when issuing the subpoenas, the Judges recognized that they “seek[] *narrow* discovery from the third-party Licensees.” Subpoena Order at 1 (emphasis added).

3. The Copyright Act authorizes the Judges to issue subpoenas when “resolution of the proceeding would be substantially impaired by the absence” of the information sought. 17 U.S.C. § 803(b)(6)(C)(ix). The Judges have determined that the documents sought by the subpoena meet this standard. But Snap has refused to fully comply with the document subpoena, even as considerably narrowed by Amazon, and has not committed to a production schedule.

Snap’s boilerplate objections — which do not articulate any basis for why Snap believes the subpoena’s document requests are burdensome — are improper. “Objections must clearly set forth the specifics of each objection and how that objection relates to the discovery being demanded. Pat, generic, boilerplate, and non-specific objections will not suffice.” *In re Air Crash Near Clarence Ctr., New York*, 277 F.R.D. 251, 254 (W.D.N.Y. 2011) (internal citations omitted); *see also Panola Land Buyers Ass’n v. Shuman*, 762 F.2d 1550, 1559 (11th Cir. 1985)

(conclusory recitations of expense and burdensomeness are not sufficiently specific to demonstrate why discovery is objectionable). “[B]oilerplate objections that include unsubstantiated claims of undue burden, overbreadth and lack of relevancy,” while producing “no documents . . . are a paradigm of discovery abuse.” *Jacoby v. Hartford Life & Accident Ins. Co.*, 254 F.R.D. 477, 478 (S.D.N.Y. 2009).

Snap’s delay is also unreasonable. Although Snap has stated that its [REDACTED] impose certain notice obligations, the other documents Amazon seeks are not subject to such obligations, and the subpoena has been outstanding for over two months. With trial now set to begin on September 6, Amazon has no choice but to seek appropriate relief. The documents Amazon seeks from Snap will be important to rebutting the Copyright Owners’ testimony at trial, including the testimony of the Copyright Owners’ lead expert, who relies on Snap’s [REDACTED]. Accordingly, Amazon respectfully requests that the Judges set an August 16, 2022 deadline for compliance with the document subpoena and an August 23, 2022 deadline for compliance with the testimony subpoena. This is a mere two-three weeks before the beginning of trial. It also gives Snap considerably more time than the Judges gave Apple in *Web IV* when ordering Apple to comply with nonparty subpoenas within a week of the subpoenas issuing. *See Web IV Subpoena Order* at 10.

Alternatively, or should Snap fail to comply with the Judges’ order, Amazon respectfully requests that the Judges seek a court order compelling Snap’s compliance with the Judges’ subpoenas. A private party cannot seek enforcement of an administrative subpoena on its own, *see, e.g., Wilmot v. Doyle*, 403 F.2d 811, 815 (9th Cir. 1968); *see also generally* Charles A. Wright, Arthur R. Miller & Charles H. Koch, Jr., *Federal Practice and Procedure: Judicial Review of Administrative Action* § 8145 (1st ed., Apr. 2022 Update); *Federal Procedural Forms*

§ 16:16 (Thomson Reuters, June 2022 Update), but the APA provides a mechanism for the Judges to enforce compliance with their subpoenas. *See* 5 U.S.C. § 555(d).

Agency actions to compel compliance with an administrative subpoena are summary proceedings that may be initiated under the federal rules. *See* Fed. R. Civ. P. 7(b)(1). “[T]he court’s role in a proceeding to enforce an administrative subpoena is a strictly limited one.” *FTC v. Texaco, Inc.*, 555 F.2d 862, 871-72 (D.C. Cir. 1977). “[A] court reviewing the enforceability of a subpoena may consider only whether the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant. If an agency’s subpoena satisfies these requirements, [the court] *must* enforce it.” *United States v. Inst. for Coll. Access & Success*, 27 F. Supp. 3d 106, 111 (D.D.C. 2014) (internal citations omitted). For the reasons explained above, the Snap subpoenas easily meet this standard.

CONCLUSION

Snap has yet to comply with the Judges’ May 18, 2022 subpoenas. Amazon respectfully requests that the Judges set a date certain for compliance of August 16, 2022 for the document subpoena and August 23, 2022 for the testimony subpoena. Alternatively, Amazon requests that the Judges seek enforcement of the subpoenas by court order under the APA.

Dated: August 5, 2022

Respectfully submitted,

/s/ Joshua D. Branson

Joshua D. Branson (D.C. Bar No. 981623)

Aaron M. Panner (D.C. Bar No. 453608)

Leslie V. Pope (D. C. Bar No. 1014920)

Scott Angstreich (D.C. Bar No. 471085)

KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.

1615 M Street, N.W., Suite 400

Washington, D.C. 20036

Tel.: (202) 326-7900

Fax: (202) 326-7999

jbranson@kellogghansen.com

apanner@kellogghansen.com

lpope@kellogghansen.com

sangstreich@kellogghansen.com

Counsel for Amazon.com Services LLC

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**DETERMINATION OF RATES
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**Docket No. 21-CRB-0001-PR
(2023-2027)**

DECLARATION OF BETHAN JONES

(On Behalf of Amazon.com Services LLC)

1. I am an associate at Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., counsel for Amazon in the above-captioned proceeding.

2. I respectfully submit this declaration in connection with Amazon's Emergency Motion for the Judges to Order Snap, Inc. to Comply with the Judge's May 18, 2022 Subpoenas or Alternatively to Seek Enforcement of the Subpoenas. I am authorized by Amazon to submit this declaration on their behalf, and I am fully familiar with the facts and circumstances set forth herein.

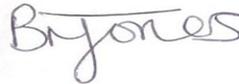
3. Attached as Exhibit A to this Declaration is a true and correct copy of a May 27, 2022 Email chain from B. Jones to P. Hammon.

4. Attached as Exhibit B to this Declaration is a true and correct copy of Non-Party Snap, Inc.'s Objections to Subpoena *Duces Tecum* to Produce Documents, Information, or Objects, dated May 31, 2022 and a true and correct copy of Non-Party Snap, Inc.'s Objections to Subpoena to Testify at a Deposition, dated May 31, 2022.

5. Attached as Exhibit C to this Declaration is a true and correct copy of an August 3, 2022 Email chain from B. Jones to P. Hammon.

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

Dated: August 5, 2022
Washington, D.C.



Bethan R. Jones
(D.C. Bar No. 156261)
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Phone: (202) 326-7900
Fax: (202) 326-7999
bjones@kellogghansen.com

Counsel for Amazon.com Services LLC

Exhibits A-C

*Restricted – Subject to Protective Order in
Docket No. 21-CRB-0001-PR (2023-2027)
(Phonorecords IV)*

Omitted from Public Version

Proof of Delivery

I hereby certify that on Friday, August 05, 2022, I provided a true and correct copy of the Amazon's Emergency Motion for the Judges to Order Snap, Inc. to Comply with the Judges' May 18, 2022 Subpoenas or Alternatively to Seek Enforcement of the Subpoenas (PUBLIC) to the following:

Joint Record Company Participants, represented by Steven R. Englund, served via E-Service at senglund@jenner.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

UMG Recordings, Inc., 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

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

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

Copyright Owners, represented by Benjamin K Semel, served via E-Service at Bsemel@pryorcashman.com

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

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

Signed: /s/ Joshua D Branson