
In Re: }
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 }
Determination of Statutory }
License Terms and Rates for }
Certain Digital Subscription }
Transmissions of Sound Recordings }
 }

Docket No. 96-5 CARP DSTRA

ORDER

On October 11, 1996, Digital Cable Radio Associates ("DCR") and Muzak, L.P. ("Muzak") filed a motion to suspend this proceeding and to compel the Recording Industry Association of America ("RIAA") to produce certain documents underlying its written direct case. On October 15, 1996, DMX, Inc. filed notice that it was joining in the motion of DCR and Muzak. These three parties are collectively referred to in this Order as the "Subscription Services."

RIAA filed its opposition on October 18, 1996, and the Subscription Services filed their reply on October 23, 1996.

On October 22, 1996, RIAA filed a motion to strike testimony and exhibits for which the Subscription Services failed to produce underlying documents. The Subscription Services filed an opposition on October 28, 1996, and RIAA filed a reply on October 31, 1996.

The motion to suspend this proceeding, the motion to compel document production, and the motion to strike testimony are considered separately below.

The Subscription Services Motion to Suspend This Proceeding

The Subscription Services assert that this proceeding should be suspended until the Subscription Services' motion to compel document production is ruled upon or the parties come

to an agreement regarding document exchange. Subscription Services Motion at 3-4. The Subscription Services further submit that they would be caused "undue hardship and prejudice" if they were required to produce documents in response to RIAA's requests before their motion was resolved. Id.

RIAA opposes a suspension, noting that because the obligation to pay section 114 royalties has been in effect since February 1, 1996, "[e]very day that a decision by the CARP is delayed, the recording companies are denied the use of royalties for the public performances of their copyrighted works by the [Subscription] Services." RIAA Opposition at 16-17. RIAA argues that the Subscription Services have halted this proceeding by refusing to produce any documents responsive to RIAA's requests, and that the Subscription Services do not have any right to ignore the other discovery procedural deadlines while their motion is pending. Id. at 17.

In reply, the Subscription Services argue that it would be unfair, until their motion is resolved, to produce documents to the RIAA when the "RIAA produces no more than a token response to the Subscription Services." Subscription Services Reply at 9. They assert that a suspension is therefore proper, so that no party gains an unfair advantage. Id.

By refusing to produce documents in response to RIAA's request for documents underlying the Subscription Services' written direct cases, the Subscription Services have effectively suspended the precontroversy discovery schedule in this proceeding. Such action by the Subscription Services contravenes a direct order of the Library and is unacceptable.

In the 1990-1992 cable distribution proceeding, several parties filed motions seeking to compel document production, but nonetheless continued to comply with the procedural dates for that proceeding and exchanged documents that were not the subject of the motions. Document

production, with respect to noncontroversial documents, was therefore completed by the time the Library resolved the document production motions. See, Order in Docket No. 94-3 CARP CD-90-92 (October 30, 1995). The Office ruled on the motions and, where production was warranted, gave the parties additional time to produce the documents, thereby obviating the need for a suspension of the entire proceeding. No party was unfairly prejudiced, and the majority of documents were exchanged in compliance with the scheduled exchanged dates.

The Subscription Services have prevented the same result from happening in this proceeding by withholding documents that they agreed to produce by a scheduled date. While the Library recognizes that an unfair advantage may occur when a party refuses to comply with a discovery request, the party with the alleged harm must seek a remedy from the Library or the CARP, and not take matters into its own hands. If the Library determines that one party has gained an unfair advantage over another party, the Library will adjust the schedule to ensure that the balance is restored.

Because the precontroversy discovery schedule is already in a de facto state of suspension due to the Subscription Services' refusal to exchange documents, the Library is denying their motion to suspend and is adopting a new precontroversy discovery schedule as described below.

RIAA Motion to Strike Testimony for Failure to Produce Documents

On October 22, the RIAA filed a motion to strike the testimony and exhibits for which the Subscription Services had agreed to produce underlying documents. The Subscription Services refused to produce the agreed upon documents pending the Library ruling on the Subscription Services motion to compel document production from RIAA. RIAA asserts that such refusal is not permitted by the rules or the Library's precontroversy discovery Order and should not be

countenanced because it frustrates the entire precontroversy discovery schedule and period. RIAA Motion to Strike at 2-4. RIAA submits that the appropriate remedy for the Subscription Services action is to strike the testimony for which they agreed to produce underlying documents. Id. at 5.

The Subscription Services oppose RIAA's motion to strike, stating that while they "generally agreed" to produce documents responsive to RIAA's discovery requests, the RIAA "responded with a hardball litigation stance" and objected to all but two of the Subscription Services' requests. Subscription Services Opposition at 1. The Subscription Services continue that "[h]aving been stiff-armed by the RIAA, and having been rebuffed further in informal efforts to resolve this discovery dispute, the Services were compelled to respond accordingly" by refusing to produce any documents to RIAA. Id. at 2. The Subscription Services assert that if they had produced documents in a timely fashion, the RIAA would have been given an unfair advantage. Id.¹

In reply, RIAA asserts that it has made efforts to resolve all discovery disputes with counsel for the Subscription Services, and that the Subscription Services' unilateral halting of the proceeding should not be condoned. RIAA Reply at 3.

The Library does not condone the Subscription Services' decision to withhold the underlying documents which they agreed to produce and strongly cautions them against taking any action which contravenes the CARP regulations or a direct order of the Librarian or the CARP.

¹ Also included in the Subscription Services' opposition is a four-part proposal for the Library to "consider" in ruling upon the Subscription Services' motion to compel. The proposal offers recommendations as to actions the Library should take depending upon whether it grants or denies the motion to compel. This "proposal" relates to the Subscription Services' motion to compel, not RIAA's motion to strike, and, therefore, will not be considered because it is untimely and improperly filed.

The Library is, however, denying RIAA's motion to strike. Striking testimony related to these documents is a very severe remedy, and one which the circumstances do not warrant. Whereas the Subscription Services' actions only created a temporary delay, the Library finds that granting the motion to strike at this time would unduly prejudice the Subscription Services' presentation of their cases in this proceeding.

This Order establishes a new precontroversy discovery schedule, and it is expected that all parties will comply with the procedural dates and not cause further delay. If any party should frustrate the new schedule in the manner that the Subscription Services have undone the original schedule, the Library may consider further motions or will designate the matter to the CARP to determine the consequences.

Subscription Services Motion to Compel Document Production

On October 3, 1996, the Subscription Services served a joint request for production of documents underlying RIAA's written direct case. The Subscription Services contend that, with the exception of two requests related to RIAA experts, the RIAA has objected to all of the Subscription Services' document requests. Subscription Services Motion at 2. The Subscription Services submit that RIAA's objections are groundless because they are based on a technicality, namely, that the Subscription Services' requests were not properly styled because they did not quote from RIAA's written direct case. *Id.* The Subscription Services have attached their October 3 requests to their motion, and ask that the Library direct the RIAA to comply with the requests and produce the relevant documents. *Id.* at 3.²

² The Subscription Services note in a footnote that Muzak filed a "supplemental" request for documents. Subscription Services Motion at 2. The Subscription Services' motion, however, does not discuss Muzak's request nor specify that production is sought for them, and the Subscription Services have

Before the Library addresses each of the Subscription Services' requests, and the accompanying objections of the RIAA, it is useful to reiterate the principles governing precontroversy discovery in CARP proceedings. Discovery is intended to produce only the documents that underlie the witness' factual assertions. 37 C.F.R. 251.45(c)(1). 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. Any augmentation of the record is the prerogative of the arbitrators, not the parties. See, Order in Docket 94-3 CARP CD-90-92 (October 30, 1995).

In order to obtain documents that underlie a witness' factual assertions, the requesting party must identify the witness and the factual assertions of that witness for which supporting documents are sought. Broad, nonspecific requests are not acceptable. Order in CRT Docket No.91-2-89 CD (September 6, 1991). For example, a request for "all documents consulted by Witness A in the preparation of her testimony" is not acceptable. The requesting party must identify specific assertions made by Witness A in her testimony, and then request the documents underlying those assertions.

Parties who offer bottom-line figures in a CARP proceeding must be prepared to share all of the underlying data that contributed to those bottom-line figures so that the figures may be verified. In addition, all documents offered in response to discovery requests must be furnished in as organized and usable form as possible.

The following rulings apply to the discovery requests of the Subscription Services made to the RIAA on October 3, 1996.

not appended a copy or description of the requests to enable the Library to determine what they were. Consequently, the document requests of Muzak will not be considered.

Request No. 1. The Subscription Services seek "[a]ll documents that RIAA referred to, consulted, or otherwise used in preparing its Direct Case including, without limitation, all documents that RIAA's Expert Witnesses referred to or relied upon in preparing the testimony, reports and attachments in RIAA's Direct Case. This document request includes, without limitation, annual reports on the recording industry and the financial state of RIAA members." Discovery Request at 3.

RIAA asserts that this is not a specific request for materials that underlie particular testimony, and therefore is overbroad. RIAA Opposition at 9. RIAA further asserts that it is obligated to produce only documents that underlie specific testimony, not documents that were consulted in preparing testimony. Id.

In reply, the Subscription Services argue that the §251.45(c) discovery rule should be interpreted broadly, and that the CARP rules do not require that document requests specify particular testimony. Subscription Services Reply at 2-3.

RULING: The Subscription Services' request is denied because it is not a specific request for materials that underlie particular testimony.

Request No. 2. The Subscription Services seeks "[a]ll documents that RIAA referred to, consulted, relied upon, or otherwise used, directly or indirectly, in preparing RIAA's Direct Case, which relate to payments by a record company or record companies for licensing rights to copyrighted compositions or `musical works,' including, without limitation, payments to third parties and payments in the case of `controlled compositions.'" Discovery Request at 4.

RIAA objects to the request, noting that the Subscription Services have not cited any testimony discussing licensing payments for musical works because there is no such testimony. RIAA Opposition at 9-10.

In reply, the Subscription Services assert that the request relates to the cost of producing sound recordings, and cite the testimony of Jason Berman, Zachary Horowitz and Hilary Rosen where statements are made regarding the expense of making sound recordings. Subscription Services Reply at 6.

RULING: The Subscription Services' request is denied because it is overbroad. If the Subscription Services desire documents underlying the statements of Berman, Horowitz and Rosen regarding the cost of producing sound recordings, they must specify that testimony to the RIAA and request the underlying documents supporting it.

Request No. 3. The Subscription Services seek "[a]ll documents relating to the promotional value of the performance of sound recordings, including but not limited to documents sufficient to show the promotional value of the performance of sound recordings via radio airplay, digital audio transmission, and music video programming." Discovery Request at 4.

RIAA opposes the request, noting that the Subscription Services do not cite any testimony in RIAA's written direct case on this issue, and submit that it is the Subscription Services' written direct case, not RIAA's, that addresses this issue. RIAA Opposition at 10.

In reply, the Subscription Services assert that the request is related to the value of sound recordings which are discussed throughout the testimony of Zachary Horowitz, Gary Morris, and Hilary Rosen. Subscription Services Reply at 7.

RULING: The Subscription Services' request is denied. It does not identify specific testimony for which documentation is sought.

Request No. 4. The Subscription Services seek "[a]ll documents relating to the displacement of sound recording sales by the performance of sound recordings over radio and/or digital audio transmission services." Discovery Request at 4.

RIAA responds that there are many statements made throughout its testimony regarding displacement of sound recording sales, and that it should not have to speculate as to which statements the Subscription Services seek underlying documentation. RIAA Opposition at 10.

In reply, the Subscription Services assert that RIAA's case "is fraught with argument" regarding the displacement of sales by digital music services, and cite the testimony of Jason Berman and Gary Morris as examples. They submit that understanding RIAA's argument is "critical" to understanding RIAA's proposed rate. Subscription Services Reply at 7-8.

RULING: The Subscription Services request is denied. Once again, the Subscription Services do not enumerate specific testimony for which they seek supporting documentation, preferring instead to make broad requests for documents underlying RIAA's theory of its case. Discovery in CARP proceedings is limited to documentation supporting the assertions of witnesses, and may not be used to obtain cross-examination or rebuttal evidence, or to explore or test another party's theory of its case.

Request No. 5. The Subscription Services seek "[a]ll documents comparing the development costs, production costs, promotional costs, marketing costs, revenues, and profitability of sound recordings with those of any other form of entertainment product or service, including but not limited to movies, music and non-music videos, and television and cable programming." Discovery Request at 4.

RIAA opposes the request, because the Subscription Services do not cite specific testimony, and asserts that its testimony does not contain the described comparisons. RIAA Opposition at 11.

In reply, the Subscription Services contend that the request relates to the costs of producing sound recordings and cable video programming which form RIAA's written direct case. Subscription Services Reply at 6.

RULING: The request is denied for the same reasons stated in Ruling No. 4.

Request No. 6. The Subscription Services seek "[a]ll documents, including but not limited to documents created as a result of surveys, focus group research, or any other research, that relate to the listening to, purchasing of, or taping of sound recordings or the public performance of sound recordings." Discovery Request at 4.

RIAA opposes the request for the same reasons as request Nos. 1 and 4. RIAA Opposition at 11.

The Subscription Services respond with the same reasons offered in No. 4. Subscription Services Reply at 7-8.

RULING: The request is denied for the same reasons stated in Ruling No. 4.

Request No. 7. The Subscription Services seek "[a]ll documents that RIAA provided to or received from RIAA's Expert Witnesses, including, without limitation, correspondence, memoranda, and drafts of testimony and reports." Discovery Request at 4.

In opposition, RIAA incorporates its response to Request No. 1. In addition, RIAA contends that the request "seeks documents beyond those relied upon by RIAA's expert witnesses for particular factual assertions." RIAA Reply at 11. RIAA submits that drafts of testimony have never been subject to production, and that such production would violate the work product doctrine. Id.

The Subscription Services do not offer a reply.

RULING: The Subscription Services request is denied. Discovery in CARP proceedings is limited to documents underlying direct testimony. A party does not have to produce documents that it provided to a witness, unless such documents underlie the direct testimony of the witness. The Subscription Services' request is far too vague and overbroad because it does not seek documents underlying the factual assertions of RIAA's witnesses. Furthermore, parties are not required to produce drafts of testimony, or documents analyzing or critiquing such drafts. Only the documents underlying the testimony appearing in the written direct case must be produced.

Request No. 8. The Subscription Services seek "[a]ll documents that Jason Berman referred to, consulted, relied upon, or otherwise used, directly or indirectly, in testifying regarding the potential of digital audio services to undercut substantially the revenue that record companies derive from the exercise of their reproduction and distribution rights. (citation omitted). This document request includes, without limitation, studies, reports, and survey results regarding realized and/or potential sales displacement of sound recordings by digital audio services." Discovery Request at 5.

RIAA states that it informed the Subscription Services that Mr. Berman "relied upon his general knowledge and experience when making this statement," and submits that this is an acceptable response, citing the Librarian's October 30, 1995 discovery Order in the 1990-1992 cable distribution proceeding. RIAA Opposition at 12.

In reply, the Subscription Services assert that RIAA should comply with the request because it is "[r]elated to the purported value of sound recordings." Subscription Services Reply at 7.

RULING: The Subscription Services request is denied because Mr. Berman relied upon his general knowledge for his statement and did not rely upon any documents.

Request No. 9. The Subscription Services seek "[a]ll documents referred to, consulted, relied upon, or otherwise used, directly or indirectly, to derive the 'marketing cost per CD' and 'CD cost breakdown' presented in the Canadian Recording Industry Association videotape (Exhibit 9 to RIAA's Direct Case). This document request includes, without limitation, all documents relating to CD manufacturing costs, royalties to artists and publishers, record company costs, record company profits, and retailer costs and profits." Discovery Request at 5.

RIAA asserts that it has informed the Subscription Services that there are no documents supporting the Canadian Recording Industry Association videotape because "the cost breakdowns were derived from ... general experience and conversations with recording industry representatives." RIAA Opposition at 12.

The Subscription Services submit that RIAA's response is unacceptable because "[w]ithout providing more than anecdotal information, RIAA's cost-related testimony is completely unsubstantiated." Subscription Services Reply at 6.

RULING: The Subscription Services request is denied because there are no underlying documents related to the Canadian Recording Industry Association videotape. The validity of the assertions made in the videotape may be tested by the Subscription Services on cross-examination.

Request No. 10. The Subscription Services seek "[a]ll documents referred to, consulted, relied upon, or otherwise used, directly or indirectly, in preparing Exhibit 14 to RIAA's Direct Case...." The request includes "source documents, industry trade publications, documents regarding formal and informal surveys of subject companies, memoranda regarding conversations with industry executives, underlying data from PKA databases, and other documents that relate to:

- a. the component elements of the 'cost' and 'expense' data relating to the cable and direct broadcast satellite ("DBS") channels referenced, relied upon, or referred to, whether or not presented in Exhibit 14;
- b. the 'program expenses' of cable/DBS channels;
- c. the compensation and percentage of revenue that cable and direct broadcast satellite ("DBS") channels pay to program owners on an individual basis;
- d. the license fees that music-oriented cable/DBS channels, including without limitation MTV, VH-1, BET, BET's Jazz Channel, TNN, CMT, Univision, The Box, Much Music, and pay-per-view or pay-per-listen services, each pay to individual program owners on a per subscriber basis, as a percentage of revenue, and in total, including documents relating to how such license fees are calculated;
- e. the license fees that cable/DBS channels, including without limitations MTV, VH-1, BET, Bet's Jazz Channel, TNN, CMT, Univision, The Box, Much Music, and pay-per-view or pay-per-listen services, each pay to individual copyright owners in sound recordings and/or music videos on a per-subscriber basis, as a percentage of revenue, and in total, including documents relating to how such license fees are calculated;
- f. the revenue that cable/DBS channels, including without limitation music-oriented cable/DBS channels including MTV, VH-1, BET, BET's Jazz Channel, TNN, CMT, Univision, The Box, Much Music, and pay-per-view or pay-per-listen services, each receive from individual cable operators;

- g. the revenue that cable/DBS channels, including without limitation music-oriented cable/DBS channels including MTV, VH-1, BET, BET's Jazz Channel, TNN, CMT, Univision, The Box, Much Music, and pay-per-view or pay-per-listen services, each receive from individual DBS operators;
 - h. the percentage of cable and DBS subscribers, respectively, that order premium services (excluding pay-per-view), including the percentage of homes passed represented by each; and
 - i. the percentage of cable and DBS systems, respectively, that carry AMC, Bravo, and TCM, including the percentage of homes passed represented by each."
- Discovery Request at 5-7.

RIAA opposes the request for the reasons stated in response to discovery request No. 1. In addition, RIAA objects to the nine subparts of the request because RIAA believes they amount to interrogatories, which are not permitted under the rules, and do not reference the factual references in RIAA written direct case. RIAA notes that they will produce the documents on "which Mr. Gerbrandt relied in preparing Exhibit 14." RIAA Opposition at 12-13.

In reply, the Subscription Services acknowledge that RIAA will produce some documents, but assert that all their request should be fully complied with because "[w]ithout complete back-up documentation on the key economic assumptions underlying the RIAA's direct case, the Subscription Services (and the CARP) will be denied any effective means to test the quality and character of the data that underlie these 'estimates' and, hence RIAA's assumptions." The Subscription Services state that "[u]nless RIAA intends to concede to the CARP that there is no

documentary foundation underlying its assertions, it should produce all relevant documents requested...." Subscription Services Reply at 4-5 (emphasis in original).

RULING: RIAA has agreed to produce the documents on which Mr. Gerbrandt relied in preparing Exhibit 14, which is what is required under §251.45(c). As noted above, all bottom line figures must be verified, and the Subscription Services are entitled to the underlying documents that support the figures provided in tables 1-4 and Appendix A of Exhibit 14. They are not entitled, however, to documentation showing the breakdown of fees paid for music-oriented programming, or the amounts paid to each copyright owner on a per subscriber basis or the percentages of premium programming ordered by subscribers, if indeed such documents exist. Further, RIAA is not required to produce documents for cable network channels that were not a part of the Kagan survey, such as Univision, The Box, and Much Music. RIAA is also not required to create documents that were not used in preparing Exhibit 14, such as the percentage of cable and DBS subscribers ordering premium services relative to the homes passed by cable and DBS services. Once again, discovery in CARP proceedings is for obtaining documents that underlie witnesses' factual assertions. It is not for the purpose of obtaining information for use in cross-examination to explore the validity of witnesses' theories and assumptions. Consequently, to the extent that RIAA's document production for Exhibit 14 is consistent with this ruling, the Subscription Services' request is denied.

Request No. 11. The Subscription Services seek "[a]ll documents reviewed, referred to, consulted, relied upon, or otherwise used, directly or indirectly, in preparing Exhibit 15." The request includes "source documents, industry trade publications, underlying data, empirical reports and studies, and other documents which relate to:

- a. the movie license fee expenditures for premium services and AMC, Bravo, and TCM;
- b. the revenues AMC, Bravo, and TCM receive from cable operators;
- c. the revenues AMC, Bravo, and TCM receive from DBS operators;
- d. the number of cable and DBS systems, respectively, that carry AMC, Bravo, and TCM, as a percentage of total systems and percentage of homes passed; and

- e. the number of cable and DBS subscribers, respectively, that order AMC, Bravo, and TCM, as a percentage of total subscribers and total homes passed." Discovery Request at 7-8.

RIAA objects to the request for the reasons stated in response to request Nos. 1 and 10.

RIAA Opposition at 13.

The Subscription Services offer the same reply as that described in No. 10. Subscription Services Reply at 4-5.

RULING: The Subscription Services request is granted in part and denied in part. As discussed above, all bottom line figures must be verified, and RIAA must produce underlying documents for the figures provided in Exhibit 15. Subparts (a) through (c) of the Subscription Services request appear directed at the figures in Attachments A and B of Exhibit 15, and RIAA must produce the underlying documents supporting the revenues and movie license fee expenditures for premium services (Exhibit A) and the revenues and movie license fee expenditures for AMC, Bravo and TCM. Subparts (d) and (e) seek documents that are outside the scope of discovery and are denied.

Request No. 12. The Subscription Services seek "[d]ocuments sufficient to show how the percentage of programming expenses attributable to movies was derived by Wilkovsky Gruen Associates, Inc. in Exhibit 15 ... (including Attachments A, B, and C thereto)." Discovery Request at 8.

RIAA opposes the request because it does not identify the portion of Exhibit 15 to which the request refers, and "RIAA is unable to determine what it is the Services are seeking." RIAA Opposition at 13.

In reply, the Subscription Services do not clarify their request, other than stating that Request No. 12 seeks "underlying documents related to the costs of producing sound recordings and the costs of producing cable video programming." Subscription Services Reply at 6.

RULING: The Subscription Services request is nonspecific and is denied.

Presumably, the Subscription Services are looking for any documents showing how Wilkovsky Gruen Associates did the math for determining movie license fee as a percentage of revenue, even though the accuracy of the percentages can be already verified by the numbers in Attachments A and B of exhibit 15. Attachment C of Exhibit 15, however, does not contain any percentages, nor does it discuss movie license fees.

Request No. 13. The Subscription Services seek "[a]ll cable programmer financial information, including but not limited to balance sheets, income statements, and revenue reports, relied upon or reviewed by Wilkovsky Gruen Associates, Inc. in preparation of Exhibit 15...." Discovery Request at 8.

RIAA opposes the request for the reasons stated in response to requests Nos. 1 and 10. RIAA Opposition at 13.

The Subscription Services reply in the same fashion as their reply in request No. 12. Subscription Services Reply at 6.

RULING: The Subscription Services request is granted in part. It appears that the request is directed at the revenue figures for premium services and AMC, Bravo and TCM, as principally identified in Attachments A, B, and C. Because these are bottom line figures, they must be verified and the RIAA must produce underlying documents as to how these revenue figures were determined. To the extent that the request seeks other documentation, it is denied.

Request No. 14. The Subscription Services seek "[a]ll documents that Gary Morris consulted, referred to, or relied upon, directly or indirectly, in making the statement that 'digital transmission technology ... ultimately also may supplant the record sales upon which artists so heavily depend for their livelihood.'" This document request includes, without limitation, studies,

reports and survey results regarding realized and/or potential sales displacement of sound recordings by digital audio services." Discovery Request at 8.

RIAA responds that "[Mr.] Morris relied upon his general knowledge and experience when making this statement." RIAA Opposition at 14.

The Subscription Services do not offer a reply.

RULING: The Subscription Services request is denied because Mr. Morris relied upon his general knowledge for his statement and did not rely on any documents.

Request No. 15. The Subscription Services seek "[a]ll documents that Zachary Horowitz referred to, consulted, relied upon, or otherwise used, directly or indirectly, in testifying regarding the substantial production costs for sound recordings." Discovery Request at 9.

RIAA asserts that "[t]his is not a specific request for materials that underlie particular testimony" and that it is the Subscription Services' responsibility to identify specific testimony for which they desire support. RIAA Opposition at 14.

The Subscription Services cite, by way of example, several of Mr. Horowitz's statements regarding the costs of producing sound recordings, and assert that the RIAA should produce all documents that support any statements that Mr. Horowitz made in his testimony regarding the costs of producing sound recordings. Subscription Services Reply at 6.

RULING: The Subscription Services request is denied because it is far too general and does not identify the specific testimony for which documentation is sought.

Request No. 16. The Subscription Services seek "[a]ll documents that Zachary Horowitz referred to, consulted, relied upon, or otherwise used, directly or indirectly, in testifying

about the promotional value of music videos to the marketing of sound recordings.... [T]his document request includes, without limitation, all documents relating to:

- a. the costs of producing sound recordings;
- b. the costs of distributing sound recordings;
- c. the costs of marketing sound recordings;
- d. the value of exclusive licenses for sound recordings;
- e. the value of music videos in promoting sales of sound recordings, including any and all research, studies, surveys, or reports that discuss the relationship between music video airplay and sales of new sound recording releases;
- f. the value of radio in promoting the sales of sound recordings, including any and all research, studies, surveys, or reports that discuss the relationship between radio airplay and sales of new sound recording releases;
- g. the value of subscription music services in promoting sales of sound recordings, including any and all research, studies, surveys, or reports that discuss the relationship between subscription service airplay and sales of new sound recording releases;
- h. the supply of music videos by record companies to cable/DBS channels including, without limitation, MTV, VH-1, BET, BET's Jazz Channel, TNN, CMT, Univision, The Box, Much Music, and pay-per view or pay-per-listen services;
- i. the supply of sound recordings by record companies to radio stations;
- j. the supply of sound recordings by record companies to subscription music services;

- k. fees paid and/or fees charged by MCA Music Entertainment Group, its affiliated record labels, and/or other record companies in connection with the broadcast of music videos on music-oriented cable/DBS channels including, without limitation, MTV, VH-1, BET, BET's Jazz Channel, TNN, CMT, Univision, The Box, Much Music, and pay-per-view or pay-per-listen services;
- l. agreements between MCA Music Entertainment Group, its affiliated record labels, and/or other record companies, on the one hand, and cable and home satellite channels or services, including without limitation music-oriented channels including MTV, VH-1, BET, BET's Jazz Channel, TNN, CMT, Univision, The Box, Much Music, and pay-per-view or pay-per-listen services, on the other hand; and
- m. documents sufficient to show why `85% of all sound recordings' do not recoup their costs and why the remaining 15% of all sound recordings do." Discovery Request at 9-10.

RIAA states that requests referred to in the preamble and subpart (m) of Request No. 16 do not have any underlying documentation because Mr. Horowitz relied upon his experience and knowledge. RIAA objects to the remainder of requests for the reasons stated in response to Requests No. 1 and 10, and notes that the documents sought in subparts (d), and (f) through (l) are not related to issues in Mr. Horowitz's testimony. RIAA further asserts that Mr. Horowitz discusses the cost of producing sound recordings at length, and that subpart (a) is insufficient because it does not identify particular aspects of his testimony. RIAA Opposition at 14-15.

In reply, the Subscription Services assert that RIAA should comply with their request because the request seeks underlying documents related to testimony concerning the value of sound recordings. Subscription Services Reply at 7.

RULING: The Subscription Services request is denied. It is not acceptable to request documents supporting testimony on the cost associated with producing sound recordings when virtually all of Mr. Horowitz's testimony is devoted to that topic. The request must identify specific aspects of the testimony for which documents are sought. The request only does this in subpart (m), for which Mr. Horowitz relied upon his general knowledge and experience in making the statement. The remainder of subparts do not specify any testimony and, in the cases of subparts (f) through (l), are wholly unrelated to Mr. Horowitz's testimony.

Request No. 17. The Subscription Services seek "[a]ll documents that Hilary Rosen referred to, consulted, relied upon, or otherwise used, directly or indirectly, in testifying about the 'substantial creative and financial investments necessary to produce sound recordings.' This document request includes, without limitation, all documents relating to:

- a. the costs of producing sound recordings;
- b. the costs of distributing sound recordings;
- c. the costs of marketing sound recordings;
- d. the value of exclusive licenses for sound recordings;
- e. the value of music videos in promoting sales of sound recordings, including any and all research, studies, surveys, or reports that discuss the relationship between music video airplay and sales of new sound recording releases;
- f. the value of radio in promoting sales of sound recordings, including any and all research, studies, surveys, or reports that discuss the relationship between radio airplay and sales of new sound recording releases;

- g. the value of subscription music services in promoting sales of sound recordings, including any and all research, studies, surveys, or reports that discuss the relationship between subscription service airplay and sales of new sound recording releases;
 - h. the supply of music videos by record companies to cable/DBS channels including, without limitation, MTV, VH-1, BET, BET's Jazz Channel, TNN, CMT, Univision, The Box, Much Music, and pay-per-view or pay-per-listen services;
 - i. the supply of sound recordings by record companies to radio stations;
 - j. the supply of sound recordings by record companies to subscription music services;
 - k. fees paid and/or fees charged by any record company in connection with the broadcast of music videos on music-oriented cable/DBS channels including, without limitation, MTV, VH-1, BET, BET's Jazz Channel, TNN, CMT, Univision, The Box, Much Music, and pay-per-view or pay-per-listen services;
 - l. agreements between any record company on the one hand, and cable and home satellite channels or services, including without limitation music oriented channels including MTV, VH-1, BET, BET's Jazz Channel, TNN, CMT, Univision, The Box, Much Music, and pay-per-view or pay-per-listen services, on the other hand;
 - m. documents that show all payments to performers by record companies; and
 - n. documents that show the value of exclusive licenses for sound recordings."
- Discovery Request at 10-12.

RIAA states that Ms. Rosen relied upon her general knowledge and experience in making the statement identified in the preamble to Request No. 17. RIAA objects to the remainder of the

Request because it does not make specific requests for particular testimony, and notes that its similarity to Request No. 16 demonstrates that the Subscription Services have not identified particular testimony. RIAA Opposition at 15.

In reply, the Subscription Services submit that RIAA should produce the requested documents because they relate to value of sound recordings. Subscription Services Reply at 7.

RULING: The Subscription Services request is denied for the reasons stated in Ruling No. 16. No document production is required for Ms. Rosen's statement because she relied upon her general knowledge and experience.

Request No. 18. The Subscription Services seek "[a]ll documents not otherwise produced in response to the foregoing Document Requests which are relevant to RIAA's Direct Case and the allegations and claims made therein, or upon which RIAA expects to rely at any hearing in this proceeding." Discovery Request at 12.

RIAA objects to the request for the reasons stated in response to Request No. 1. RIAA Opposition at 16.

The Subscription Services do not offer a reply.

RULING: The Subscription Services request is denied for the reasons stated in Ruling No. 1.

Resetting of the Precontroversy Discovery Schedule

Because of the de facto suspension of discovery in this proceeding, the Library is required to reset the schedule. The issue that concerns the Library the most is at what point to begin the new schedule. The Library has, above, ruled upon all of the discovery requests of the

Subscription Services that were the subject of their motion to compel and, for the reasons stated in those rulings, denied the majority of the document requests. The issue is whether the Library should begin the new schedule with follow-up requests for document production, or should allow the parties to make additional requests for underlying documents related to the written direct cases.

As noted in the discussion of the Subscription Services' motion to compel, the Subscription Services urge a broad standard of discovery, and dispute the applicability of prior discovery rulings of both the Library and the Copyright Royalty Tribunal to this proceeding. Subscription Services Motion to Compel at 2. In essence, the Subscription Services are putting forth their lack of familiarity with CARP proceedings as a mitigating factor in ruling upon their discovery requests and the handling of the discovery period. They would favor a restart of the discovery process, thereby enabling them to formulate new document requests consistent with the Library's rulings.³

At the outset, the Library is making it clear that it does not desire, and will not engage in the practice of making "advisory" rulings related to discovery or other matters in CARP proceedings. All parties to a CARP proceeding are required to be familiar with the rules contained in 37 C.F.R. parts 251-259, including the discovery rule of section 251.45(c). Good faith and ignorance are no excuse for failure to comply with the regulations. Heritage Bank & Trust Corp. v. Ardnor, 906 F.2d 292, 299 (7th Cir. 1990). Likewise, the parties to CARP proceedings must be familiar with the orders of the Library interpreting and applying the rules. Those decisions of the Library not published in the **Federal Register** are available for public inspection and copying in the Copyright Office, as are the determinations and rulings of the Copyright Royalty Tribunal.

³ The Subscription Services urge this approach in their opposition to RIAA's motion to strike. See n.1.

It does not matter, as the Subscription Services urge, that there are not any prior discovery rulings in the context of section 114. This is the first proceeding under this new license, but it does not mean that the parties begin with a blank slate as to the application of the CARP rules. The procedural rules of part 251 of 37 C.F.R. are rules of general applicability to CARP proceedings, and interpretations of those rules made in the context of proceedings involving other compulsory licenses apply with equal force to this proceeding. Ignorance of those precedents is not an excuse, and the parties to this proceeding, as well as all future CARP proceedings, must be familiar with them because they govern the aspects of practice in royalty rate adjustment and distribution proceedings.

Having said this, the Library is nonetheless cognizant of the consequences of its discovery rulings regarding the Subscription Services. With a few exceptions, the Subscription Services will proceed to arbitration without documentation supporting the assertions made by the RIAA in its written direct case. This will significantly hamper the Subscription Services' ability to verify and challenge the facts and figures presented by RIAA, thereby reducing the quality of its presentation and placing a greater burden on the CARP to divine the substantive worth of the RIAA's case.

The Library has conducted two discovery periods prior to this proceeding, both of which have resulted in the exchange of most of the documents discoverable under section 251.45(c)(1). In this proceeding, however, there appear to be significant amounts of testimony in the RIAA's written direct case that are subject to properly lodged discovery requests. The Subscription Services have failed, for the most part, to make the proper requests necessary to obtain these documents. The Library must decide, therefore, whether the Subscription Services warrant

another opportunity, consistent with the rulings of this Order, to make requests for underlying documents related to RIAA's written direct case.

In making this determination, the Library must be mindful not only of the benefits of allowing additional discovery requests, but to the potential harm such additional requests might create, particularly with respect to the RIAA, which is not in great need of an opportunity for additional requests. The Library concludes, however, that any harm to RIAA is minimal, because neither side has exchanged a single document at this point, and the entire discovery schedule is already in a state of de facto suspension. The parties have not, therefore, expended considerable time or expense in document production. The efficiency and effectiveness of the discovery period, and the CARP proceeding itself, is better served by allowing all parties in this proceeding to make further requests for underlying documents related to the written direct cases, in addition to the ones that the parties have already made.

In making additional requests, it is expected that the parties will formulate requests that are consistent with the discovery rulings contained in this Order, as well as those from prior proceedings. Further, the parties are required to produce the documents which they have already agreed to produce in response to the initial discovery requests made under the previous precontroversy discovery schedule. Production of those documents shall take place by the same deadline established below for production of documents in response to additional requests.

The following is the new precontroversy discovery schedule, with the accompanying filing deadlines:

Action	Deadline
Additional Requests for Underlying	December 5, 1996

Documents Related to Written Direct Cases

Responses to Additional Requests for Underlying Documents Related to Written Direct Cases	December 9, 1996
Completion of Document Production for Both Initial and Additional Requests for Underlying Documents Related to Written Direct Cases	December 13, 1996
Follow-Up Requests for Underlying Documents	December 17, 1996
Responses to Follow-Up Requests	December 24, 1996
Motions Related to Document Production	December 27, 1996
Production of Documents in Response to Follow-Up Requests	January 2, 1996
All Other Motions, Petitions, and Objections	January 8, 1996

As a final matter, the Library is underscoring that it is making a one-time exception by allowing additional discovery requests to correct what would be a glaring disparity in document production between the parties in this proceeding. All parties in this and future proceedings are therefore put on notice that they must be familiar with discovery practice in CARP proceedings and will not be afforded additional discovery requests for failure to comply with the rules.

Wherefore, for the reasons stated above, **IT IS ORDERED** that the Subscription Services motion to suspend this proceeding **IS DENIED**. **IT IS FURTHER ORDERED** that the Subscription Services motion to compel document production **IS GRANTED IN PART AND DENIED IN PART**; and **IT IS FURTHER ORDERED** that RIAA's motion to strike testimony **IS DENIED**.

SO ORDERED.

Marybeth Peters,
Register of Copyrights.

BY: William J. Roberts, Jr.
Senior Attorney

DATED: November 27, 1996