

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' OPPOSITION TO AMAZON'S MOTION
TO COMPEL RELATED TO COPYRIGHT OWNERS' PRIVILEGE CLAIMS**

National Music Publishers' Association ("NMPA") and Nashville Songwriters Association International ("NSAI") (together, "Copyright Owners" or "COs") respectfully submit this memorandum in opposition to the motion of Amazon.com Services LLC ("Amazon") to compel related to Copyright Owners' privilege claims (the "Motion").

INTRODUCTION

Amazon bring its Motion ostensibly seeking a "full record" regarding [REDACTED] [REDACTED] – the very same licenses, producing [REDACTED] [REDACTED], that Amazon fought to suppress. Amazon tried to suppress any evidence showing [REDACTED] because they demonstrated that [REDACTED] [REDACTED]

Amazon's *volte face* can be explained by the simple fact that the parties' present dispute presents another opportunity to engage in the burden and distraction of motion practice, while the hearing in this matter draws ever closer. Its arguments on this Motion stand in stark contrast to its defense of its own claims of privilege, only further underscoring the opportunistic and improper positions taken by Amazon. Indeed, Amazon, and every other service, have refused to produce any privilege log. As Copyright Owners have observed previously, apparently Amazon believes that there are two sets of rules: those that apply to Amazon and those that apply to others.

At bottom, the issue to be decided by this motion and Copyright Owners' accompanying cross-motion is one of procedural fairness and balance. Amazon has made a unilateral demand for privilege logs, which demand was answered by Copyright Owners with a request for all participants to do the same, which the Services did not accept. Notably, Amazon's motion seeking to compel Copyright Owners, alone among all Participants, to provide a privilege log nowhere mentions Copyright Owners' entirely fair and balanced proposal to do so if every other Participant is required to play by the same rules, nor does it mention that every one of the Services rejected Copyright Owners' proposal.¹

Where Amazon has received logs – either through the participants' prior cooperation with respect to redactions or by the Judges' August 3, 2022 Order with respect to documents withheld on the basis of privilege (eCRB Doc No. 27092) – again engaging in the “tit for tat” litigation games-playing that the Judges previously admonished Amazon's counsel about - Amazon claims

¹ Indeed, reflecting just how much this motion is solely a gambit by Amazon's counsel, Copyright Owners have received communications from counsel for other Services threatening to seek sanctions if Copyright Owners have the temerity to cross-move to impose the same privilege log obligation on other Participants that Amazon seeks to impose solely on Copyright Owners.

that *in camera* review is required of all but one of the records contained on such logs, presenting a potpourri of arguments ranging from waiver to a categorical absence of privilege as befits the document, all untethered to reality or to the very authority Amazon cited in support of its own claims of privilege at issue in Copyright Owners’ Motion to Compel Amazon to Produce Unredacted Documents to Challenge Clawback Notice, which the Judges largely sustained. *See* August 25, 2022 Further to Order on Copyright Owners’ Motions to Compel Amazon to Produce Unredacted Documents & Challenge Clawback Notice (eCRB Doc. No. 27191).

Participants in this proceeding have been operating under the agreement not to provide logs of documents withheld, and no participant has done so voluntarily in this proceeding (or in *Phonorecords III*). Amazon has demanded that this agreement be unilaterally reformed so that Copyright Owners no longer have the benefit of the agreement but that all other Participants continue to enjoy its benefits. While Amazon has made no showing requiring the provision of privilege logs here (and certainly not unless it is conditioned on that requirement being parallel), Copyright Owners respectfully request that, if privilege logs are to be required of one, they be required of all.

BACKGROUND

A. UMPG’s Productions Regarding [REDACTED]

In rebuttal discovery in this proceeding, Amazon propounded a series of broad requests seeking “all documents” concerning three [REDACTED]. Amazon and Copyright Owners were discussing the contours of a production in response to these requests, but Amazon nonetheless filed a motion to compel at the formal close of rebuttal discovery seeking to compel. As part of those discussions, Amazon proposed search terms, which Copyright Owners ran over the documents of UMPG custodians. On July 26, 2022, Copyright Owners made a production of 307

documents concerning the valuation of the three at-issue UMPG licenses. Copyright Owners and Amazon went back and forth concerning that production for several days, discussing issues relating to deduplication and the search protocol. As a result of those discussions, Copyright Owners provided a metadata overlay for these documents on August 1, 2022.

Having received the documents that were consistent with the participants' prior negotiations, Amazon sat silent, and waited for the Judges to grant its motion on the same request, compelling the production of "all documents." *See* August 3, 2022 Order on Amazon's and Spotify's Motion to Compel Copyright Owners to Produce Documents about Purported New Rebuttal Benchmarks (eCRB Doc. No. 27091). Two days after the entry of the Order (four days after the participants last corresponded regarding the production), Amazon wrote to request additional searches of UMPG documents "[n]ow that the Judges have granted our motion to compel on these requests." *See* Ex. 5 at 2, Young Decl.

Notwithstanding Amazon's counsel's lack of candor with the Judges, Copyright Owners ran the additional, requested search terms and, over the course of the following 11 days, produced an additional 941 records in light of the Judges' August 3, 2022 Order and the breadth of the at-issue requests. Amazon requested that Copyright Owners provide a log of documents redacted in those productions, which Copyright Owners did (as is consistent with the participants' prior conduct concerning redactions).

Trying to parlay the advantage it perceived was provided by the Judge's August 3, 2022 Order and ignoring the agreement that no Participant would provide any privilege logs, Amazon then demanded that Copyright Owners provide a log of documents withheld on the basis of privilege. Copyright Owners advised that, consistent with the agreement that governed all of the Participants, they would not provide the logs unilaterally but were open to discuss the provision

of privilege logs (for the very few documents Copyright Owners had withheld or redacted based on privilege) if all participants were prepared to agree to provide logs of withheld documents. Ex. A at 1, August 30, 2022 Declaration of Marion R. Harris (“Harris Decl.”). No Service, including Amazon, agreed to do so.

Instead, Amazon filed the instant Motion seeking to impose one-sided discovery obligations on Copyright Owners while enjoying a separate set of rules for itself and the other Services. While Amazon’s Motion should be denied in its entirety, Copyright Owners are cross-moving to require all Participants to provide logs of documents withheld from production in this proceeding, as the obligation to provide privilege logs cannot and should not be one-sided.

B. Copyright Owners’ August 10, 2022 Privilege Log

In response to the Judges’ August 3, 2022 Order on Amazon’s Motion to Compel Regarding Production Commitments (eCRB Doc. No. 27092), Copyright Owners filed a log of documents withheld on the basis of privilege or protection from production in response to the requests for production addressed in that August 3, 2022 Order. *See* Harris Declaration, Exhibit A (eCRB Doc No. 27132). That log reflects that [REDACTED]

[REDACTED]. During an August 15, 2022 meet and confer among the participants, Amazon asserted that the [REDACTED]

[REDACTED] *See* Ex. 8 at 1 Young Decl. Amazon also asserted that [REDACTED]

[REDACTED].

Id.

ARGUMENT

I. AMAZON’S ONE-SIDED DEMAND FOR PRIVILEGE LOGS IS MERITLESS

Amazon repeatedly recites that Copyright Owners have “refused” to provide a privilege log for documents withheld from production by UMPG, but, as with many of the recitations of Amazon’s counsel, the truth is otherwise. Copyright Owners have not refused to provide privilege logs. They simply do not agree to the unilateral imposition of an obligation to do so. If privilege logs are required to be provided for documents withheld from production on the grounds of privilege, then such logs should be provided by all Participants on an equal basis. That is and was Copyright Owners’ position on the August 15, 2022 meet-and-confer and in subsequent correspondence. *See* Ex. 8, Young Decl.; Ex. A at 1-2, Harris Decl.

Indeed, despite repeatedly making clear that Copyright Owners were prepared to discuss the exchange of privilege logs, neither Amazon nor any other Service Participant agreed to discuss that issue, instead apparently finding that this one-sided obligation seemed perfectly fine to Amazon. Ex. 8 at 1, Young Decl. (“I specifically noted that participants’ discovery obligations are and should be equal, and if the Services were prepared to reciprocate, we could discuss the exchange of privilege logs.”). Thus, the only refusal to provide privilege logs here is on the part of the Service Participants, and not Copyright Owners. To be clear, consistent with the agreement that has governed this proceeding, Copyright Owners are not insisting that privilege logs should be required. Rather, only that if they are to be required, that requirement must be imposed on all Participants.

Copyright Owners’ supposed “refusal” to provide a privilege log apparently casts a cloud of suspicion over the documents withheld by UMPG because, in Amazon’s idiosyncratic view,

UMPG’s custodians, despite being attorneys, cannot have privileged communications.² However, the participants have operated under an understanding that privilege logs are not provided in this proceeding (or in *Phonorecords III*), which undermines any suspicion that Amazon seeks to attribute to the absence of a log.

In any event, as Amazon itself has submitted in these proceedings (and such submission was sustained by the Judges in their August 25, 2022 Order (eCRB Doc No. 27191), “[w]here a communication has both ‘a legal and a business purpose,’ the privilege applies if ‘obtaining or providing legal advice was *one* of the significant purposes of the attorney-client communication.’” See Amazon’s Authority in Support of Privilege Redactions at 2 (eCRB Doc. No. 26746) (quoting *F.T.C. v. Boehringer Ingelheim Pharm., Inc.*, 892 F.3d 1264, 1267 (D.C. Cir. 2018) (emphasis in original)). The fact that UMPG custodians may negotiate licenses – licenses that exist in a complicated legal and regulatory framework – does not preclude that those same attorney custodians from engaging in privileged communications. Indeed, UMPG has produced internal communications between its custodians – both of whom are attorneys – that it does not contend are privileged.

Amazon’s naked recitations of suspicion cannot and should not be allowed to overturn the participants’ understanding and practice in this proceeding with respect to privilege logs.³ But if suspicion alone is sufficient, Copyright Owners have plenty of suspicion about the propriety of the

² Indeed, further demonstrating that no good deed goes unpunished, Amazon’s knowledge of documents withheld by UMPG is based on the fact that Copyright Owners voluntarily identified the number of documents withheld in the spirit of cooperating in the discovery process. Copyright Owners, by contrast, have no idea as to the volume of materials withheld on the basis of privilege claims by any Service Participant, including Amazon. Copyright Owners also observe that Amazon has implemented a practice in which it places [REDACTED]

[REDACTED]. There has been considerable public press about this improper tactic being used by another Participant.

³ It is obvious that Amazon, having first tried unsuccessfully to suppress all evidence concerning these [REDACTED], now seeks to undermine them in any and every which way, animating their persistence and aggressiveness with respect to any communications relating to these licenses, even when lacking legal or factual bases to obtain them.

Services' claim of privilege with respect to documents they have not produced (especially given the relative paucity of production from the Services as compared to the hundreds of millions of pages of documents produced by Copyright Owners). If, however, the Judges do compel the provision of privilege logs by Copyright Owners, such obligation should be imposed upon all Participants, as requested in Copyright Owners' contemporaneously filed cross-motion.

II. *IN CAMERA* REVIEW IS UNWARRANTED

In its Motion, Amazon seeks the *in camera* review of three categories of documents – (i) the documents withheld by UMPG in response to RFPs 105-108; (ii) the █████ documents redacted by UMPG relating to its agreements with █████; and (iii) the █████ documents withheld by █████. This is, of course, the standard “tit for tat” approach that Amazon’s counsel has taken before in this proceeding and which the Judges have already admonished counsel for doing. As to each of these categories of documents, *in camera* review is not warranted.

First, as to the documents withheld by UMPG in response to RFPs 105-108, Amazon bootstraps the fact that it does not have a privilege log as a justification for *in camera* review. By that logic, the Judges would be put in a position of reviewing all documents withheld by all Participants in this proceeding. Amazon also points to a single identified document from the UMPG production which Copyright Owners confirmed was withheld on the basis of privilege as evidence that *in camera* review is warranted, speculating that “negotiating digital media” agreements is not privileged. That statement is at a level of abstraction as to be meaningless because it says nothing of the document withheld.

Copyright Owners have demonstrated, through the production of 475 internal communications responsive to RFPs 105-108 involving Messrs. Kokakis and Dallas (both of whom are attorneys) that they can distinguish between privileged and non-privileged

communications in these contexts. Despite its own practice of [REDACTED] [REDACTED] not providing any privilege log as to withheld documents (the only Amazon documents reviewed by the Judges were those which were partially redacted, not those totally withheld), Amazon however, seems to contend that no such privilege exists (now that its privilege is not at issue).

Second, regarding the documents redacted by UMPG, Amazon complains of the “barebones” redaction log, yet its complaints largely reduce to the fact that the communications logged are between Messrs. Kokakis and Dallas.⁴ For one, the redaction log provided by Copyright Owners contains more detail than the log prepared by Amazon in response to the Judges’ May 27, 2022 Order in this proceeding (eCRB Doc No. 26725), in which Amazon invoked privilege with repeated, boilerplate recitations concerning both “[REDACTED],” “[REDACTED]” and “[REDACTED]” –

[REDACTED]

⁴ As the log provided was one of in-line redactions, Amazon’s counsel had access to all of the information concerning the communication on the face of the document itself.

[REDACTED]

See Appendix A, June 2, 2022 Declaration of Christopher M. Young (eCRB Doc. No. 26746).

Indeed, Amazon’s own redaction log reflects the fact that [REDACTED] [REDACTED] but Amazon seeks to impose a different standard on UMPG because its legal counsel participates in negotiations (which, [REDACTED] [REDACTED]). Copyright Owners have satisfied their burden of demonstrating the privileged nature of the two redactions at issue (appearing in a total of four documents). They are communications between counsel to UMPG regarding the “[REDACTED]” and the “[REDACTED]” The [REDACTED] [REDACTED] are activities conducted by attorneys for which the attorney-client privilege applies. Amazon’s attempt to cast the activity as “[REDACTED] [REDACTED]” is disingenuous and would have rendered nearly all of its proposed redactions improper as well, a conclusion with which the Judges disagreed in their August 25, 2022 Order largely sustaining Amazon’s redactions. (eCRB Doc No. 27191).

Third, Amazon seeks *in camera* review with respect to eight documents withheld by [REDACTED] and [REDACTED], as reflected on Copyright Owners’ August 10, 2022 privilege log. With respect to the [REDACTED] documents, Amazon argues that the [REDACTED] [REDACTED] (because, Amazon presumes [REDACTED] – a claim it fabricates from whole cloth), apparently ignoring, for example, the fact that many of the very applications are governed by legal agreements and/or are distributed by platforms that regulate the functions of applications – all analysis of which is unquestionably legal. Or, that the question of music piracy itself may require legal determination. Apparently, because Amazon can hypothesize a non-privileged document (and because Amazon is engaged in its “tit for tat” tactic), Copyright Owners’ assertion of privilege is suspect. That is obviously wrong, and there is no basis to require *in camera* review of the [REDACTED]

With respect to the [REDACTED] documents, Amazon’s argument is more sweeping and generalized, submitting that [REDACTED] has waived privilege with respect to [REDACTED] [REDACTED]. This waiver purportedly arises out of Mr. Cohan’s rebuttal testimony in which he testified that he was “deeply troubled by Amazon’s machinations” and that Amazon “is more concerned with profits than the well-being of its ‘business partners.’” [REDACTED] WRT ¶ 10.⁵ Indeed, in his rebuttal testimony, because Amazon liberally applied restrictions to the written testimony it offered, Mr. Cohan stated that he was specifically discussing what he understood “Amazon has discussed in its WDS.” *Id.* ¶ 11. The totality of [REDACTED] testimony describes his discussion with Ms. Braun concerning [REDACTED]

⁵ While Amazon directed Copyright Owners to paragraphs 10 and 11 of Mr. Cohan’s written rebuttal testimony, its Motion also includes paragraph 9 as a basis for the purported waiver. *See* Ex. 8 at 1, Young Decl.

Dated: August 30, 2022
New York, New York

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Attorneys for Copyright Owners

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Washington, D.C.

In the Matter of:

DETERMINATION OF RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(Phonorecords IV)

Docket No. 12-CRB-0001-PR (2023-2027)

DECLARATION OF MARION R. HARRIS
(On Behalf of Copyright Owners)

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


2. I submit this declaration in connection with Copyright Owners' Opposition to Amazon's Motion to Compel Related to Copyright Owners' Privilege Claims. I am authorized by Copyright Owners to submit this declaration on their behalf, and I am fully familiar with the facts and circumstances set forth herein.

3. Annexed as **Exhibit A** is a true and correct copy of correspondence among counsel for the participants in this proceeding concerning Amazon's Motion to Compel Related to Copyright Owners' Privilege Claims and Copyright Owners' Cross-Motion to Compel Participants to Exchange Privilege Logs.

4. 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: August 30, 2022
New York, New York

A handwritten signature in cursive script that reads "Marion R. Harris". The signature is written in black ink and is positioned above a solid horizontal line.

Marion R. Harris (N.Y. Bar No. 4774600)
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Counsel for Copyright Owners

EXHIBIT A
RESTRICTED

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)

**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' Opposition to Amazon's Motion to Compel Related to Copyright Owners' Privilege Claims (the "Opposition").

3. I have reviewed the Opposition. I am also familiar with the definitions and terms set forth in the Protective Order. Each of the redactions made in the Opposition is necessitated by the designation of one of the participants in this proceeding as "Confidential Information" under the Protective Order. Because the Copyright Owners are bound under the Protective Order to treat as "Restricted" and to redact information designated "Confidential Information" by participants,

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: August 30, 2022
New York, New York



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Counsel for Copyright Owners

Proof of Delivery

I hereby certify that on Tuesday, August 30, 2022, I provided a true and correct copy of the Copyright Owners' Opposition to Amazon's Motion to Compel Related to Copyright Owners' Privilege Claims [PUBLIC] to the following:

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

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

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

Joint Record Company Participants, 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

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

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

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

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

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

Signed: /s/ Marion R Harris