

**BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001**

**Complaint of Time
Warner Inc. et al.
Concerning Periodicals Rates**

) **Docket No. C2004-1**

**OBJECTION OF AMERICAN BUSINESS MEDIA
TO REQUESTS FOR PRODUCTION
Time Warner et al. /ABM-T3-2
Time Warner et al. /ABM-T3-3
(September 23, 2004)**

Pursuant to rule 27(c), American Business Media hereby objects to the following requests for production:¹

Time Warner et al./ABM-T3-2

The first part of this request is an interrogatory asking if witness McGarvy conducted any analyses to determine whether changes in “mailing behavior” could be made to mitigate the impact of the proposed rates on Periodicals produced by Crain Communications. The answer to that question, when submitted, will be “yes.” The remainder of the request is a request for production of documents: the analyses and the data on which such analyses were based.

¹ American Business Media notes that the complainants’ caption on the discovery requests to witness McGarvy describes the contents only as “interrogatories,” although some are clearly requests for production. By contrast, the contemporaneous fourth set of requests directed to American Business Media itself are correctly described as both interrogatories and requests for production. American Business Media does not know whether the incomplete description of the discovery directed against this and American Business Media’s other witnesses is inadvertent, or whether it represents a subtle attempt to avoid rule 27(a), which limits requests for production of documents to those in the “custody or control of the participant,” and here American Business Media is the participant. Rule 5(a) limits the term “participant” to parties. ABM’s witnesses and the companies for which they work are not parties or participants.

American Business Media objects to this request on two grounds. The first basis for this objection is that the documents sought, which include mail.dat files (such files being necessary to any analysis), are confidential and need not be disclosed, especially by Crain Communications, a non-party, for the reasons expressed below, where American Business Media discusses specifically the complainants request for mail.dat files.

The second ground for this objection is that the analysis performed was performed by witness McGarvy in response to a direct request by the undersigned counsel for American Business Media for purposes of this litigation. The analysis is therefore classic attorney work product that need not be disclosed. This privilege was clearly described in *Pittman v. Frazier*, 129 F.3d 983, 988 (8th Cir. 1997):

The work product privilege is designed to promote the operation of the adversary system by ensuring that a party cannot obtain materials that his opponent has prepared in anticipation of litigation. *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991). The doctrine allows for discovery of such documents and tangible things only upon a showing of "substantial need and an inability to secure the substantial equivalent of the items through alternate means without undue hardship" for ordinary work product (such as photographs and raw information), and "only in rare and extraordinary circumstances" for opinion work product (containing mental impressions, conclusions, opinions, or legal theories regarding the litigation). *In re Murphy*, 560 F.2d 326, 333-36 & n. 20 (8th Cir. 1977)....

Moreover, the fact that other data prepared in response to a request by counsel has been used to develop exhibit LB-1 does not preclude a claim of privilege over other such calculations. The court in *Pittman* explained (*id.*):

We have stated that disclosure to an adversary waives work product protection as to items actually disclosed. *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 846 (8th Cir. 1988). If documents otherwise protected by the work-product rule have been disclosed to others with an actual intention that an opposing party may see the documents, the party who made the disclosure should not subsequently be able to claim protection for the documents as work product. But disclosure of some documents does not destroy workproduct protection for other documents of the same character. Wright & Miller, § 2024 at 209 (emphasis added); *see also Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1222 (4th Cir.1976) ("broad concepts of subject matter waiver analogous to those applicable to claims of attorney-client privilege are inappropriate when applied to Rule 26(b)(3)"); *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 310-12 (D.D.C.1994) (production of documents protected by attorney work product doctrine resulted in waiver of privilege only as to those documents produced).

American Business Media notes that while Ms. McGarvy's prepared testimony makes a one-sentence reference to the general impact of the complainants' rate proposal (page 6, lines 13-17), the testimony does not deal with impact on Crain Communications or anyone else. Rather, it addresses the mailing practice changes that are taking place and the limits on such changes, the need for making changes slowly, and the extent to which present rates reflect costs. If the complainants seek studies conducted by Crain Communications at the request of counsel simply because impact is an issue in this proceeding, irrespective of Ms McGarvy's testimony, they have no compelling need to examine changes to that impact that might *theoretically* be possible for the thirty publications produced by Crain Communications. As explained in detail below, American Business Media has made available to complainants the complete mail.dat files for 155 member publications, and the complainants can use these

files as well as their own data to show how changes in mail preparation can affect the impact of the proposed rates. They can show no compelling need for data protected by the attorney work product privilege.

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This request for production (not, as captioned by the complainants, an interrogatory) seeks a representative mail.dat file for each publication produced by Crain Communications, the publisher by which witness McGarvy is employed.

American Business Media does not believe that an objection is necessary, since the mail.dat files of Crain Communications' publications are not within the custody or control of American Business Media, and therefore (as specified in the footnote above), those files do not fall within the ambit of rule 27. Crain Communications is not a party to this case, and the fact that it has agreed to permit its employee to testify for American Business Media does not make it a party. American Business Media's truthful answer, to be provided separately, that it has neither custody nor control over Crain Communications' files, should be a sufficient response to this request for production.²

In an excess of caution, however, American Business Media objects to the request on the ground that the mail.dat files sought contain commercially sensitive, proprietary and confidential information for which the complainants

² We note that the Magazine Publishers of America, the association to which Time Warner and other complainants belong, has used this same defense when other parties sought discovery against its members, even a member that offered a witness. In Objections filed on February 2, 1998 in Docket No. R97-1, MPA argued that the information sought from it and its member, Meredith, "is not within the custody or control of MPA" and that, even if the members had the data, "MPA has no legal right to obtain that information from its members." It appears that the matter was not further pursued.

have established no need and that is, if relevant at all, only marginally relevant to the issues in this proceeding.

The Commission has long recognized that participation of the public in its proceedings would be seriously impeded if such participation required that the books, contracts and other commercially sensitive information of participating companies thus became fair game for discovery. For example, in Presiding Officer's Ruling No. R2000-1/102 (July 31, 2000), he stated:

The Commission's policy regarding the discovery of intervenors' commercially sensitive information has been reiterated in a series of rulings—absent exceptional circumstances, such data need not be produced.

The Ruling added that “[t]he balance between disclosure and commercial sensitivity rests initially on whether the data are essential for the Commission's deliberations, including importantly, evaluating the direct case of the party resisting disclosure.”

This ruling and those that it cites protect a *party* from an obligation to disclose commercially sensitive information. Here, the complainants seek commercially sensitive information from a *non-party*, which, even if a permissible request, must be subject to an even higher standard, a standard heightened further by the fact that Ms. McGarvy does not even testify about the impact of the complainants' proposal upon Crain Communications publications or Periodicals in general.

There should be no disputing the fact that mail.dat files contain commercially sensitive, confidential and proprietary information. In fact, they contain all of the information that is contained on a form 3541 Periodicals mailing

statement, and more, and the Postal Service routinely rejects Freedom of Information Act requests for mailing statements, citing the commercial sensitivity and confidentiality of their contents.

American Business Media anticipates that the complainants will contend that, since American Business Media has raised an issue in this case about the impact of the proposed rates on Periodicals, it is entitled to probe into the details of the Periodicals published by Crain Communications. If they do so, they would be wrong. We begin with the fact American Business Media has made no specific claim about the impact of the proposal upon Crain Communications

To be sure, American Business Media has presented an exhibit (LB-1, presented by witness Bradfield) that shows the impact of the rates proposed by the complainants upon 156 publications³, and in doing so witness Bradfield agreed with the complainants (see Bradfield at 6) that the impacts portrayed could in some cases be ameliorated or even reversed if the publishers (and printers) changed the way that the mail is prepared.

But the impact issue in this case is not the impact of rates (that are not even directly at issue) on those 156 publications, or even all American Business Media-member publications, but on the twenty thousand or more publications entered into the mail. The complainants cannot make even a colorable case that there are “exceptional circumstances” warranting an order directing disclosure *by a non-party* of commercially sensitive information related to thirty publications produced by Crain Communications.

³ Although there are 144 lines in the exhibit, lines 77 and 78 contain the collective information for 14 co-palletized titles.

Nor is such disclosure essential for the Commission to be able to evaluate the direct case presented by American Business Media or for the complainants to be able to prepare rebuttal testimony. As stated above, American Business Media has contended that that the rates proposed would have a wide range of impacts and has recognized that changes in mail preparation will affect that impact. Complainants would no doubt like to show with greater detail how such changes would affect the impact. They certainly had but did not take advantage of the opportunity to do so in their direct testimony, where such a demonstration belonged, either through use of data on their own publications or by constructing realistic but hypothetical publications.

More importantly, they now have every opportunity to do so in their rebuttal testimony, and to do so without the need to obtain and review a “representative” mail.dat file from Crain Communications or any other American Business Media member. First, the complainants can use their own data, which include publications in a wide range of sizes, or hypothetical publications. Note that the complainants in fact produce a number of publications that are similar in size to American Business Media-member publications, and they routinely make supplemental mailings of their larger publications that mirror the mailing characteristics of much smaller publications. See Tr. 73-75, which show 25 individual mailings of less than 70,000 pieces.

Second, they can use the 155 mail.dat files already provided to them by American Business Media to calculate “before and after” rate impacts with as many combinations and permutations as they desire. Although those mail.dat

files are a few years old, and thus may not be representative in all cases of the current mailing characteristics of those 155 specific publications, the data are certainly representative of small and medium size publications in general. Third, the complainants can pursue additional data related to the publications used in the testimony of Postal Service witness Tang.

Again, the issue in this case is not the impact of the proposal on Crain Communications or on the 156 publications in Exhibit LB-1. If the complainants seek to show that in some, many, most or all cases, the adverse impact of the rates they propose on smaller circulation publications can be ameliorated by shifting from sacks to pallets or by building bigger bundles or sacks, they can use other data available to them.⁴ For its part, American Business Media will not contend that the general results of such an inquiry by complainants are not relevant or material based on the age of the files, which are sufficiently dated to offer mailer protection but not so dated as to be unrepresentative of certain types of Periodicals.

For these reasons, even if the request for production directed against a non-party is proper, a proposition with which American Business Media does not agree, the mail.dat files sought need not be provided. An order directing the disclosure of this non-essential, confidential information by a non-party merely because an employee of that non-party offered her testimony would send a chilling notice that parties to these proceedings that cannot afford or locate

⁴ One reason that certain American Business Media members were willing to provide the 155 mail.dat files is that such files would provide the complainants with data they could use for this purpose, but without the need to provide more recent files or files attributed to any particular member.

independent “consultants” but must rely on employees or employees of members do so at great peril.

Respectfully submitted,

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