

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' CROSS-MOTION
TO COMPEL THE EXCHANGE OF PRIVILEGE LOGS**

National Music Publishers' Association ("NMPA") and Nashville Songwriters Association International ("NSAI") (together, "Copyright Owners" or "COs") respectfully cross-move for an order compelling the participants to exchange privilege logs.

INTRODUCTION

In this Cross-Motion, Copyright Owners seek the exchange of privilege logs. While the Participants have to date operated under an agreement that no Participant would be required to provide any privilege log for documents withheld, Amazon has jettisoned this agreement, albeit solely as to Copyright Owners, demanding that Copyright Owners produce privilege logs. Based on the agreement, while Copyright Owners did not agree that any Participant should be required to provide privilege logs, Copyright Owners proposed that if such logs were to be required of any Participant, they must be required for all.

Having rejected that reasonable and balanced approach, Amazon then moved to compel the Copyright Owners alone to be required to provide a privilege log. The other Services, informed of Copyright Owners' intention to cross-move to compel all Participants to exchange privilege

logs if any one of the Participants were required to do so, have stepped to the side (and in their silence, have confirmed that they have no willingness to provide any privilege logs.¹ In seeking to unilaterally impose a privilege log obligation solely on Copyright Owners, Amazon’s argument actually makes the case for all Participants to do so (if any such obligation is to be imposed on any individual Participant) – as they are “██████████” (Ex. 2 at 5, Harris Decl.), and the failure to provide them constitutes a “waiver” (*see* Amazon’s Motion to Compel Copyright Owners Related to Copyright Owners’ Privilege Claims at 7 (citing *Brown v. Barnes & Noble, Inc.*, 474 F. Supp. 3d 637, 646 (S.D.N.Y. 2019))). While Copyright Owners are fully supportive of the agreement that Amazon’s counsel seeks to abrogate solely as to Copyright Owners, this cross-motion merely seeks to ensure that any obligation to provide privilege logs is an obligation borne by all Participants equally.

ARGUMENT

Throughout these proceedings, until approximately August 2022, the Participants had operated in accordance with an agreement that privilege logs need not be exchanged. Indeed, this same agreement prevailed throughout *Phonorecords III* as well. Amazon, however, on the very eve of trial (indeed precisely because it is on the eve of trial) has sought to effect a one-sided and unilateral change in the Participants’ agreement through its demand for privilege logs from Copyright Owners, a requirement that neither Amazon nor any of its fellow Service Participants has agreed to have imposed on them.

While entirely unfair and unbalanced, the reason the Service Participants refuse to subject themselves to a privilege log requirement even as Amazon demands it be imposed on Copyright

¹ As reflected in Exhibit 1 to the August 30, 2022 Declaration of Marion R. Harris (“Harris Decl.”) submitted herewith, counsel for Pandora wrote to understand the scope of Copyright Owners’ cross-motion and to argue that Copyright Owners had waived the ability to seek privilege logs from Pandora. When asked to identify any prejudice visited on Pandora by virtue of this cross-motion, Pandora did not respond.

Owners is obvious – privilege logs are labor intensive and time-consuming, and this burden is exacerbated by Amazon’s purposefully exquisite timing: making its motion to compel production of privilege logs on the virtual eve of trial. Indeed, these concerns prompted counsel for Pandora to argue that Copyright Owners had somehow waived the ability to seek privilege logs, and that Pandora would suffer some unidentified prejudice if it had to provide them (a waiver argument that seems to apply equally to Amazon’s demand that Copyright Owners somehow should be the only Participant subjected to this burden). Should the Judges grant Amazon’s motion compelling Copyright Owners to provide privilege logs, then the obligation to provide privilege logs should be one applicable to all Participants in discovery in this proceeding.

There is no rational basis on which Amazon’s motion can be granted and this cross-motion denied. Despite the Participants’ agreement, as a matter of formality, each and every Participants’ requests for production included a request for privilege logs. *See, e.g.*, Ex. 3 at 2-3 (Instruction 7, Copyright Owners’ Rebuttal Requests for Production to Amazon). And, Amazon’s primary argument, however one-sided it is, claims that the provision of privilege logs is [REDACTED] [REDACTED] (Ex. 2 at 5, Harris Decl.). Having made that argument, there is no principled basis on which Amazon (or any other Service Participant) can explain how Copyright Owners alone should be required to provide a privilege log while the Service Participants continue to enjoy the benefit of the agreement Amazon has attempted to unilaterally abrogate as to only Copyright Owners.

Finally, as privilege logs should be considered [REDACTED] (in Amazon’s words), there is no greater or lesser prejudice imposed on any Participant in having to provide one, particularly when the relief sought is one against all Participants.² Accordingly, should the Judges determine that

² No Service Participant other than Pandora raised any arguments of waiver or prejudice when advised of Copyright Owners’ intended cross-motion, and Pandora was unable to identify any specific prejudice supporting its claim of waiver when asked by Copyright Owners. *See* Ex. 1, Harris Decl.

the Participants' agreement respecting the non-production of privilege logs should be abrogated, then that finding must be applied equally to all Participants, not merely to one. While it is surely the intent of Amazon's motion and its specific timing to both distract Copyright Owners from their trial preparation and to impose a unilateral burden on Copyright Owners, that intent is neither high-minded nor fair, and Amazon should not be rewarded for its continued litigation games-playing.

CONCLUSION

Copyright Owners respectfully request an order applicable to all Participants if Amazon's motion were to be granted requiring all Participants to exchange logs detailing any documents withheld from production on the basis of privilege or other protection from disclosure. Such an order is required to ensure procedural fairness in light of Amazon's recent request to compel privilege logs from Copyright Owners, despite the participants' agreement through this proceeding (and *Phonorecords III*) to not exchange privilege logs.

Dated: August 30, 2022
New York, New York

PRYOR CASHMAN LLP

By: Marion R. Harris
Benjamin K. Semel
Frank P. Scibilia
Donald S. Zakarin
Marion R. Harris
7 Times Square
New York, New York 10036
(212) 421-4100
bsemel@pryorcashman.com
fscibilia@pryorcashman.com
dzakarin@pryorcashman.com
mharris@pryorcashman.com

Attorneys for Copyright Owners

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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' Cross-Motion to Compel the Exchange of Privilege Logs. 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 1** 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 the Exchange of Privilege Logs.

4. Annexed as **Exhibit 2** is a true and correct copy of correspondence among counsel for Amazon, Spotify and the Copyright Owners concerning Copyright Owners' production of documents on behalf of UMPG.

5. Annexed as **Exhibit 3** is a true and correct copy of Copyright Owners' Rebuttal Requests for Production to Amazon, dated May 3, 2022.

6. Copyright Owners met and conferred with the Service Participants regarding the relief sought in this Cross-Motion on August 15, 2022. In addition, Copyright Owners corresponded via e-mail with the Service Participants concerning this Cross-Motion. See **Exhibit 1**.

7. 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



Marion R. Harris (N.Y. Bar No. 4774600)
PRYOR CASHMAN LLP
7 Times Square
New York, New York 10036
Telephone: (212) 421-4100
Email: mharris@pryorcashman.com

Counsel for Copyright Owners

EXHIBIT 1
RESTRICTED

EXHIBIT 2
RESTRICTED

EXHIBIT 3
RESTRICTED

Before the
COPYRIGHT ROYALTY BOARD
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In the Matter of:

DETERMINATION OF RATES
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(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' Cross-Motion to Compel the Exchange of Privilege Logs (the "Motion").

3. I have reviewed the Statement. I am also familiar with the definitions and terms set forth in the Protective Order. Each of the redactions made in the Statement 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



Marion R. Harris (N.Y. Bar No. 4774600)
PRYOR CASHMAN LLP
7 Times Square
New York, New York 10036-6569
Telephone: (212) 421-4100
Email: mharris@pryorcashman.com

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' Cross-Motion to Compel the Exchange of Privilege Logs [PUBLIC] to the following:

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

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

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

Sony Music Entertainment, 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

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

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

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

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

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

Signed: /s/ Marion R Harris