

UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re

**DETERMINATION OF ROYALTY RATES AND
TERMS FOR MAKING AND DISTRIBUTING
PHONORECORDS (Phonorecords III)**

**Docket No. 16-CRB-0003-PR
(2018-2022)**

PROTECTIVE ORDER

I. The Participants

As of the date of this Protective Order, 13 participants remain active in the captioned proceeding (Participants). This Order pertains to the captioned proceeding only and binds the Participants.

II. Authority

The Copyright Royalty Judges (“Judges”) reiterate a strong presumption in favor of the public interest in access to the records of the subject proceeding. Section 803(c)(5) of the Copyright Act (Act) nonetheless authorizes the Judges to issue protective orders “as may be appropriate to protect confidential information . . .” 17 U.S.C. § 803(c)(5). In prior proceedings, the Judges have issued protective orders to facilitate and expedite discovery in both rate determination and distribution proceedings.¹

III. Protected Material

The Act does not define “confidential information.” The Participants agree, however, that in this proceeding (as has been proposed by participants in prior proceedings) the “confidential information” protectable under this Order shall consist of commercial or financial information a Participant discloses (Producing Participant) to another Participant or other Participants by any means (including, but not limited to, in documents, testimony, or argument), and that the Producing Participant has reasonably determined in good faith would, if disclosed, either competitively disadvantage the Producing Participant, provide a competitive advantage to another Participant or entity, or interfere with the ability of the Producing Participant to obtain like information in the future.

The Participants further agree in this proceeding, as they have in prior proceedings, to exempt from the requirements of this Order any document or information that (1) may be found in the public records of the Copyright Royalty Board, the Copyright Office, or any other federal or state governmental agency; and (2) was, is, or during the pendency of the subject proceeding becomes, legitimately, public information.

¹ See, e.g., Protective Order, Docket No. 14-CRB-0001-WR (2016-2020) (Web IV).

IV. Protective Measures

A. Production

The Producing Participant shall mark with a conspicuous label of “RESTRICTED — Subject to Protective Order in Docket No. 16-CRB-0001-PR (2018-2022) (Phonorecords III)” all material that the Producing Participant, reasonably and in good faith, asserts is protected by this Order (hereinafter referred to as “Restricted”). The Producing Participant shall mark Restricted portions with highlights or brackets, marking information to the narrowest extent possible to achieve the goal of maintaining confidentiality.

The Producing Participant shall deliver with all Restricted materials an affidavit or declaration signed under penalty of perjury listing a description of all materials marked with the “Restricted” stamp and the basis for the designation.

Participants shall treat transcripts of deposition testimony taken in connection with this proceeding as presumptively Restricted for a period of 30 days from the date of the completion of the deposition. Deponent’s counsel and/or any Participant may maintain as Restricted any portions Receiving Participants with Restricted portions marked accordingly, along with an affidavit or declaration signed under penalty of perjury listing a description of the transcript portion(s) marked “Restricted” and the basis for the designation(s).

“Producing Participant” shall include any entity, whether a Participant or not, that produces documents in connection with this proceeding, whether by subpoena or consent (“Producer”). Any Producer may designate documents it produces as Restricted in accordance with the terms of this Order, and those documents shall be subject to all of the terms and protections in this Order. The instruction in Section V of this Order prohibiting withholding of documents from production on the grounds that they are subject to confidentiality provisions in private agreements shall apply to all Producers.

B. Receipt

A Participant may receive Restricted materials only by and through outside counsel of record in this proceeding. Any participant receiving Restricted material from another Participant or other Participants in this proceeding (“Receiving Participant”) shall use the Restricted material solely for the purposes of this proceeding, and shall guard and maintain the confidentiality of all Restricted materials. The Receiving Participant, by and through counsel of record in this proceeding, shall execute and abide by a Non-Disclosure Certificate, substantially in the form attached to this order as “Attachment A.” Before revealing Restricted materials to any other entity, the Receiving Participant shall obtain from an authorized representative of the Receiving Participant, a Non-Disclosure Certificate in like form.

The Receiving Participant shall limit access to Restricted materials to:

- (1) Outside counsel of record in this proceeding, including attorneys, paralegals, and clerical employees required by involvement in this proceeding to view the Restricted materials, provided that the outside counsel shall use the Restricted materials solely for the purposes of this proceeding, and not for any other purpose, including competitive decision-making on behalf of a Participant or a competitor of a Participant;
- (2) The personnel supplied by any independent contractor (including litigation support service personnel) with whom the outside counsel of record work, to the extent counsel deem necessary for the sole purpose of assisting in this proceeding;

(3) Any outside independent consultant or expert (Expert) who is assisting a Participant in the proceeding and to whom counsel determine disclosure is necessary for the limited purpose of assisting in, or consulting with respect to, this proceeding.

(4) The Copyright Royalty Board and its staff;

(5) Any person who it appears, based on the face of the document, other documents, or prior testimony, authored, received, or had prior knowledge of the Restricted materials or the information contained therein, or who is a present director, officer, or employee of the Producing Participant; and

(6) Any other person with the prior written consent of the Producing Participant.

An Expert is “independent” if he or she has no interest, financial or otherwise, in the outcome of this proceeding, and is not an employee, officer, or director of, nor anticipated at the time of retention to become an employee, officer, or director of, and plays no ongoing role in the management of, nor has involvement in competitive decision-making on behalf of (1) any or any competitor thereof, (b) a trade association that represents parties or competitors or members of Participant or any competitor thereof, (2) a trade association that represents Participants or competitors or members of Participants or competitors, or (3) a member of a trade association or licensing agent that is a Participant. If any Participant seeks to challenge the independence of another Participant’s designated Expert, the Participants shall follow the procedure described in section D of this Order.

All individuals entitled to see Restricted materials agree to gain access to those materials only via a secure network connection and to store Restricted materials at a location and in a manner that ensures that access is limited to persons authorized under this Order.

C. Use of Restricted Materials

The Receiving Participant may use Restricted materials, plainly marked in accordance with this Order and filed under seal, in any portion of this proceeding, including examination of witnesses, closing argument, and in its proposed findings and conclusions.

When a Participant refers to Restricted materials in any filings with the Judges, the Participant shall file the Restricted materials under seal and file concurrently suitably redacted papers for inclusion in the Judges’ public record. Any Participant or other entity filing redacted and sealed papers must also file a “redaction log” containing, for every item claimed as Restricted, (1) identification of the document or other source by title, page number, and Producing Participant, (2) the basis or bases for the redaction, and (3) a description of the redacted material sufficient to permit any receiving or reviewing Participant to challenge the material’s designation as “Restricted.”

Examination of a witness concerning Restricted material that may be disclosed to the witness under the terms of this Order shall be conducted *in camera* and closed to all persons except those authorized by the terms of this Order. Any portion of the hearing transcript that refers to the Restricted material shall be sealed and subject to this Order. To the extent possible, the court reporter shall segregate into separate transcripts information designated as Restricted, with blank, consecutively numbered pages being provided in a nondesignated main transcript. The separate transcript containing Restricted material shall have page numbers that correspond to the blank pages in the main transcript. Participants shall provide copies of all Restricted materials that the Judges admit into evidence in sealed, confidential envelopes or other appropriate containers endorsed to indicate they are sealed pursuant to this Order.

Within 21 days after the conclusion of this proceeding,² the Receiving Participant of any Restricted materials, shall return to the Producing Participant all Restricted materials including any additional copies, notes, or records in any form reflecting the contents of Restricted materials. In the alternative, the Receiving Participant may destroy all Restricted materials, additional copies, notes, and records in any form reflecting the contents of the Restricted materials and must tender to counsel for the Producing Participant an affidavit or declaration under penalty of perjury verifying that all Restricted materials, copies, notes, and records are destroyed. Nothing in these paragraphs shall prohibit a Participant's outside counsel from retaining copies of any written testimony, brief, motion, pleading, or other filed document, exhibit, transcript, or internal memorandum that reflects Restricted materials, provided that any Restricted materials retained by counsel shall remain subject to the provisions of this Order.

D. Motions to Expand the Scope of the Protective Order or to Challenge Designation of Restricted Materials

All Participants shall use the following procedure to seek permission to disclose Restricted materials to a person or entity not expressly authorized by this Order or to challenge the nature or extent of the Producing Participant's Restricted designation(s).

- (1) The Receiving Participant shall notify the Producing Participant by email of the details of its request. In a document attachment to the email, the Receiving Participant shall state, in detail, the factual and legal bases for its request.
- (2) Within four business days, the Producing Participant shall respond by email. If the Producing Participant does not agree to the Receiving Participant's request, then in a document attachment to the email, the Producing Participant shall state the factual and legal bases for its refusal to agree. If the Producing Participant fails to respond to the request or fails to attach the required document, then the Judges may grant the request.
- (3) On the same date as calculated for step (2), if the Producing Participant has objected to the Receiving Participant's request, in whole or in part, the Producing Participant shall file with the Judges, in accordance with the Judges' procedural regulations, the parties' emails and attachments and shall also forward them to the Judges by email at crb@loc.gov. The Judges will consider the papers submitted by the Producing Participant to be a motion by the Receiving Participant and a response by the Producing Participant. The Judges will not accept from the Producing Participant or the Receiving Participant any papers that have not been provided already to the other Participant in interest. The Producing Participant shall deliver these emails and attachments to all parties in this proceeding in accordance with the Judges' procedural regulations. This procedure shall not apply to any attempt by a Receiving Participant to disclose Restricted materials of a Producer that is not otherwise a Participant. Rather, with respect to Producers' information, the Receiving Participant shall provide the Producer at least five (5) business days' notice of its intent to disclose the material identified by the Producer as Restricted, to afford the Producer an opportunity to challenge the pending disclosure in a court of competent jurisdiction.

² The conclusion of this proceeding shall occur at the resolution of all available appeals or, if no Participant files an appeal, at the end of the time period allowed for noting an appeal.

(4) Any Participant other than the Producing Participant or the Receiving Participant wishing to make a substantive filing with regard to the request and the objection thereto shall file a written submission with the Judges within two business days after receiving notice of the motion, delivering the response papers to all other parties in this proceeding, and shall forward the submission to the Judges by email at crb@loc.gov. However, no other Participant responding in this context may seek permission to disclose Restricted materials or to challenge a Restricted designation in the submissions.

(5) The Judges will decide the issue(s) as soon as possible on the basis of the papers filed and delivered through the procedure described above, without reply papers or oral argument, unless the Judges order otherwise.

The Producing Participant shall bear the burden of justifying the designation or limitation it seeks to impose.

E. Inadvertent Disclosure of Privileged Material

Nothing in this Order shall require production of information that a party contends is protected from disclosure by the attorney-client privilege, the work product privilege, the common interest privilege, or any other privilege, doctrine, right, or immunity. Disclosures among Participants' attorneys of work product or other communications relating to issues of common interest shall not affect or be deemed a waiver of any applicable privilege or protection from disclosure. The inadvertent production or filing of any privileged document or other privileged information in connection with this proceeding shall be without prejudice to any claim that the inadvertently disclosed material is privileged or protected from disclosure and the Producing Participant or filing Participant shall not be held to have waived any rights by inadvertent production in this proceeding or in any other federal or state proceeding. In the event that a Producing Participant discloses or files inadvertently disclosed material that the Producing Participant or filing Participant considers to be privileged in whole or in part, the Producing Participant or filing Participant may retrieve the inadvertently disclosed material by giving written notice to the Receiving Participant(s) not later than five business days after discovery of the inadvertent production or filing of the material. The notice must identify the nature of the asserted privilege or protection.

Upon receipt of notice, each Receiving Participant shall return promptly return to the Producing Participant or filing Participant, or destroy, whichever the Producing Participant requests, the original and all copies of the material to which the notice pertains. In the event that only part of the material is claimed to be privileged, the Producing Participant or filing Participant shall furnish redacted copies of material (removing only the parts claimed to be privileged) to all Receiving Participants, together with the written notice. Upon receipt of the redacted copy, each Receiving Participant shall return promptly to the Producing Participant or filing Participant the original and all copies of the unredacted material.

A Participant inadvertently filing privileged or protected material bears responsibility for seeking, by motion on notice to all Participants, action by the Judges to seal a document. The moving Participant shall also file a redacted document to assure a complete public record.

F. Inadvertent Failure to Designate

The inadvertent failure by a Producing Participant to designate any document or other information as "RESTRICTED" material under this Order shall not waive the designation provided that, within five business days of the Producing Participant learning of the inadvertent failure to designate, the Producing Participant notifies all Receiving Parties that the document or other information is protected under this Order. The Producing Participant shall reproduce the document or other information with the

correct confidentiality designation concurrently with its notification to the Receiving Parties. Upon receiving the document or other information with the correct confidentiality designation, the Receiving Parties shall return or securely destroy, at the Producing Participant's option, all documents or other information that are not designated properly.

A Receiving Participant shall not be in breach of this Order for any use of the documents or other information before receiving notice that the material is protected under this Order, unless an objectively reasonable person would have realized that the material should have been appropriately designated as Restricted under this Order. Once a Receiving Participant receives notice of the correct designation for the material, the Receiving Participant shall treat the material as Restricted under this Order, reserving all rights to assert that the re-designation is not proper under the procedures set forth in this Order regarding challenging designations.

Notwithstanding the above, a subsequent designation of "RESTRICTED" shall apply on a going-forward basis.

G. Inadvertent Disclosure to Unauthorized Persons

In the event any Participant discloses any materials Restricted pursuant to this Order to any person or persons not authorized under this Order, the Participant responsible, and each Participant with knowledge thereof, shall notify immediately counsel for the Producing Participant whose Restricted materials have been disclosed and provide to counsel all known relevant information concerning the nature and circumstances of the disclosure. The responsible disclosing Participant shall also take promptly all reasonable measures to retrieve the improperly disclosed Restricted materials and to ensure no further or greater unauthorized disclosure and/or use thereof.

Unauthorized or inadvertent disclosure shall not change the status of Restricted materials or waive the right to hold the disclosed document or information as "RESTRICTED."

This Order does not bar counsel, in rendering legal advice to its client, from sharing with its client counsel's evaluation of issues that may be based in whole or in part on Restricted material, so long as counsel does not disclose to its client the substance of the Restricted material.

V. Production of Documents Subject to Confidentiality Restrictions

No Participant shall withhold from production responsive, non-privileged, discoverable documents solely because they are subject to confidentiality restrictions imposed by private agreement with another entity, whether or not that entity is a Participant in this proceeding. Participants are hereby ordered not to assert confidentiality provisions in private agreements with third parties as grounds for withholding otherwise discoverable material. Documents so limited by private agreements may be designated as Restricted under this Order and shall be subject to the protections of this Order. The Judges do not intend this Order to override any obligation a Participant might have to inform the third party of any disclosure or discovery request relating to the third party's allegedly confidential information.

VI. Subpoenas

If at any time documents containing Restricted materials are subpoenaed by any court, arbitral, administrative, or legislative body, or are otherwise requested in discovery, the Receiving Participant to whom the subpoena or other request is directed shall promptly give written notice thereof to every Participant who has produced the requested or subpoenaed documents and to its counsel and shall provide

each affected Participant an opportunity to object to the production of the subject documents, provided, however, that nothing contained in this Order shall modify or limit any confidentiality provisions imposed separate and apart from this Order. If, within ten days of receiving written notice, a Producing Participant does not take steps to prevent disclosure, the Receiving Participant to whom the subpoena or request is directed may produce the subject documents. In producing the subject documents, the Receiving Participant shall take all reasonable measures to have the documents treated in accordance with the terms of this Order.

VII. Failure to Comply

The Judges may sanction violations of this Order as they deem appropriate, to the fullest extent permitted by law, including exclusion of evidence obtained, developed, or handled in any way contrary to the requirements of this Order.

VIII. Order

Based upon the foregoing agreements of the parties, the Judges adopt the agreed definition of “confidential information” described in part III above, subject to the terms of this Order as detailed in part IV above. The Judges hereby **ORDER** compliance with part V and VI of this Order and endorse the sanctions described in part VII.

SO ORDERED.

DATED: July 27, 2016.

Suzanne M. Barnett
Chief Copyright Royalty Judge

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**DETERMINATION OF ROYALTY RATES AND
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**Docket No. 16-CRB-0003-PR
(2018-2022)**

NON-DISCLOSURE CERTIFICATE

I certify that:

1. Restricted materials provided to me in connection with the captioned proceeding are subject to the terms and restrictions of the Protective Order entered on July 28, 2014;
2. I have received and read the Protective Order, and I have no unanswered questions regarding the content or implications of the Protective Order;
3. I and any firm designated below qualify under the Protective Order to have access to Restricted materials;
4. I and any firm designated below agree to be bound by the Protective Order;
5. I shall not disclose or use the contents of Restricted materials, or any notes, memoranda, or other form of information reflecting the contents of the Restricted materials, other than in accordance with the terms of the Protective Order;
6. When informed by counsel for my client, I shall return or destroy Restricted materials as provided by the Protective Order; and
7. I understand that a violation of this certificate constitutes a violation of an order of the Copyright Royalty Judges.

I certify that I am authorized to represent and sign on behalf of any “Organization” that is identified below and to bind agents and employees of the Organization to the terms of the Protective Order.

DATED: _____

SIGNATURE

PRINT NAME

ORGANIZATION: _____

TITLE: _____