

PRESIDING OFFICER'S  
RULING NO. C2009-1/23

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Complaint of GameFly, Inc.

Docket No. C2009-1

PRESIDING OFFICER'S RULING  
GRANTING, IN PART, POSTAL SERVICE'S MOTION  
TO COMPEL RESPONSES TO DISCOVERY REQUESTS  
USPS/GFL-5, 8, 16, 26, 28, 38, 39, 46, 49, 50, 51, 52(e), 54, AND 60

(Issued June 10, 2010)

I. INTRODUCTION

The Postal Service seeks a ruling compelling GameFly, Inc. (GameFly) to provide responses to certain discovery requests.<sup>1</sup> GameFly opposes the Motion for most requests.<sup>2</sup> For USPS/GFL-51, 54, and 60, GameFly explains that the Postal Service has agreed to accept the promised production "in satisfaction of its motion to compel a response to this request." *Id.* at 11, 23. The Postal Service attempts to further refute additional aspects of GameFly's Answer.<sup>3</sup> For the reasons discussed below, the Motion is granted, in part, and denied, in part.

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<sup>1</sup> Motion of the United States Postal Service to Compel Responses to Discovery Requests USPS/GFL-5, 8, 16, 26, 28, 38, 39, 46, 49, 50, 51, 52(e), 54, and 60, May 28, 2010 (Motion).

<sup>2</sup> Answer of GameFly Inc. to Motion of USPS to Compel Answers to Discovery Requests USPS/GFL-5, 8, 16, 26, 28, 38, 39, 46, 49-51, 52(e), 54 and 60, June 3, 2010 (Answer).

<sup>3</sup> See Reply of the United States Postal Service to Answer of GameFly Inc. to Motion of USPS to Compel Answers to Discovery Requests USPS/GFL-5, 8, 16, 26, 28, 38, 39, 46, 49-51, 52(e), 54 and 60, June 7, 2010 (Reply); and Motion of the United States Postal Service for Leave to Reply to Answer of GameFly Inc. to Motion of USPS to Compel Answers to Discovery Requests USPS/GFL-5, 8, 16, 26, 28, 38, 39, 46, 49-51, 52(e), 54 and 60, June 7, 2010. This motion is granted.

## II. THE POSTAL SERVICE'S MOTION TO COMPEL

Relying upon 39 CFR 3001.26(a) and 27(a), the Postal Service requests the Commission to compel responses to its discovery requests, which, as a general matter, seek documents related to the theft of GameFly's DVDs, its mailpiece design, its transportation costs, the composition of DVDs, and records of meetings between GameFly and the Postal Service. The Postal Service submits that the "discovery requests addressed by this Motion seek information 'reasonably calculated to lead to the discovery of admissible evidence, and do not impose a disproportional burden in relation to the potential probative value of the information.'" Motion at 1.

## III. GAMEFLY'S ANSWER

In its Answer to the Motion, GameFly reinforces its objections with several general considerations on the theory of the case, and the bounds of plausible defenses, before turning to the specific requests. GameFly asserts that it has already answered most of these questions in part, and is producing certain additional responsive information in a good faith effort. Answer at 2. While it reasserts that many of the requests are unduly burdensome, it contends that "the objection that cuts across the remaining discovery requests is relevance: virtually none of them are reasonably calculated to lead to the discovery of relevant and admissible evidence." *Id.* It reasons that even if the facts alleged were taken as true, they would not establish a valid defense. *Id.*<sup>4</sup>

GameFly also maintains its claims of privilege, such as the settlement privilege, attorney-client privilege, and attorney work product privilege. It urges that the standards of discovery under rules 26 and 27, though stated in the terms of "information reasonably calculated to lead to the discovery of admissible evidence," is further limited

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<sup>4</sup> Generally, it urges that "the cost difference that are relevant...are differences in the *Postal Service's* costs, not the Customers' costs." (Emphasis in original.) Answer at 21. GameFly adds that "the asserted differences between GameFly and Netflix mail, *even if taken as true*, would not negate the functional equivalence of the two companies' mail service. *Id.* at 5 (emphasis in original).

by the burden involved or the narrowed scope of discovery permissible under the applicable law. See, e.g., Answer at 3-4, 21-22, 28.

#### IV. ANALYSIS AS TO SPECIFIC REQUESTS

The Postal Service's Motion focuses on 14 of the discovery requests, and GameFly's limited opposition identifies three of these discovery requests that are being effectively resolved by the parties, USPS/GFL-51, 54, and 60.<sup>5</sup> See Answer at 11, 23. The 11 remaining disputed discovery requests are addressed by subject matter.

##### A. Requests USPS/GFL-5 and 16

USPS/GFL-5. Please produce all documents and communications related to actual or alleged theft of GameFly DVDs, the mail piece design of each such piece, and efforts to address or remediate actual or alleged theft.

USPS/GFL-16. Separated by each 5-digit ZIP Code, please describe the frequency with which GameFly has taken the actions described in the response to USPS/GFL-15.<sup>6</sup>

These requests seek documents concerning the theft of GameFly DVDs, the extent of its remediation efforts, and mailpiece design.

The Postal Service contends that GameFly's objections as to relevance and undue burden are misguided, and that it must be allowed to explore "the reasons for GameFly's decisions about how it prepares its DVDs for mailing and the impact of those decisions upon how those mail pieces are processed." Motion at 2. It also contends that GameFly has alleged that DVD rental companies are "similarly situated in the physical design of their mailpieces and the vulnerability of DVDs to damage." *Id.* at 3. It asserts that GameFly and Netflix are not similarly situated because GameFly mailpieces experience significant theft rates or face different theft risks than Netflix. *Id.*

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<sup>5</sup> GameFly is amenable to producing a privilege log on June 9, 2010, and the Postal Service has agreed to certain production of documents in satisfaction of these three requests.

<sup>6</sup> USPS/GFL-15 requests that GameFly "describe any actions taken by GameFly when it suspects customer theft."

GameFly argues that these discovery requests are not relevant and are unduly burdensome because it is not seeking a remedy for the loss due to theft and the parties have already stipulated to the material facts that concern theft.<sup>7</sup> It posits that the responsive materials, including thousands of emails, would largely relate to many incidents of a single loss and would not be adequately probative to justify the burden. Similarly, it notes that materials on theft shared with law enforcement officials remain commercially sensitive and disclosure could impair its theft reduction efforts. Answer at 19.

The request in USPS/GFL-5 is granted in part. While GameFly does not seek a remedy for losses due to theft, the fact that theft occurs has potential implications for mailpiece design which, in turn, could affect mailpiece processing by the Postal Service. Request USPS/GFL-5 seeks information regarding the potential connection between theft, mailpiece design, and mailpiece processing that could be relevant to issues in this case. Information produced in response to this discovery request could lead to the discovery of admissible evidence. To avoid the undue burden that GameFly asserts would result from a ruling compelling a full response to this request, GameFly is ordered to produce only those documents or communications that relate to both theft mitigation and mailpiece design together. Responsive information may be filed under seal if it would disclose commercially sensitive materials such as communications with law enforcement officials related to theft reduction.

With regard to USPS/GFL-16, the Postal Service has not adequately shown how correlating theft by ZIP Code might lead to evidence that is probative. The Motion is denied with respect to USPS/GFL-16.

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<sup>7</sup> See Objections of GameFly Inc. to USPS Discovery Requests USPS/GFL-5, 8, 12, 15-18, 25, 26, 28, 38, 39 and 46, May 14, 2010, at 3-4 (Objections). The record also already reflects that "On November 1, 2006, GameFly changed the color of its mailer from bright orange to white as a theft-prevention measure after being informed by the U.S. Postal Inspection Service that bright orange mailers were being identified by airline cargo handlers as GameFly mailers even when inside sealed containers." Answers of GameFly, Inc., to USPS Discovery Requests (USPS/GFL-1-4, 6-7, 9-38, 40-45), May 19, 2010, at USPS/GFL-7 Answer.

B. Requests USPS/GFL-8 and 50

USPS/GFL-8. Please describe in detail the production of mail pieces, starting with procurement of stock and all mailing/shipping supplies and extending to the point actual mail is inducted or entered. If changes in mail piece design triggered or coincided with any change in the production process, please explain completely before and after processes and why such changes were undertaken.

USPS/GFL-50. Please provide a complete history of the physical design and composition of DVDs (as distinguished from mail piece design) containing games or other materials sent to GameFly subscribers and customers.

- a. For each DVD design, please provide the physical dimensions, including thickness.
- b. For each DVD design, please provide a complete description of the materials used in producing the DVD.
- c. For each DVD design, please compare and contrast the dimensions and the materials used to create the DVD with the dimensions and materials used in video DVDs sent by Netflix, Blockbuster, or any other mailers who distribute video DVDs through the mail. If you lack information about any particular mailer's practices, please answer with regard to GameFly's general knowledge of the DVD industry.
- d. For each DVD design, please compare and contrast the dimensions and the materials used to create the DVD with the dimensions and materials used in DVDs containing other data sent by Netflix, Blockbuster, or any other mailers who distribute such DVDs through the mail. If you lack information about any particular mailer's practices, please answer with regard to GameFly's general knowledge of the DVD industry.
- e. With regard to your answer to the previous question, how do the thickness, density, flexibility and manufacturing of the DVDs mailed by GameFly compare to DVDs used for new or alternative DVD formats such as Blu-Ray?

USPS/GFL-52. For each type of DVD sent by GameFly through the mail to subscribers or other customers.

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e. For Each type of DVD mailed by GameFly described above, compare and contrast the costs and prices of DVDs containing movies or other data mailed by Netflix, Blockbuster, or other mailers of DVDs. If you lack information about any particular mailer's practices or products, please answer with regard to GameFly's general knowledge of the DVD industry.

These requests pertain to the mailpiece design, changes in mailpiece design, physical design and composition of DVDs, and the costs and price of DVDs of DVD rental companies that contain movies or data other than movies.

The Postal Service again maintains that these requests are relevant to the "key issue" of "whether GameFly is similarly situated to Netflix", as alleged. Motion at 5. It submits that "[k]nowledge of the similarity between respective GameFly and Netflix mail pieces is one of the bases for comparing the two", and that the susceptibility of DVDs to breakage in mail processing may be discerned from the DVDs' composition. *Id.*

GameFly reiterates its position that these requests are irrelevant. Answer at 12. In opposing production of information requested by USPS/GFL-8, GameFly cites a litany of documents to substantiate its assertion that "every major DVD rental company—not just GameFly—has sought to minimize the exposure of its return mail to automated letter processing" to avert harm from the allegedly substantial incremental breakage that may be avoided via by-pass processing. *Id.* at 11-12 (emphasis in original). It argues further that:

[E]ven if details about the *physical makeup* of each GameFly mail piece were somehow relevant, the details of the *processes* by which each mailpiece used by GameFly was designed, manufactured, procured and assembled *before* entry of the mailpiece into the postal system have no conceivable relevance.

*Id.* at 12 (emphasis in original).

Notwithstanding its objections to this discovery request, GameFly agrees to provide a narrative description of how it procures, assembles, and prepares mailers for entry into the mail. *Id.* at 13. Beyond that, GameFly claims it cannot provide any further information even if compelled to do so. *Id.*

While it may be appropriate at some time following discovery to conclude that responsive materials on the physical makeup or processes of GameFly's mailpieces are not likely to be relevant factors that affect any determination on the merits, such a conclusion appears to be premature.<sup>8</sup> Information held by a claimant that may bear upon differences in the characteristics in the mailpiece should be disclosed.<sup>9</sup> The proper approach permits a defendant to explore the contours of any perceived differences in products being compared under the lens of unfair discrimination or undue preference to permit a more thorough analysis, even if the outcome on the merits may be more than likely to remain the same.<sup>10</sup> Accordingly, discovery request USPS/GFL-8 appears to merit production of certain additional responsive information.

To the extent that GameFly has in its possession further information regarding the procurement, assembly, and preparation of mailers that goes beyond that information which it has voluntarily agreed to provide, it is ordered to produce such information. In addition, GameFly is ordered to respond to that portion of USPS/GFL-8

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<sup>8</sup> It is simply too early to find, as GameFly asserts, that "[o]nce a mailpiece—a tangible physical object—is inducted into the postal system, the provenance and prior history of the mailpiece are immaterial." *Id.* at 12-13. GameFly's allegations of discrimination may be predicated on the assumption that it has been, or could have been, mailing a DVD mailpiece with a design and characteristics sufficiently like that of the DVD mailpieces of Netflix to warrant similar processing treatment. The Postal Service should be allowed to test whether each basis for its related opposing contentions is correct.

<sup>9</sup> Notably, GameFly has previously indicated that its supplying manufacturer of mailpieces apparently may have faced certain constraints in modifying mailpieces beyond certain specifications during all or part of the relevant timeframe.

<sup>10</sup> Because the facts can affect the applicable law, the Postal Service should be permitted to test the facts during discovery, rather than be foreclosed by sweeping presumptions that GameFly invites at this stage, where it asserts that "[d]ifferences in the design and production of mail pieces cannot undermine the similarity or functional equivalence of GameFly and Netflix mail, the disparity in the rates and terms of service offered to the two mailers, or the absence of any cognizable justification for the discrimination on grounds of cost of service (or any other ground). *Id.* at 14.

that requests an explanation of any changes in mailpiece design triggered by, or coinciding with, any change in the production process.

With respect to USPS/GFL-50, GameFly argues that differences in DVD design and composition are immaterial and that, in any event, it has no particular insight into this question. Both USPS/GFL-50(a) and (b) seek information regarding the design and composition of DVDs used by GameFly. It would appear that the design and composition of GameFly DVDs have potential implications for the mailpiece production covered by USPS/GFL-8, discussed above. Given those potential implications, the Postal Service should also be permitted to explore GameFly DVD design and composition. Whether or not such DVD design and composition are ultimately determined to be relevant or material in a determination on the merits of GameFly's complaint can be determined later. While GameFly is ordered to respond to USPS/GFL-50(a) and (b), it need only provide information in its possession or under its control. GameFly is not required to perform tests or studies of DVD design or composition.

With respect to USPS/GFL-50(c), (d), and (e), the Motion is denied. Those subparts seek information regarding a comparison of GameFly DVDs with the DVDs of Netflix, Blockbuster, and other mailers. GameFly asserts, without apparent contradiction, that it "has not performed any research or analyses of the material used in the manufacture of DVDs." Answer at 15. GameFly will not be ordered to perform such research or analyses. Nor will GameFly be ordered to engage in speculation regarding these matters on the basis of its "general knowledge of the DVD industry" as USPS/GFL-50(c), (d), and (e) request.

Finally, the Motion is denied with respect to USPS/GFL-52(e). In essence, GameFly states that it does not have in its possession the information needed for the cost and price comparisons sought by the Postal Service. Id. at 16. This assertion appears to be true. Accordingly, a ruling compelling a response would be futile. Nor will GameFly be ordered, as requested by USPS/GFL-52(e), to provide speculative cost and price comparisons based upon its "general knowledge of the DVD industry."

C. Requests USPS/GFL-26 and 28

USPS/GFL-26. What is the transportation cost incurred by GameFly to transport its mail from each GameFly distribution center to the postal facility used by that distribution center? What is the transportation cost incurred by GameFly to transport its mail from the postal facility to each GameFly distribution center?

USPS/GFL-28. Please describe the total cost that GameFly would incur if it expanded its distribution network to sixty or one hundred twenty locations. In your answer, please itemize costs separately.

These requests seek information that concern GameFly's transportation costs to and from postal facilities, and the hypothetical costs of transport for a given topography of GameFly's potential distribution network.

In support of its Motion, the Postal Service argues that the information it seeks is relevant information likely to lead to the discovery of admissible evidence and that production of the requested information is not unduly burdensome. Motion at 6-8. GameFly asserts that the requested information is irrelevant and that its production would be burdensome. Answer at 20-22.

The Presiding Officer has questions regarding the relevance of GameFly's transportation costs to and from the postal facilities used by GameFly's distribution centers. However, the question of relevance is rendered academic by GameFly's representation that it does not possess the information requested by USPS/GFL-26. Answer at 21. There is no suggestion in either the Postal Service's Motion or its Reply that GameFly does indeed have the information requested. GameFly also opposes any requirement that it perform a special study in order to provide the requested transportation costs as burdensome and legally unjustified. Since GameFly does not possess the requested information and since a special study would be burdensome and without legal justification, the Motion to compel a response to USPS/GFL-26 is denied.

With respect to USPS/GFL-28, the Postal Service's request in essence seeks to have GameFly perform a special study of a hypothetical situation in order to produce information that GameFly does not possess. This request is also denied.

D. Requests USPS/GFL-38, 46, and 49

USPS/GFL-38. Please produce all records of all meetings between GameFly and postal employees. Please include the topics discussed and the meeting minutes prepared by GameFly employees.

USPS/GFL-46. Please produce all records of all emails between GameFly and postal employees.

USPS/GFL-49. Please provide a listing of all meetings and communications with Postal Service employees in which mail piece design, performance, including breakage and theft results, and rates and classification of GameFly mailings of DVDs were discussed. Please include dates and locations of each meeting, a list of GameFly employees attending, and a list of Postal Service employees attending.

a. For each meeting and communication please provide a description of the discussion, including recommendations made by the Postal Service, and each response by GameFly.

b. For each meeting and communication, please provide a description of any physical tests conducted on GameFly actual mail pieces or any prototype mail pieces that were considered.

c. For each meeting and communication, please produce all documents and written communications, whether directed to the Postal Service or not, related to the meetings and communications referred to in your answer.

d. For each response by GameFly to suggestions made by the Postal Service described above, please discuss the reasons why GameFly responded as it did, including any analysis employed to formulate the response.

These requests seek all records of all meetings and all emails between GameFly and the Postal Service (USPS/GFL-38 and 46), and “a listing of all meetings and communications with Postal Service employees in which mailpiece design, performance, including breakage and theft results, and rates and classification of GameFly mailings of DVDs were discussed.”

The Postal Service contends that GameFly's objections based upon relevance, undue burden, and privilege lack merit. It points out that not all the relevant materials that are responsive necessarily relate to settlement or fall within any privilege. Motion

at 8. Nor does it share GameFly's views that a mere self-serving description of the email and meetings can satisfy GameFly's discovery duties. Instead, it demands an opportunity to scrutinize the responsive information independently as litigation ordinarily permits. *Id.* at 9. Also, "GameFly [must] be directed to produce a privilege log that allows the Postal Service to evaluate GameFly's privilege claims." *Id.*

GameFly objects on grounds of relevance, undue burden, and privilege.

GameFly asserts that:

[T]he Postal Service already knows as much about these communications and meetings as GameFly does. Every email between GameFly and a postal employee was, by definition, sent or received by one or more postal employees. Every meeting between GameFly and the Postal Service was, by definition, attended by Postal Service employees.

Answer at 26.

GameFly also objects to USPS/GFL-38 and 46 on grounds that certain emails and minutes are covered by settlement privilege. It also asserts that:

[T]he written 'meeting minutes' and other meeting 'records' created by GameFly employees and agents after the meetings but not disclosed to the Postal Service...were communications among GameFly's legal counsel, economic consultant and senior executives in anticipation of litigation. Those communications are covered by attorney-client privilege and the work product doctrine.

*Id.* at 26-27.

The term "record," used in USPS/GFL-38 and 46, is not defined. In context, however, it may reasonably be interpreted to include documents, if any, in addition to those provided at the meetings and the emails between the parties. GameFly will not be required to provide copies of any documents already provided to the Postal Service. By definition, that would include all documents exchanged at the meetings and all emails between the parties. As GameFly argues, the Postal Service is privy to all such

documents and emails. However, other documents prepared by GameFly concerning those meetings and emails are to be provided, unless subject to a legitimate claim of privilege. For example, notes made by a GameFly employee concerning a meeting or email are to be provided. If privilege is asserted concerning any compelled document, it must be identified in a privilege log.

USPS/GFL-49 seeks a listing of all meetings and communications with Postal Service employees in which mailpiece design was discussed and, in addition, requests a description of the discussion, a description of any physical tests conducted by GameFly that were considered, and all documents and communications related to the meetings and communications. Consistent with Federal practice generally, and Fed. R. Civ. P. rule 26(b) specifically, the conventional approach is to permit discovery generally whenever there is good cause.<sup>11</sup> Discovery, however, may be limited properly when “the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.” Fed. R. Civ. P. rule 26(b)(2)(C)(i).

The Postal Service’s Motion as to USPS/GFL-49(a), (b), and (d) is therefore denied. The information requested appears to be duplicative and equally available to the Postal Service. The information requested in subpart (c), while not already available to the Postal Service, appears to be substantially duplicative of information requested in USPS/GFL-38 and 46. Consequently, the Motion is denied as to USPS/GFL-49(c) as well.

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<sup>11</sup> The relevant part of subpart (1) of rule 26(b) provides that: “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.” Fed. R. Civ. P. rule 26(b)(1).

E. Request USPS/GFL-39

USPS/GFL-39. Please produce all communications with other parties identified in this case, including all parties who submitted any filing posted in the C2009-1docket.

This request seeks all communications with other parties identified in this proceeding, including those who filed papers in this docket.

The Postal Service contends that GameFly's objections as to relevance and privilege again are unjustified. It cites GameFly's motion to compel to expound on the relevance of third-party communications with other DVD mailers.<sup>12</sup> The Postal Service submits that these communications with other parties are likely to illuminate (a) any preference given to Netflix; (b) whether the manual processing of Netflix (and Blockbuster) reply mailers serves some unique operational need; and (c) information about the treatment given to other DVD mailer. See Motion at 10.

Relying upon cited case law and analyses of authorities cited by GameFly, the Postal Service also asserts that it is likely that any privilege was waived by GameFly upon voluntarily sharing the information with thirdparty mailers. *Id.* at 11. The Postal Service relies upon a finding in *Verschoth v Time Warner*, 2001 WL 546630 (S.D.N.Y. 2001) that an editor waived privilege under work product doctrine by disclosing the work product information to a freelance writer working with him on a project where the later had no contract with the editor's magazine and the disclosed information was not pertinent to the project. *Id.*

GameFly objects to this request, noting it communicated with at least two parties about commercial matters unrelated to the issues that gave rise to this litigation. Answer at 27. It maintains that the "[d]isclosure of those communications is not reasonably calculated to lead to the production of admissible evidence." *Id.* It also objects since this request seeks to disclose settlement discussions. *Id.* It explains that discussions of this kind are protected by settlement privilege and, when engaged in by

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<sup>12</sup> See Motion of GameFly, Inc. to Compel Responses to Discovery Requests GFL/USPS-3(e), 4(e), 6(a)-(e), (g)-(h), 7, 8, 14(e), 15, 16(f), (g), 20(a)-(d), 21, 28, 29, 31, 40, and 41(c), August 24, 2009.

legal counsel, also constitute attorney work product. *Id.*<sup>13</sup> GameFly urges that “courts generally find waiver of the work product privilege only if the disclosure substantially increases the opportunity for potential adversaries to obtain the information.”<sup>14</sup> It asserts that each third party with which it shared information initiated discussions and was aligned in interest with it.

GameFly’s objections are sustained, in part, at this juncture for privileged materials, provided that the claims of privilege are included in its supplemental privilege log. The request for “all communications with other parties identified in this case” is denied as overly broad and unduly burdensome, except as described below.<sup>15</sup>

GameFly is directed to produce certain non-privileged responsive communications exchanged with such “other parties” that were generated since the date one year prior to the filing of the Complaint. While the relief requested is granted in limited part, GameFly’s production need only include responsive communications on DVD mail that pertain to inbound reply or return mail treatment by the Postal Service, automated processing of return mail, or manual culling (or priority manual processing) of return mail. *See also* P.O. Ruling C2009-1/5 at 11-12. However, it is directed to also redact all information concerning any commercially sensitive or proprietary information of such other party.

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<sup>13</sup> GameFly claims its legal counsel discussed this case with such other parties who, after reading about the case, contacted GameFly concerning the Postal Service’s conduct toward DVD rental companies. GameFly maintains that disclosure would reveal the opinion work product of legal counsel, contrary to protection permitted under work product doctrine.

<sup>14</sup> *Id.* In contrast, the Postal Service argues that the *Verschoth* case it cited supports a broader standard of waiver without regard to whether there is any increased risk of disclosure to potential adversaries. This is not entirely correct. First, the question in that unpublished opinion more accurately addressed whether a media company (a wrongful termination defendant) waived the privilege under work product doctrine by disclosing the work product information to a freelance editor working with it on a project where the latter had no employment contract with the defendant’s magazine and the disclosed information was not pertinent to the editor’s project. Upon review, the district judge in southern New York upheld a determination that the privilege was waived because the disclosure to a third party editor who had worked with the plaintiff substantially increased the likelihood that the work product (a disputed communication) was likely to fall into the hands of the adversary. *See Verschoth*, 2001 WL 546630, at \*4, fn.7. The other authorities cited by GameFly are not to the contrary.

<sup>15</sup> *Compare* P.O. Ruling C2009-1/5 at 9-11 and 15.

GameFly shall further notify the interested parties and indicate what materials are being produced within three days of the date of this ruling. That notice shall indicate that such parties may require GameFly to first produce the material solely by filing it under seal for *in camera* inspection to permit a ruling on any promptly raised objection by the third party to disclosure to the Postal Service; it shall also indicate that third-party objections not submitted by June 24, 2010 may be deemed waived.

### RULING

1. The Motion of the United States Postal Service to Compel Responses to Discovery Requests USPS/GFL-5, 8, 16, 26, 28, 38, 39, 46, 49, 50, 51, 52(e), 54, and 60, filed May 28, 2010, is granted, in part, as set forth in the body of this Ruling.
2. Requests USPS/GFL-16, 26, 28, 49, 50(c)–(e), and 52(e) are denied to the extent they would entail further production beyond any already stipulated by GameFly.
3. USPS/GFL-51, 54, or 60 no longer appear to be in dispute.
4. GameFly is directed to complete a privilege log, with prompt supplementation as needed, reflecting further details that concern each document it claims as privileged, consistent with this Ruling.
5. Responsive materials ordered to be produced shall be provided by June 14, 2010, except for materials on USPS/GFL-39.

Dan G. Blair  
Presiding Officer