

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

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COMPLAINT OF TIME WARNER INC. ET AL.  
CONCERNING PERIODICALS RATES

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Docket No. C2004-1

MOTION OF TIME WARNER INC. ET AL.  
TO COMPEL PRODUCTION OF DOCUMENTS RESPONSIVE TO  
TW ET AL./ABM-T1-3  
(October 6, 2004)

Pursuant to section 27(d) of the rules of practice, Time Warner Inc., Condé Nast Publications, a Division of Advance Magazine Publishers Inc., Newsweek, Inc., The Reader's Digest Association, Inc., and TV Guide Magazine Group, Inc. (collectively, Time Warner Inc. et al.) hereby respectfully move to compel production of documents requested by TW et al./ABM-T1-3 to witness Cavnar (ABM-T-1).

On September 23, 2004, American Business Media (ABM) filed three documents objecting to Time Warner Inc. et al. interrogatories and requests for production of documents: TW et al./ABM-T1-3 to witness Cavnar (ABM-T-1); TW et al./ABM-T2-3 & 9 to witness Bradfield (ABM-T-2); and TW et al./ABM-T3-2 and 3 to witness McGarvy (ABM-T-3).<sup>1</sup> These objections and the requests to which they relate are nearly identical for the three ABM witnesses. Consequently, to minimize needless and tedious repetition, Time Warner Inc. et al. have consolidated their arguments in this motion to compel responses to TW et al./ABM-T1-3, which will be

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<sup>1</sup> See "Objection of American Business Media to Request for Production: Time Warner et al./ABM-T1-3" (hereafter "ABM-T-1 Objection"); "Objection of American Business Media to Requests for Production: Time Warner et al./ABM-T2-3, Time Warner et al./ABM-T2-9" (hereafter "ABM-T2-Objection"); and "Objection of American Business Media to Requests for Production: Time Warner et al./ABM-T3-2, Time Warner et al./ABM-T3-3" (hereafter "ABM T-3 Objection") (all filed September 23, 2004).

cross-referenced in much briefer motions to compel responses to the other above-referenced discovery requests. Where any aspect of Time Warner Inc. et al.'s requests, ABM's objections, or the relevant discussion is distinctive to a particular witness, it has been clearly identified and discussed separately.

#### Interrogatories and requests for production subject to ABM objections

ABM objects to the discovery requests set out below, which include a request for production of documents that was directed separately to each of ABM's three witnesses (Cavnar; Bradfield; McGarvy), an interrogatory to Bradfield, and a request for production to McGarvy:

- TW et al./ABM-T1-3 to Cavnar; TW et al./ABM-T2-3 to Bradfield; TW et al./ABM-T3-3 to McGarvy:

"Please provide a recent representative mail.dat file for each [name of witness's employer: Hanley Wood (Cavnar); VNU (Bradfield); Crain Communications (McGarvy)] publication."

- TW et al./ABM-T2-9 to witness Bradfield:

"Please provide the following information, to the extent that it can be extracted from mailing statements, mail.dat files or any other available sources, for each VNU publication that is mailed under Periodicals rates.

- (1) frequency of publication;
- (2) average mailed volume per issue;
- (3) average weight per piece;
- (4) average total print order per issue
- (5) printer and Zip code where printed;
- (6) percent at each presort level (carrier route, 5-digit, 3-digit and basic).
- (7) for each presort level, the percent that is pre-barcoded;
- (8) percent qualifying for each per-piece discount provided under current rates;
- (9) percent that is palletized;
- (10) percent editorial content;
- (11) percent of advertising pounds entered in each zone;
- (12) average number of pieces per bundle;
- (13) for sacked pieces, average number of pieces per sack;
- (14) for palletized pieces, average number of pieces per pallet

(15) the minimum number of pieces per sack, as currently set for this publication in the fulfillment program used."

- TW et al./ABM-T3-2 to witness McGarvy:

"Have you conducted any analyses to determine if any changes in mailing behavior could be made to mitigate the impact of the proposed rates upon the Crain Communications publications? If the answer is yes, please provide copies of all such analyses and the data on which they were based (e.g., mail.dat files)."

## Discussion

### Requests for production of "representative mail.dat files"

ABM raises identical objections to each of the requests to its three witnesses for "a recent representative mail.dat file for each . . . publication" published by that witness's employer:

- (1) that the requested mail.dat files do not fall within the ambit of section 27 of the Commission's rules of practice ("Requests for production of documents"), because:
  - (a) rule 27(a) limits requests for production of documents to those in the "custody or control of the participant";<sup>2</sup>
  - (b) "[r]ule 5(a) [a mistake for 5(h)] limits the term 'participant' to parties";<sup>3</sup>

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<sup>2</sup> In relation to this argument, ABM also indulges its penchant for baseless suspicion (disregarding the convention that in legal documents captions are not to be treated as part of the text ):

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. . . . American Business Media does not know whether the incomplete description . . . 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. . . . ABM's witnesses and the companies for which they work are not parties or participants.

ABM-T-1 Objection at 1, n.1;.ABM-T-2 Objection at 1, n.1; ABM-T-3 Objection at 3, n.1.

Without commenting on whether any sensible person would describe such an attempt as "subtle," Time Warner Inc. et al. merely observe that the first sentence in each of the discovery requests expressly references rule 27.

<sup>3</sup> ABM-T-1 Objection at 1, n.1;.ABM-T-2 Objection at 1, n.1; ABM-T-3 Objection at 3, n.1.

- (c) neither ABM's witnesses nor their employers are parties to this proceeding; and
  - (d) although ABM is a party, the requested mail.dat files are not within its "custody or control";
- (2) that "the mail.dat files sought contain commercially sensitive, proprietary and confidential information for which the complainants have established no need and that is, if relevant at all, only marginally relevant to the issues in this proceeding."

With respect to the first of these objections, Time Warner Inc. et al. concede that neither ABM nor any other participant can be compelled to produce documents that are not within its custody or control. We also concede that Hanley Wood, VNU, and Crain Communications are not participants in this proceeding and therefore also cannot be compelled to produce documents.<sup>4</sup> But that hardly ends the matter. For example, it does not follow from anything that has been said that ABM is entitled to present testimony without respect to whether it or its witnesses are in a position to respond to legitimate discovery to the extent necessary "to afford opposing parties a meaningful hearing."<sup>5</sup> Nor does it follow that either the participant or its witnesses are excused from the application of rules that are independent of rule 27. One such rule is Federal Rule of Evidence 705, which governs the disclosure of facts or data underlying expert opinions: "The expert may in any event be required to disclose the underlying facts or data in cross-examination."

Each of ABM's witnesses testifies in an expert or professional capacity and relies on his or her professional experience as a basis for the opinions expressed. Thus, for example, when asked for the basis of his assertion that under the

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<sup>4</sup> Nor are the requests directed to Hanley Wood, VNU, or Crain Communications, contrary to ABM's assertions that "[h]ere, the complainants seek commercially sensitive information from a *non-party*." ABM-T-1 Objection at 3; ABM-T-2 Objection at 3; ABM-T-3 Objection at 5.

<sup>5</sup> Docket No, R94-1, Order Elaborating on Oral Ruling Granting Brooklyn Union Gas Co. Requests for Relief (PRC Order No. 1024). issued August 17, 1994, at 12.

complainants' proposal "many Periodicals mailers would see their rates increase above the Standard rates" (ABM-T-1 at 21, l. 11), witness Cavnar replied:

My statement is not based upon analysis of any particular titles but upon many years of experience in the industry and some very recent experience I had when we actually switched two publications from the Periodicals rate to the Standard rate.

Response to TW et al./ABM-T1-8 (filed September 28, 2004).

It is the opinion of the complainants that Cavnar's "experience" has misled him, that his assertion that because of his "experience" he need do no analysis to back up his claim is ill-founded, that a correct analysis will show that nearly all Periodicals facing a 20 percent or higher increase under the complainants' proposal (assuming no change in their mailing practices) would, if they were to make the changes necessary to comply with Standard rate sack limits for pieces and pounds, have qualified themselves for much lower Periodicals rates than Standard rates, and therefore that Cavnar must have misinterpreted the "recent experience" at Hanley Wood to which he refers, or that experience must have involved publications that are in some respect highly atypical of Periodicals in general.<sup>6</sup>

Similarly, complainants believe that Cavnar's assertion that he has no need to analyze the potential impact of the proposed rates on Hanley Woods publications because, all of them being co-palletized, they would be sure to benefit, is based on a misconception and is not correct. To verify their beliefs on these matters and to prepare rebuttal testimony demonstrating the nature of Cavnar's misunderstandings and the reasons he has fallen into them, complainants need and are entitled to access to the information on which he relied in forming them

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<sup>6</sup> See also the responses of Bradfield to TW et al./ABM-T2-4(a) ("my testimony is based on my experience in the industry, not 'analysis'") and TW et al./ABM-T2-7 ("[t]his testimony is based on experience, not any analysis") .

Similarly, and contrary to ABM's assertions (Objection ABM-T-3 at 3), witness McGarvy testifies extensively about the impact of the proposed rates and bases her opinions primarily on her experience managing distribution and postal affairs for Crain Communications for the last nineteen years (ABM-T-3 at 2) and on the extent to which the mailing profiles of other publications do or do not resemble those of Crain Communications publications. For example, she states in the introduction to her testimony:

If implemented, they [the proposed rates] would sacrifice many small publications in order to assure guaranteed rate reductions for Time Warner and would result in speculative, modest benefits, at best, for the Postal Service and most other Periodical mailers. I draw these conclusions not as an economist or a Postal Service costing expert but as a person who, unlike the Time Warner [*sic*, for "Time Warner Inc. et al."] witnesses who presented the proposal, has actually been involved in both producing and distributing Periodicals through the mail. Theory is nice, but reality is often different.

ABM-T-3, page 1, line 10–page 2, line 2.<sup>7</sup>

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<sup>7</sup> See also ABM-T-3 at 8, l. 3–9, l. 2:

The proposed rate structure would present other problems for small publishers as well. Crain is a relatively large and, I submit, sophisticated publisher of short-run publications numbering around 30, with one larger publication (*Autoweek*). It can afford to have a distribution department of the type I head, and it is large enough to be an attractive client for large and sophisticated printers. As a result, we can find a printer, such as Quad/Graphics and RR Donnelley, that will co-palletize our publications, and we have the knowledge, the software access and, frankly, the money that would permit us to at least attempt to weigh rate versus service issues and to make the horrendously complex sacking, palletizing, bundling and drop shipping decisions that would be necessary for every mailing under the proposed rate structure.

Make no mistake about it—if rates were as proposed by Time Warner, the task of figuring out how to best “package” a mailing would be enormous and, I would think, simply beyond the capability of many small publishers. I know that we were not even able to calculate the postage at the proposed rates with our present mailing characteristics without mail.dat files (that not all publishers produce) and a new program developed by Time Warner. One ABM member that wanted to calculate that impact for its publications gave up and asked me to do it. The task of simply calculating the rates for a publication with specified characteristics, which is what we did, is far less complicated than calculating when, for example, it might cost less under the proposed rate structure to mail large sacks than small pallets, where the crossover point lies between larger, less finely sorted bundles and smaller, more finely sorted bundles, and the myriad other calculations that would have to be made and repeated to minimize postage under the proposed structure.

Like ABM's other witnesses, McGarvy testifies at length in general and anecdotal terms to the existence of a yawning divide between publishers such as her employer, which she describes as "a relatively large and . . . sophisticated publisher of short-run publications" (ABM-T-3, p. 8, ll. 4-5), and other "countless small and under-represented publications" who, she says, would find adapting to the proposed rate changes "simply beyond [their] capability" (id. at 13, ll. 22-23, 8, l. 15). And in the same vein:

Although Crain does not publish anything with circulations in the thousands, as opposed to the tens of thousands, there are many out there who are not represented in this case and who, due to their size, are not candidates for co- anything and are no doubt stuck with small sacks. They, too, must be considered . . .

Id. at 9, ll. 12-15.<sup>8</sup>

Likewise, Bradfield's testimony goes on for some pages describing in highly general terms the alleged impediments to drop shipping and co-mailing by publications unlike those owned by his employer ("[m]y concern is for the weeklies, the very small publications, the small printers with relatively few publications and others that cannot turn a switch or run a program to change their mailing characteristics or the way that they prepare mail" [ABM-T-2 at 12, ll. 21-23]) and, at the same time, the alleged needlessness of strengthening the incentives for such practices:

Despite these threshold impediments, publishers of shorter run publications are moving in the direction that the complainants wish to "encourage" with rate carrots and sticks. VNU began co-mailing nine of its titles this summer, and our experience, combined with comments to me by several printers, indicate that we can expect to see *gross* postage savings of about 9% to 15%, with the added front-end costs eroding around half of that number. For our titles for a couple of months, the net postage saving has been about 4.5%. I expect that number to improve over time.

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<sup>8</sup> As to *why* these "countless" publications are "not represented in this case," or the details of Ms. McGarvy's, or ABM's, appointment as their representative, we are left to speculate.

ABM-T-2 at 15, l. 18–16, l. 2.

Thus, in addition to their general reliance on their professional employment experience as the basis for virtually all of the expert opinion testimony they give in this case, ABM's witnesses' specific references to the characteristics of their employers' publications, and their use of those characteristics as the point of comparison for other, unnamed publications which they allege lack a similar capacity to adopt more efficient mailing practices, put those characteristics into issue and make them relevant to this case. And since those comparisons are not incidental to their testimony but in fact constitute its central theme, ABM's assertions that the requested data are, "if relevant at all, only marginally relevant to the issues in this proceeding" (ABM-T-1 Objection at 2) and that other data "that have been made or are available . . . can be used by the complainants for any legitimate purposes of which the [requested] mail.dat files would be used" (ABM-T-2 Objection at 3) must be rejected.

Significantly, no Commission precedent that we are aware of supports the view that documents in the custody or control of a *witness*, and which are *relevant to the substance of the witness's testimony*, are immune from discovery under rule 27 unless the witness happens also to be a participant in the case in his or her own right (or the employee of a participant).<sup>9</sup> And there is an excellent precedent supporting the contrary view.

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<sup>9</sup> ABM incorrectly asserts that the Magazine Publishers of America (MPA) "has used this same defense [i.e., that requested documents were not within its custody or control] when other parties sought discovery against . . . 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." ABM-T-1 Objection at 2, n. 2; ABM-T-2 Objection at 2, n.2; ABM-T-3 Objection at 4, n.2.

ABM's description is erroneous in every conceivable respect. The interrogatory did not request information from "MPA and its member Meredith," nor was Meredith a "member that offered a witness." The interrogatory was directed not to Meredith, which was a participant in the case, but to MPA et al. witness Little, who happened to be the President of Meredith but who did not appear as a witness for Meredith. Moreover, MPA did not object to the request for Meredith's mailing data on the grounds that the information was not within its custody and control but rather on the grounds that the

It would be difficult to discover a more cogent response to ABM's objections that the requested documents are immune from discovery because Hanley Wood, VNU, and Crain Communications are not participants in this proceeding and ABM, which is a participant, does not have custody or control over them than ABM's own motion to compel a response to interrogatories to witness Pieters in Docket No. MC95-1. Pieters, a senior vice president of the Meredith Corporation, testified on behalf of the Postal Service concerning Periodicals co-mailing and drop shipping. His autobiographical sketch happened to mention that also served on the Board of Directors of Publishers Express, a private company that engaged in the business of magazine delivery and was not a participant in the case. When the Postal Service objected to interrogatories to Pieters concerning Publishers Express, ABM (then "ABP") moved to compel a response. ABP argued as follows:

[T]he Postal Service argues only that discovery is authorized against "a participant" and not, presumably, against the witness to whom the questions are directed. Thus, the Postal Service

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Postal Service already has in its possession "far more complete, and therefore relevant, information," in the form of billing determinants, and that evidence of such dubious relevance did not justify the "burden" on Meredith of producing it. "Nevertheless," MPA continued, "and notwithstanding these objections, MPA and Meredith are mindful of their obligations as participants in this proceeding. They will provide such information as they have within their custody and control that can be produced without undue burden."

Those circumstances are entirely distinguishable from the circumstances at issue here: (1) Meredith Corporation was a participant in Docket No. R97-1 and thus was plainly subject to requests for production of documents under rule 27; (2) witness Little's testimony concerned conditions in the periodicals industry generally, contained no reference to Meredith (other than the single mention of his position at Meredith in his autobiographical sketch), and placed no reliance (either explicit or implicit) on his experience at Meredith; (3) no objection to providing the Meredith data was raised on grounds related to custody and control.

In the same document that objected to the request to witness Little for data on Meredith's publications, MPA did also object to Postal Service interrogatories (USPS/MPA--3-33) that sought extensive data "pertaining to mailing characteristics of each of the approximately 800 publications published by MPA's approximately 200 member companies." That objection was based in part on the grounds that "the information sought . . . is not within the custody or control of MPA *nor is it available to MPA*" (emphasis added). Those 200 member companies, of course, were not participants in the case, *nor were their employees appearing as witnesses and giving expert opinion testimony based on their experiences at those companies.*

See Docket No. R97-1, Objections of Magazine Publishers of America to Postal Service Interrogatories USPS/MPA-3-33 AND USPS/MPA-T1-3-33, filed February 2, 1998; and Direct Testimony of Christopher M. Little (MPA-T-1).

contends, while the witness may have the information, it is "not available to the Postal Service," although the Postal Service must have agreed to Mr. Pieters' reference to Publishers Express. This novel interpretation of the Commission's rules would lead to staggeringly unacceptable results, is applied generally. For example, if ABP were to provide the testimony of a printer, interrogatories and requests for documents concerning that printer's operations would be inappropriate, because, while the witness and his company would have the data, ABP as an entity would not. In fact, every time a party used the services of a witness not employed by the party, this same problem would and could arise. Quite clearly, the Commission's rules' reference to the "participant" must mean the participant and the witness himself, and the rule is meant to broaden the scope of inquiry (from witnesses to the Postal Service) and not narrow it as suggested by the Postal Service. The Postal Service should be compelled to respond to these questions.<sup>10</sup>

The Presiding Officer saw merit in ABP's arguments. He concluded:

In this case, the Postal Service sponsors witnesses with professional backgrounds in the mailing industry. The scope of proper discovery on these witnesses does not extend to the business practices of their regular employers, *when that information* is not known to the Postal Service and *is outside the scope of their testimony*.

Applying this "scope of testimony" test, the Presiding Officer granted in part ABP's motion to compel a response:

I find that witness Pieters . . . should provide a brief description of the business of Publishers Express, commensurate with his position on the board of Publishers Express.<sup>11</sup>

Time Warner Inc. et al. conclude that discovery directed to a *witness*, requesting facts or documents underlying the witness's testimony, is entirely proper. It may happen that some or all of the facts or the documents requested are proprietary to the witness's employer and cannot be disclosed without the consent of

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<sup>10</sup> Docket No. MC95-1, First Motion of American Business Press to Compel Production of Documents and Responses to Interrogatories from United States Postal Service, filed April 28, 1995, at 7-8.

<sup>11</sup> Docket No. MC95-1, Presiding Officer's Ruling Disposing of American Business Press Motion to Compel (Presiding Officer's Ruling No. MC95-1/11), issued June 1, 1995, at 2 (emphasis added) and 9.

the employer. But that eventuality is always possible, and witnesses are always free to invoke a legitimate privilege on their employer's behalf.<sup>12</sup> But to construe requests to witnesses for documents relevant to their testimony as improper discovery directed to their non-party employer, as ABM does in its objections, is simply perverse.

With respect to the second of ABM's objections to providing "representative mail.dat files" for Hanley Wood, VNU, and Crain--that "the mail.dat files sought contain commercially sensitive, proprietary and confidential information for which the complainants have established no need and that is, if relevant at all, only marginally relevant to the issues in this proceeding"--we believe that the relevance issue has been adequately addressed above. We are prepared to accept the declarations of Hanley Wood, VNU, and Crain that they regard at least some of the information requested as commercially sensitive, and proprietary. But if the relevance standard has been met, as we believe it has, and assuming the materials have been properly classified as confidential, the proper remedy is to subject disclosure to a protective order rather than to withhold the materials.<sup>13</sup> Complainants have no objection to appropriate protective conditions.

TW et al./ABM-T2-9 to witness Bradfield

ABM also objects to the following interrogatory to witness Bradfield:

"Please provide the following information, to the extent that it can be extracted from mailing statements, mail.dat files or any other

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<sup>12</sup> Time Warner et al. witness Schick, whose employer, Quad/Graphics, Inc., is not a participant in this docket, testified extensively and responded to extensive written discovery concerning Quad and his work there. After all, his professional experience as a Quad employee is the primary basis upon which he is able to offer expert testimony relevant to this proceeding, as is also the case for witness McGarvy. In the few instances where questions asked for information that witness Schick deemed proprietary to his employer and confidential, he so stated. See, e.g., Tr. 508.

<sup>13</sup> See, e.g., Presiding Officer's Rulings No. R90-1/5 (April 27, 1990); R90-1/15 (May 31, 1990); R90-1/28 (June 14, 1990); R90-1/33 (June 26, 1990).

available sources, for each VNU publication that is mailed under Periodicals rates.

- (1) frequency of publication;
- (2) average mailed volume per issue;
- (3) average weight per piece;
- (4) average total print order per issue
- (5) printer and Zip code where printed;
- (6) percent at each presort level (carrier route, 5-digit, 3-digit and basic).
- (7) for each presort level, the percent that is pre-barcoded;
- (8) percent qualifying for each per-piece discount provided under current rates;
- (9) percent that is palletized;
- (10) percent editorial content;
- (11) percent of advertising pounds entered in each zone;
- (12) average number of pieces per bundle;
- (13) for sacked pieces, average number of pieces per sack;
- (14) for palletized pieces, average number of pieces per pallet
- (15) the minimum number of pieces per sack, as currently set for this publication in the fulfillment program used."

As ABM asserts, and complainants agree, this request seeks "much of the same information . . . that would be found in the mail.dat files" requested in TW et al./ABM-T2-3. Consequently, ABM raises the same objections of lack of custody and control and commercial confidentiality that it makes to TW et al./ABM-T2-3. We believe that those issues are fully addressed in our discussion above.

ABM raises one additional objection to TW et al./ABM-T2-9: that the production of this information for VNU's 46 publications would be burdensome. Having borne equivalent and larger burdens of production in many proceedings at the Commission, complainants (who, contrary to what ABM seems to imagine, do not have platoons of lawyers, consultants, and analysts perpetually at the ready to do their bidding) are not unsympathetic.

Since ABM's objection to this request apparently will rise or fall with its objection to the provision of mail.dat files, and since the provision of those files would obviate the need for much of the information requested in TW et al./ABM-T2-9, there appears to be no purpose in arguing about burden at the stage of the

proceedings. Time Warner Inc. et al. respectfully request only that they may reserve the right to address the question of burden again in the event that the Presiding Officer denies our motion to compel the production of mail.dat files but is inclined, but for the question of burden, to grant our motion to compel of response to TW et al./ABM-T2-9.

TW et al./ABM-T3-2 to witness McGarvy

TW et al./ABM-T3-2 asks witness McGarvy:

"Have you conducted any analyses to determine if any changes in mailing behavior could be made to mitigate the impact of the proposed rates upon the Crain Communications publications? If the answer is yes, please provide copies of all such analyses and the data on which they were based (e.g., mail.dat files)."

ABM's Objection states that it will answer "yes" to the first sentence of the request but that it objects, on various grounds, to the second sentence.

ABM states three objections to the second sentence of TW et al./ABM-T3-2:

- (1) that the requested documents proprietary and confidential;
- (2) that Crain Communications is not a party to this case; and
- (3) that the referenced analyses were "performed . . . in response to a direct request by the undersigned counsel for American Business Media for purposes of this litigation" and are therefore privileged from discovery as attorney work-product.

The first two have already been addressed in our discussion of ABM's objections to requests for "representative mail.dat files." Thus, only the claim of attorney work-product privilege remains to be addressed.

Quoting *Pittman v. Frazier*, 129 F.3d 983, 988 (8th Cir. 1997), ABM correctly states that the privilege applies to "documents and tangible things" that an "opponent has prepared in anticipation of litigation" and that it "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'. . . ." (internal citation omitted).<sup>14</sup> However, ABM's application of the doctrine to TW et al./ABM-T3-2 is unpersuasive.

First, ABM neglects entirely the distinction between the two categories of documents requested: "all such analyses and the data on which they were based (e.g., mail.dat files)." Witness McGarvy's "analyses" may or may not constitute documents "prepared in anticipation of litigation." The mail.dat files (or other data) that she analyzed certainly do not. With respect to that category of documents, the work product privilege plainly has no application.

Second, having quoted *Pittman's* correct statement of the standard for application of the privilege, ABM proceeds to distort both the standard and the substance of McGarvy's testimony in an effort to force the instant circumstances to fit within the ambit of the privilege. Of McGarvy's testimony, ABM states:

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.

ABM-T-3 Objection at 3.

As discussed in detail in the previous section, McGarvy testifies extensively about the impact of the proposed rates. She bases her opinions about the impact of the proposed rates primarily on her experience managing distribution and postal affairs for Crain Communications for the last nineteen years (ABM-T-3 at 2) and on the extent to which the mailing profiles of other publications do or do not resemble those of Crain Communications publications.

ABM, however, reasoning from its manifestly inaccurate characterization of McGarvy's testimony, argues:

If the complainants seek studies conducted by Crain Communications at the request of counsel simply because impact is

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<sup>14</sup> This is the standard incorporated in Rule 26(b)(3) of the Federal Rules of Civil Procedure.

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.

ABM-T-3 Objection at 3.

That statement could hardly be more misleading:

- (1) complainants ask McGarvy for analyses "you conducted," not for "studies conducted by Crain Communications";
- (2) complainants do not seek those analyses "simply because impact is an issue in this proceeding, irrespective of Ms McGarvy's testimony" but because McGarvy's testimony consists chiefly of opinions about impact, many of them grounded on expertise which she claims by virtue of her experience with Crain or on comparisons of the characteristics of other publications with those she is responsible for at Crain;
- (3) the test for applicability of the privilege is not "compelling need" but "substantial need and an inability to secure the substantial equivalent of the items through alternate means without undue hardship" (*Pittman*, 129 F.3d at 988; FRCP, Rule 26(b)(3)); and
- (4) the changes that complainants seek to examine are not "changes to that impact that might *theoretically* be possible for the thirty publications produced by Crain Communications" but changes that may have been included in an *actual* analysis of the impact of the proposed rates performed by the person who "for nineteen years" has been responsible for "managing the distribution of all of Crain's weekly, bi-weekly and monthly publications, a job that includes managing the company's postal affairs" (ABM-T-3, p. 2, ll. 9-11).

In sum, the attorney work product privilege could, as a matter of principle, apply to analyses prepared for ABM's counsel by witness McGarvy, but it has no application to the documents on which she may have based that analysis (presumably, mail.dat files) that were not prepared at counsel's request or for the purposes of litigation but produced in the routine course of business. Where the materials in question are an analysis or analyses by the witness herself of the probable impact of the proposed rates on a number of publications (even putting aside the fact that they are also the publications about which she is most

professionally knowledgeable and to which she makes a number of specific references in her testimony) and she appears in this case chiefly to give expert testimony about the probable impact of the proposed rates, the relevance, indeed the centrality, of the materials to the issues raised in her testimony is virtually self-evident. Finally, since the requested documents bear not merely on the state of witness McGarvy's knowledge but on the level of her expertise and the quality of her judgments in assessing probable impacts of the proposed rates, there do not exist any "substantial equivalent[s]" of the requested items. Therefore, the presumption created by the work product privilege, to the extent that it may exist respecting any analyses of the impact of the proposed rates prepared by witness McGarvy, is overcome by the necessary showing of relevance, substantial need, and the unavailability of a substantial equivalent.

WHEREFORE, Time Warner Inc. et al. respectfully move to compel production of documents requested by TW et al./ABM-T1-3 to witness Cavnar (ABM-T-1).

Respectfully submitted,

s/ \_\_\_\_\_  
John M. Burzio  
Timothy L. Keegan

COUNSEL FOR  
TIME WARNER INC.

Burzio & McLaughlin  
Canal Square, Suite 540  
1054 31st Street, N. W.  
Washington, D. C. 20007-4403  
Telephone: (202) 965-4555  
Fax: (202) 965-4432  
E-mail: burziomclaughlin@covad.net