

In Re: Determination of Statutory License Terms and Rates for Certain Digital Subscription Transmissions of Sound Recordings	} } } } } } }	Docket No. 96-5 CARP DSTR
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ORDER

On December 27, 1996, the Library of Congress received several precontroversy discovery motions in the above-captioned proceeding. The Recording Industry Association of America ("RIAA") submitted the following five motions:

1. A motion to compel Digital Cable Radio Associates ("DCR"), Muzak, L.P. ("Muzak"), and DMX, Inc. ("DMX") (collectively, the "Services") to produce documents and to preclude the written direct testimony for which documents are not produced;
2. A motion to compel the Services to identify to which request each produced document is responsive;
3. A motion to compel DCR to produce documents;
4. A motion to compel Muzak to produce documents; and
5. A motion to compel production of all documents in the public domain relied upon by Muzak's witnesses.

DMX and DCR filed a motion to compel RIAA to produce documents and to strike the written direct testimony for which documents are not produced. DMX also filed a motion to compel RIAA to produce documents in response to its, and Muzak's, follow-up requests for documents. Additionally, Muzak filed a motion to compel RIAA to produce documents and to strike the written direct testimony for which documents are not produced.

Oppositions and replies¹ to the respective motions have been filed, and the motions are ripe for resolution.

Discussion

This is the Library's second foray into the thicket of document exchange in this proceeding. On November 27, 1996, in response to a stalemate between the Services and RIAA over document exchange, the Library issued a lengthy and detailed Order articulating the scope and requirements of the precontroversy discovery process in CARP proceedings, and giving the parties a second opportunity for document exchange within those parameters. Order in Docket No. 96-5 CARP DSTRA (November 27, 1996). In response to the Library's order, the parties have filed a new set of motions.

Before ruling upon those motions, the Library will recap the principles of precontroversy discovery in CARP proceedings described in the November 29 Order, and prior rulings of the Library in other proceedings. They are:

1. Discovery is intended to produce only documents that underlie a witness' factual assertions in his/her written direct testimony. It 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;
2. Broad, nonspecific discovery requests are not acceptable. The requesting party must identify the witness and the factual assertions for which supporting documents are sought;
3. All bottom-line figures offered by a witness in his/her testimony must be verified through supporting documentation; and
4. All documents offered in response to discovery requests must be furnished in as organized and useable form as possible.

¹ RIAA's opposition was filed one day after the filing deadline, and was accompanied by a motion for leave to file. DMX filed its reply to RIAA's opposition five days later accompanied by a motion for leave to file. Both filings have been accepted by the Office.

See, November 27, 1996 Order at 6-7. These principles are the guideposts for discovery in every CARP proceeding, and are being applied by the Library in ruling upon the following motions.

Motions and Rulings

I. RIAA's Motions

A. **Motion to Compel Production and To Preclude.** At issue in this motion is the permissibility of a party producing documents in response to a specific request to "reserve its right" to amend its response and produce additional documents after the deadlines for responses and production established in the precontroversy discovery schedule. RIAA offers several examples of DCR's and Muzak's expressions of reservation of this "right." RIAA Motion Attachments E, H, J, and K. RIAA contends that this practice is not permissible, and requests the Library to compel the Services to produce all documents responsive to RIAA's discovery requests and state that all such documents have been produced. Additionally, RIAA requests that the Library preclude the services from presenting direct testimony regarding or relying upon documents that RIAA has requested but that are not produced.

DCR, DMX and Muzak oppose RIAA's motion by asserting that they have produced all documents responsive to RIAA's requests. Further, the Services assert that it would be premature for the Library to ban the introduction of additional documents in the future, because the Library cannot forecast special circumstances which might warrant such introduction.

RULING: RIAA's motion is moot because the Services have asserted that they have produced all documents responsive to RIAA's requests. The Library notes, however, that all parties are required to produce responsive documents of which they are aware, or had good reason to be aware, by the deadlines established in the precontroversy discovery schedule. There can be no holding back of documents, or "reservation of the right" to respond to document requests or produce documents after the deadlines, regardless of whether such documents are in the parties' possession or the public domain. Amendments to responses, and

additional document production, may not be made as of right, and can only be made for good cause shown.

Failure to show good cause as to why responsive documents were not produced by the deadlines established in the precontroversy discovery schedule shall, in the future, result in the striking of that portion of testimony which the dilatory documents support.

B. **Motion to Compel Identification of Documents Responsive to Requests.** RIAA submits that the Services have failed to identify which documents produced by the Services are responsive to RIAA's individual requests; "instead, the Services merely handed over a stack of documents." RIAA Motion at 1. With respect to DCR, RIAA charges that DCR has asserted that documents in its written direct case are responsive to certain RIAA requests, but failed to identify which documents in the written direct case are responsive to RIAA request numbers 15, 36, 38, 40, 41, 43 and request numbers 8 and 10 for the testimony of John Woodbury. With respect to DMX, RIAA charges that DMX has not identified all the documents that its witnesses relied upon (intimating that there may be additional, unspecified documents), and that DMX has made nonspecific reference to "articles" in response to RIAA's request numbers 28, 30-34, 49, 40, and 44 without identifying the articles. Finally, with respect to Muzak, RIAA charges that Muzak has not identified the documents submitted as part of its written direct case which are responsive to RIAA's request.

The Services argue that the Library's rules do not require them to identify the documents responsive to each RIAA request, but submit that they have taken it upon themselves to do so in an effort to facilitate this proceeding.

RULING: RIAA's motion is moot with respect to DCR and Muzak because they have identified the responsive documents. RIAA's motion with respect to DMX is granted, and DMX is directed to identify which "articles" it has produced are responsive to RIAA's request numbers 28-34, 39-40, and 44.

As the Library stated in the November 27, 1996 Order in this proceeding, "documents offered in response to discovery requests must be furnished in as organized and useful form as possible." Order at 7. "Organized" does not mean dumping documents upon a requesting party and expecting the requesting party to sort through them and determine on its own which documents are responsive to each of its requests. The federal judicial system does not permit this, and the Library likewise will not permit such action in CARP proceedings. See Fed.R.Civ.P. 34(b) (produced documents must be organized and labeled to correspond with the categories in the request). Consequently, the Library is making it clear for this proceeding, and future proceedings, that a producing party must, in all cases, identify which of the documents it has produced are responsive to each of the requests of the requesting party.

C. **Motion to Compel DCR to Produce Documents.** RIAA requests the Library to compel production of the following documents from DCR:

1. The individual responses to the survey conducted by Valley Forge Information Services;
2. A list of the names, addresses, and telephone numbers of the participants in the Valley Forge Information Services' survey;
3. The complete questionnaire used to administer the study conducted by Chilton Express;
4. A copy of the Music Choice Diary Study, including those individuals in the study universe and a complete copy of the survey questionnaire;
5. Documents underlying projections in a DCR business plan for rights fees (pages DCR0000604 and DCR0000620 of the documents produced by DCR);
6. Documents underlying the revenues and expenses on pages DCR0000650-651 of the documents produced by DCR;
7. Documents underlying the figures for breakdown of revenue by line of business contained in the bar graphs on page DCR0000599 of the documents produced by DCR; and
8. An August 26, 1996 e-mail from Fernando Laguarda to John Woodbury regarding potential for precedential effect of DCR sound recording licenses.

DCR objects to request numbers 1-3 on the grounds that they have produced all responsive documents, and that identification of survey respondents are confidential. DCR objects to request

number 4, asserting that it has produced the pages of the Music Choice Diary study applicable to Lou Simon's testimony. DCR also objects to request numbers 5-7, asserting that the documents sought are "source" documents prepared in the ordinary course of business and have not been introduced into evidence by DCR as part of its direct case. Finally, DCR objects to request number 8 as seeking a document which does not underlie a factual assertion of John Woodbury.

RULING: RIAA's motion is granted in part and denied in part. DCR is directed to produce to RIAA the completed survey forms of respondents to the survey conducted by Valley Forge. The identity of the respondents may be redacted from the surveys. RIAA's request for the names, addresses and telephone numbers of the respondents participating in the survey is denied. See, e.g. Order in Docket No. 94-3 CARP CD 90-92 at 48 (October 30, 1995).

DCR is directed to produce for RIAA the complete questionnaire used to administer the Chilton Express study. A party is entitled to a complete copy of a survey, and the questionnaire and responses used to complete the survey. Likewise, DCR is directed to produce for RIAA a complete copy of the Music Choice Diary study, including a complete copy of the questionnaire and the responses. The identity of the respondents may be redacted.

RIAA's requests for all documents underlying projections in a DCR Business Plan for rights fees on pages DCR0000604 and DCR0000620, documents underlying the revenues and expenses listed on pages DCR0000650-651, documents underlying the figures for the breakdown of revenue by line of business on page DCR0000599 are denied because such requests are beyond the scope of the witness's testimony.

Finally, RIAA's request for the August 26, 1996 e-mail from Fernando Laguarda to John Woodbury is denied because the document does not underlie specific testimony.

D. Motion to Compel Muzak to Produce Documents. RIAA asserts that it submitted 20 discovery requests to Muzak, and an additional three requests to the amended testimony of Bruce Funkhouser, and Muzak responded that it would produce documents responsive to these requests. RIAA asserts, however, that Muzak did not produce any documents responsive to request numbers 6, 15, 17 and 20, and the three additional requests related to the Funkhouser testimony. RIAA seeks production of documents responsive to these requests.

Muzak asserts that it has reached an agreement with RIAA that moots its motion. RIAA does not object.

RULING: RIAA's motion is moot.

E. **Motion to Compel Muzak to Produce Documents in the Public Domain.** At issue in this motion is Muzak's assertion that its witness, Bruce Funkhouser, has the "right" to rely upon documents in the public domain to support his testimony, despite Muzak's failure to produce such documents. RIAA seeks production of these public domain documents.

Muzak asserts that it has already produced all documents that were relied upon by its witnesses.

RULING: RIAA's motion is moot because Muzak has produced all responsive documents. The Library notes, however, that there is no "public domain" exception to the obligation to produce documents that underlie a witness's testimony. If a witness relied upon a document in making his/her factual assertions, that document must be produced, whether or not it is in the public domain. Furthermore, production must be made in accordance with the deadlines established in the precontroversy discovery schedule. See Ruling in IA above.

II. DMX Motion to Compel Production

DMX requests the Library to compel RIAA to produce documents responsive to its follow-up discovery request numbers 3-9. These requests seek documents supporting the figures contained in various Kagan Associates reports that were produced by RIAA in response to DMX's initial document requests, and that were used by Larry Gerbrandt in preparing his testimony.

RIAA objects to producing these documents because 1) it asserts that it has already produced the documents upon which Mr. Gerbrandt relied in preparing his testimony, as required by the Library's rules; and 2) there are no specific documents that underlie the estimated figures in the Kagan reports--rather, they are projections and determination derived from the informed

judgements of Kagan staff. RIAA submits that it would be unduly burdensome to attempt to produce every document that contributed to the judgement of Kagan staff.

RULING: DMX's request is denied. RIAA has already produced documents responsive to DMX's initial requests which underlie certain figures presented in Mr. Gerbrandt's testimony. DMX is not entitled to further documentation to determine the origin of the figures because such documents, if they exist, are beyond the scope of the witness's testimony. The accuracy of the figures, taken from another source and used by Mr. Gerbrandt in his testimony, may be verified on cross-examination.

III. DCR Motion to Compel Production and/or Strike Testimony

DCR requests the Library to compel RIAA to produce documents that its asserts underlie the written direct testimony of Larry Gerbrandt, David Wilkofsky, and Zachary Horowitz, and to strike all testimony for which RIAA does not produce documents in response to DCR's requests. With respect to Mr. Gerbrandt's testimony, DCR argues that RIAA has failed to produce documents which support Mr. Gerbrandt's assertions regarding revenue and programming expenditures for cable video services, and instead have produced documents which simply restate the numbers contained in Mr. Gerbrandt's testimony. DCR submits that it is entitled to documents that demonstrate how those figures were determined.

RIAA objects to this request on the grounds that DCR does not identify the specific responses of RIAA to which DCR is complaining, and, to the extent that DCR's motion to compel seeks the same documents as DMX's motion to compel, incorporates its response to DMX's motion to compel.

With respect to Mr. Wilkofsky's testimony (and Mr. Gerbrandt's), DCR submits that it is entitled to documentation which defines the terms "rights" and "license fees" as they are used in RIAA's written direct case. DCR asserts that because RIAA has introduced testimony

regarding programming rights and license fees in the cable marketplace, DCR must know the precise definitions to analyze what is being valued and sold. RIAA asserts that there are no documents which define these terms.

With respect to Mr. Horowitz's testimony, DCR seeks documents supporting his testimony that 1) a sound recording for a new artist costs over \$200,000, and an album for an established superstar artist costs about \$1,000,000; 2) record company costs for music videos are typically between \$50,000 and \$100,000, and sometimes higher than \$500,000; and 3) describes the marketing cost and cost breakdown for CD's, contained in the Canadian Recording Industry Association video sponsored by Mr. Horowitz. RIAA objects to requests numbers one and two, asserting the statements are based upon Mr. Horowitz's experience and knowledge of the music business. RIAA objects to the third request on the grounds that the Library previously denied the request in its November 27, 1996 Order.

RULING: DCR's requests are denied. With respect to the testimony of Mr. Gerbrandt, the request is denied for the reasons stated in II. With respect to the testimony of Mr. Wilkofsky (and Mr. Gerbrandt), the request is denied because the RIAA asserts that there are no documents which defined the terms "rights" and "license fees." DCR may inquire as to the meanings of these terms during cross-examination of Mr. Wilkofsky and Mr. Gerbrandt. With respect to Mr. Horowitz's testimony, the request is denied because Mr. Horowitz's testimony is based on his general experience and knowledge, and is subject to cross-examination. With respect to the Canadian Recording Industry Association video, the Library has already ruled that no supporting documents exist for the video. See Order in Docket No. 96-5 CARP DSTRA at 13 (November 27, 1996).

IV. Muzak Motion to Compel Production and/or Strike Testimony

Muzak requests the Library to compel RIAA to produce certain documents, and to strike testimony for which no documents are produced. First, Muzak seeks documents that underlie Larry Gerbrandt's and David Wilkofsky's assertions that they were retained by RIAA to provide

testimony regarding the amounts paid by cable/DBS operators for programming (Gerbrandt), and the amount of license fees that digital music services should pay for performance of sound recordings (Wilkofsky). Muzak asserts that such documents are necessary to permit it to determine the scope of the work that the witnesses were requested to perform. RIAA objects to production, asserting that the letters from RIAA counsel to Messrs. Gerbrandt and Wilkofsky retaining their services are outside the scope of discovery because neither of the letters were relied upon to provide substantive factual assertions.

Second, Muzak seeks documents for David Wilkofsky's assertion that Exhibit 15 of his testimony identifies what music services would have to pay if there were marketplace negotiations instead of a statutory license. RIAA asserts that the Exhibit itself explains this assertion, and that there are no other documents supporting the request.

Third, Muzak seeks documents for Jason Berman's assertion that RIAA's requested statutory rate is based upon negotiations that take place in the free marketplace. RIAA objects to the request on the grounds that Mr. Berman's statement is based upon his knowledge and experience.

Fourth, Muzak seeks all documents for Jason Berman's statements in response to Congressman William Hughes' question, in a March 25, 1993 roundtable discussion, concerning Time Warner and Sony's investment in DCR as related to the payment of a performance right in sound recordings. Muzak asserts that it is entitled to these documents because Berman's testimony is referenced by Hilary Rosen's testimony. RIAA objects to the request as being outside the scope of discovery because the statements made in the legislative history to the Digital Performance Rights Act of 1995 are not factual assertions of an RIAA witness.

RULING: Muzak's requests are denied. With respect to documents supporting Mr. Gerbrandt's and Mr. Wilkofsky's retention of services by the RIAA, the

request is denied because it does not seek documentation underlying written direct case testimony. With respect to Mr. Wilkofsky's assertion that Exhibit 15 identifies the price of music license fees in the free market, the request is denied because the exhibit itself is the documentation supporting this assertion. With respect to Mr. Berman's assertion regarding the free marketplace, the request is denied because it is based upon his general knowledge and experience and is subject to cross-examination. Finally, with respect to Mr. Berman's statements made in the legislative process leading to enactment of the Digital Performance Rights Act of 1995, the request is denied because it is beyond the scope of the witness's testimony.

SO ORDERED.

Marybeth Peters
Register of Copyrights

BY: William J. Roberts, Jr.
Senior Attorney

DATED: January 21, 1997