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In the Matter of

**Distribution of 1995, 1996, 1997 and
1998 Digital Audio Recording Funds**

Docket No. 99-3 CARP DD 95-98

ORDER

The Library of Congress has before it two motions to compel document production filed by the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., SESAC, Inc., the Harry Fox Agency, the Songwriters Guild of America, and Copyright Management, Inc. (collectively, the "Settling Parties"). The first motion seeks documents from Eugene Curry and TaJai Music, Inc. (collectively, "Curry"), and the second seeks documents from Alicia Carolyn Evelyn ("Evelyn"). Evelyn has opposed the motion directed to her, and the Settling Parties have replied.¹ Curry has not opposed the motion directed to him.

Document Production from Curry

The Settling Parties seek documents underlying two statements made by Curry in his written direct case:

"My songs were sold on cassettes, cd's, MD's, and mccs"; and
"My sales count is more than the parties claim. They are at least 300,000."

¹ Evelyn has stylized her pleading as "Motion to Have the Copyright Office and the CARP Take Official Notice of Disparate Treatment of Individual Claimant, Evelyn, and Anomaly That Would Result From Granting the Motion of the Settling Parties to Compel Production of Documents." The Library is treating this pleading as an opposition. Although stylized as a "motion," the time period for filing motions related to document production has passed, and Evelyn's pleading as a motion is untimely. Furthermore, Evelyn's request to take "official notice" of her version of the treatment she has received from the Settling Parties regarding her musical works is not a proper use of the official notice procedure of section 251.43(e) of the rules. Section 251.43(e) provides that the CARP may take official notice of evidence submitted in a written direct case without a sponsoring witness. The evidence to which Evelyn seeks official notice is contained in her written direct case, see Evelyn Written Direct Case at 3-4, with Evelyn as the sponsoring witness. To the extent that Evelyn seeks to offer any new testimony in her pleading, it is denied. If Evelyn wishes to present arguments against statements made by the Settling Parties in their written direct case, she may do so before the CARP in her proposed findings of fact and conclusions of law.

The Settling Parties state that Curry refused to produce underlying documents, claiming that such documents were privileged. The Settling Parties have offered to enter into a protective order with Curry if the Library orders production.

RULING: The Settling Parties' motion is granted. The second statement offers a sales figure, and any claimant offering a bottom-line figure must be prepared to share all the underlying data that contributed to that figure. Order in Docket No. 94-3 CARP CD 90-92 at 2 (October 30, 1995). The first statement refers to formats in which Curry's songs have been distributed and is made in the context of the amount of sales that he has enjoyed. Curry is required to produce documentation supporting his assertion that his works have been distributed in these formats.

In sum, Curry is directed to produce supporting documents that he has record sales in excess of 300,000, and documentation supporting his assertion regarding the formats in which his works have appeared.

Document Production from Evelyn

In their initial request for underlying documents, the Settling Parties have targeted 18 statements made by Evelyn in her written direct case. All of these statements relate to song titles to which Ms. Evelyn claims authorship, and many refer to the song chart rankings of these works. None of the statements refer to amount of sales of these titles. The Settling Parties seek documents identifying the number of sales of the songs described by Evelyn.

Although it is difficult to fully discern from Evelyn's opposition, it appears that Evelyn does not possess documentation as to the number of sales of these titles. Evelyn states that "[t]he Settling Parties have unique and first access to data and royalties. If they do not provide claimant with same, ordinarily, claimant does not receive same and therefore is unable to provide the data to the Office and the CARP." Opposition at 4. Evelyn appears to be saying that there is no reason to produce documentation of sales of her songs because the Settling Parties already have such documentation and have not shared it with her.

In reply, the Settling Parties argue that Evelyn should not be relieved of her duty to produce documents as to sales of her songs. They assert that Evelyn has presented no evidence in her written direct case as to sales of her titles, and that further failure to produce supporting documents of such sales should result in the striking of Evelyn's written direct case for lack of evidence or, in the alternative, that "the CARP should take Ms. Evelyn's failure to produce evidence into consideration when ruling on the Settling

Parties' motion for a paper proceeding, in determining the weight that should be accorded to the underlying statements in Ms. Evelyn's written direct case, and in making a final award to Ms. Evelyn in this proceeding." Settling Parties' Reply at 3.

RULING: The Settling Parties' motion is denied. The Library has stated on numerous occasions that the purpose of discovery in a CARP proceeding is to exchange documents underlying assertions made by a witness, and "is not intended to augment the record with what the witness might have said or put forward, or to range beyond what the witness said. Any augmentation of the record is the prerogative of the arbitrators, not the parties." Order in Docket No. 94-3 CARP CD 90-92 at 1-2 (October 30, 1995).

Review of the 18 statements reveals that in not one of these statements did Ms. Evelyn refer to sales of the song titles that she identifies. Because she has not made any assertions regarding sales of these titles, she is not required to produce supporting documentation.

The Library is also denying the Settling Parties' request to direct the CARP's attention to Evelyn's failure to produce evidence or supporting documents regarding the amount of sales of the song titles identified in the Settling Parties' 18 requests for document production. Such request bears on the sufficiency of evidence in Evelyn's case and is within the purview of the CARP in its consideration of the evidence. It is not, however, within the scope of discovery.

SO ORDERED.

Marybeth Peters
Register of Copyrights

By: 

William J. Roberts, Jr.
Senior Attorney

DATED: January 7, 2000