Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of: Digital Performance Right in Sound Recordings and Ephemeral Recordings	Docket No. 2009-1 CRB Webcasting III

SOUNDEXCHANGE'S OPPOSITION TO REALNETWORKS' AND LIVE365'S MOTIONS FOR ISSUANCE OF SUBPOENAS TO NONPARTY WITNESSES

SoundExchange, Inc. ("SoundExchange") hereby submits this Opposition to the Motion for Issuance of Subpoenas to Nonparty Witnesses filed by RealNetworks, Inc. and the Joinder in that Motion filed by Live365, Inc. (the "Motions").

INTRODUCTION

This is the second time RealNetworks and Live365 have filed these Motions. In denying the Motions the first time they were filed, the Court did not indicate whether it intended to allow RealNetworks and Live365 to re-file them. In the event that the Court chooses to revisit its denial of the Motions, the Court should deny the Motions for at least three independent reasons.

First, as set forth below, the governing statute and regulations do not authorize the Copyright Royalty Judges ("CRJs") to issue discovery subpoenas to nonparties for deposition testimony and documents. The Motions fail for this straightforward reason.

Second, even if the CRJs were authorized to issue discovery subpoenas to nonparties (which they are not), the Motions should be denied because RealNetworks and Live365 have failed to show a sufficient need for the nonparty discovery they seek. Documents produced by SoundExchange in the ordinary course of discovery provide them with more than enough

information to challenge SoundExchange's witnesses' testimony about Pandora, Slacker and CBS Interactive. If the movants believe SoundExchange's witnesses' testimony is unreliable because it is not based on certain financial data, they are free to test the reliability of the testimony through deposition and cross-examination. Indeed, the movants had the opportunity to establish the relevance of the nonparty discovery they seek when they deposed Dr. Pelcovits earlier this week, but failed to do so. While RealNetworks and Live365 plainly are anxious to peak behind the curtain at their competitors' commercially sensitive information, that is not a legitimate basis for the subpoenas they seek.

Third, allowing the nonparty discovery sought here would contravene the Congressional intent to encourage settlement and would undermine the express Congressional statement in the Webcaster Settlement Acts of 2008 and 2009 that information related to certain settlement agreements should not be used in this proceeding.

DISCUSSION

I. The Governing Statute and Regulations Do Not Authorize the CRJs to Issue Discovery Subpoenas to Nonparties.

The Motions should be denied because the governing statute and regulations do not authorize the CRJs to issue discovery subpoenas to nonparties. The CRJs' subpoena power is set forth in 17 U.S.C. § 803(b)(6)(C)(ix). That provision treats discovery requests to participants/witnesses separately from requests to nonparticipants. With respect to *participants and witnesses*, it states that the CRJs "may issue a subpoena commanding a participant or witness to appear and give testimony, or to produce and permit inspection of documents or tangible things," if certain conditions are met.[1] Thus, for example, the CRJs could issue a

[1] Section 803(b)(6)(C)(ix) provides in full: "In proceedings to determine royalty rates, the Copyright Royalty Judges may issue a subpoena commanding a participant or witness to appear

subpoena in this proceeding to SoundExchange or Dr. Pelcovits in certain circumstances. But Pandora, Slacker and CBS Interactive are neither participants nor witnesses in this proceeding. For this simple reason alone, the requested relief should be denied.

With respect to seeking information from *nonparticipants* like Pandora, Slacker and CBS Interactive, § 803(b)(6)(C)(ix) establishes a different standard that limits the CRJs' power. It does not include them among those individuals who may be subpoenaed. Rather, it provides that "[n]othing in this clause shall preclude the Copyright Royalty Judges from *requesting* the production by a nonparticipant of information or materials relevant to the resolution by the Copyright Royalty Judges of a material issue of fact." (Emphasis added.) Under this plain statutory language, the CRJs may *request* information from Pandora, Slacker and CBS Interactive, but lack authority to *issue a subpoena* to them. If Congress wanted to give the CRJs the authority to issue subpoenas to nonparticipants, it would have said so explicitly in the statute, and it would not have set forth a separate and distinct standard for seeking information from them. *See, e.g.*, *Bobreski v. E.P.A*, 284 F. Supp.2d 67, 76 (D.D.C. 2003) (holding that Secretary of Labor lacked subpoena authority where statutory text did not clearly grant it, and where Congress's omission appeared intentional because other parts of the statutory scheme expressly authorized subpoenas); *United States v. Iannone*, 610 F.2d 943, 945-47 (D.C. Cir. 1979) (holding that if Congress had intended to grant the Inspector General the authority to subpoena witness testimony, it would have specified that power in the statutory text).

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and give testimony, or to produce and permit inspection of documents or tangible things, if the Copyright Royalty Judges' resolution of the proceeding would be substantially impaired by the absence of such testimony or production of documents or tangible things. Such subpoena shall specify with reasonable particularity the materials to be produced or the scope and nature of the required testimony. Nothing in this clause shall preclude the Copyright Royalty Judges from requesting the production by a nonparticipant of information or materials relevant to the resolution by the Copyright Royalty Judges of a material issue of fact."

RealNetworks' and Live365's request for subpoenas cannot be squared with the statutory language. Absent express statutory language authorizing the subpoenas, the subpoenas cannot be issued. *Peters v. United States*, 853 F.2d 692, 696 (9th Cir. 1988) (stating that even where agency had "broad subpoena and investigatory authority," court was "reluctant to assume the existence" of authority to issue third party subpoenas "where Congress has not provided for them specifically," and that "[t]he authority of an administrative agency to issue subpoenas for investigatory purposes is created solely by statute."). Indeed, if the CRJs were allowed to issue discovery subpoenas to nonparties, the last sentence of § 803(b)(6)(C)(ix) would be superfluous -- *i.e.*, there would be no need to indicate that the CRJs can "request" information from nonparticipants if the CRJs were authorized to subpoena information from them. *See, e.g.*, *Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995) ("An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage.").

RealNetworks and Live365 also ignore the difference between the CRJs' regulations governing discovery and their regulations governing hearings. If the CRJs had authority to issue subpoenas during the course of discovery, one would expect to see that authority set forth in the regulations governing discovery. But the section of the regulations governing "Discovery in royalty rate proceedings," 37 C.F.R. § 351.5, makes absolutely no reference to subpoenas of any kind, let alone subpoenas to nonparties. Rather, the regulations refer to the CRJs' subpoena power once -- in the section entitled "Conduct of hearings"-- which, as the name suggests, sets forth the rules for the live hearings conducted by the CRJs. 37 C.F.R. § 351.9. The reference to subpoenas in the regulation that governs the "Conduct of hearings" makes clear that the CRJs

may issue subpoenas to participants and witnesses in connection with hearings, not in connection with discovery.

Moreover, in an attempt to support its theory that a motion for issuance of subpoenas to nonparties is allowed, RealNetworks repeatedly cites to the section of the regulations governing discovery motions, § 351.5(c). *See* RealNetworks Mot. at 6-9. But that section undermines RealNetworks' theory. It provides that participants may file motions seeking information from an "opposing participant or witness" – not from nonparticipants. *See also* § 351.5(b) (participant may file motion to compel information from an "opposing participant").

RealNetworks and Live365 also suggest that discovery subpoenas to nonparties should issue here because settlement agreements published in the Federal Register pursuant to the Webcaster Settlement Act ("WSA") indicate that digital music services that elect the rates made available by those settlements may not participate, "give evidence or otherwise support or assist" in this or certain other proceedings unless they are subpoenaed to do so. *See* RealNetworks Mot. at 4-5; Live365 Mot. at 3. Those agreements are irrelevant to the question of whether the CRJs have the authority to issue discovery subpoenas to nonparties. Private parties cannot create subpoena authority for the CRJs where no such authority has been granted by Congress. Moreover, the reference to subpoenas in the agreements purports to do nothing more than excuse services from liability for breach of the agreement if they should be subpoenaed by this or some other court under current or future law. SoundExchange was willing to include such an exception in the WSA agreements when those services expressed concern about whether there were any circumstances in which they might be compelled to participate in proceedings under authority of this or another court. But SoundExchange's willingness to accommodate such concerns should not be interpreted as expressing SoundExchange's agreement that the CRJs have

authority to issue discovery subpoenas to nonparties. Where the CRJs' authority does not exist by statute, the language of an agreement cannot create it.

II. RealNetworks and Live365 Have Failed to Show That Absent the Discovery from the Nonparties, the CRJs' Ability to Achieve a Just Resolution of the Proceeding Would Be Substantially Impaired.

Even if the statute and regulations authorized the CRJs to issue the requested subpoenas (which they do not), the Motions should be denied because RealNetworks and Live365 have not established a sufficient need for the requested information.

The movants claim that they need discovery from Pandora, Slacker and CBS Interactive "to probe the reliability" of SoundExchange's witnesses, most notably Dr. Pelcovits, who make statements about the webcasting industry. *See* RealNetworks Mot. at 2; Live365 Mot. at 1-2. The movants complain that the witnesses' statements are "[b]ased largely on . . . second-hand observations," are "characterizations of unverifiable facts," and that discovery from the nonparties is needed to "test" the witnesses' statements. RealNetworks Mot. at 3-4, 7; Live365 Mot. at 1-2.

RealNetworks' and Live365's claims that Dr. Pelcovits' statements cannot be tested without nonparty discovery are demonstrably false. Dr. Pelcovits' observations about the size and growth of the webcasting services at issue are based in large part on SoundExchange payment and usage data. SoundExchange is producing that information to RealNetworks and Live365 in the ordinary course of discovery. That information enables the movants to test the reliability of Dr. Pelcovits' testimony. Dr. Pelcovits also reviewed publicly available information about various webcasting services and the webcasting industry, and all of that information has been produced to the movants already as part of SoundExchange's Initial Disclosures.

But even if the movants' arguments about second-hand information were correct (which they are not), they do not justify issuing subpoenas to the nonparties. If RealNetworks and Live365 believe SoundExchange's witnesses' testimony is unreliable because it is based on second-hand knowledge or unverifiable information, they are free to challenge those witnesses' credibility on that basis through deposition and cross-examination.

Indeed, RealNetworks and Live365 deposed Dr. Pelcovits earlier this week. They failed to establish through him their need for the information they are seeking in the proposed subpoenas to nonparties. Counsel for Live365 asked Dr. Pelcovits point blank whether it would "impact his analysis" if "Pandora provided evidence in this proceeding that it could not be economically viable to continue its service under SoundExchange's proposed royalty rates for 2011 to 2015." *See* Pelcovits Deposition Transcript at 231 (uncertified rough draft) (Dec. 14, 2009). He responded: "In and of itself, no." He explained that he "would not change my opinion based on one company's financials." *Id.* at 231-232. Counsel for Live365 then asked him whether similar evidence from Slacker and last.fm would impact his analysis. Again, he responded that "it would not be useful to review basic business documents" from those companies and that "we have evidence from actual deals, which I would value a lot more than [an] individual compan[y's] presentation of its financial business case." *Id.* at 232. In short, the movants failed to establish that the information they seek from the nonparties is sufficiently relevant to Dr. Pelcovits' testimony to justify the nonparty subpoenas.

RealNetworks also bases its request for the subpoenas on the discussion in the written direct testimony of SoundExchange witness W. Tucker McCrady concerning Warner Music Group's agreement with Slacker. RealNetworks Mot. at 3. RealNetworks' reliance on this testimony in support of its Motion is wholly misplaced. Mr. McCrady's testimony describes the

services offered under the agreement and the rate structure of the agreement. *See* Written Direct Testimony of W. Tucker McCrady at 16-18. Again, if RealNetworks wants to challenge testimony about Slacker's agreement with Warner Music Group, it can depose and cross-examine Mr. McCrady about the agreement, and it has already sought the agreement from SoundExchange in the ordinary course of discovery. His references to the agreement do not create an additional need for the extraordinary discovery sought by the movants.

III. Granting the Motions Would Contravene the Congressional Intent to Encourage Settlements.

Congress has made it clear that it wants to encourage settlements of rate-setting proceedings. The statutory scheme is structured to foster settlements. *See* 17 U.S.C. § 803(b)(3)(A)(i) (establishing voluntary negotiation period); § 803(b)(6)(C)(x) (requiring the CRJs to "order a settlement conference among the participants"); § 801(b)(7)(A) (specifying that one of the CRJs' functions is to consider adoption of settlement agreements). In fact, in the Webcaster Settlement Acts of 2008 and 2009, Congress demonstrated its interest in settlements by creating periods of time during which SoundExchange could enter into agreements that are binding on all copyright owners of sound recordings and others entitled to payment of royalties under Section 114. *See* 17 U.S.C. § 114(f)(5).

Issuing subpoenas to nonparticpants that have opted into rates made available by settlements would contravene Congressional intent by removing one of the incentives for settling. Rate-setting proceedings before the CRJs are time-consuming and costly, and can lead to the public disclosure of information that a party believes is proprietary or confidential.[2] The

[2] Although there is a Protective Order in this proceeding, it applies only to discovery. *See Order Granting Joint Motion to Adopt Protective Order* (Sept. 23, 2009) ("the proposed protective order is imposed only with respect to the discovery phase of the proceeding," though "[p]arties may move for application of the Protective Order, where appropriate, in other phases of the

benefit obtained by avoiding these costs, burdens and risks may be a motivating factor in a party's decision to opt into rates made available through settlement. The three nonparticipants at issue here -- Pandora, Slacker and CBS Interactive -- have opted to accept rates made available through settlements with SoundExchange, and thereby have avoided the need to devote time and money to this proceeding. To require them to participate in discovery anyway would deny them one of the benefits they may have believed they obtained by opting into settlements. It would also eliminate one of the incentives to settle for parties in the future. If parties that opt into settlements can be required to participate in discovery, settlement may become a less desirable option and there may be fewer settlements in the future.

Finally, to the extent that the Motions seek information related to nonprecedential settlement agreements entered into pursuant to the Webcaster Settlement Acts of 2008 and 2009 ("WSA"), they are an improper end-run around the express terms of the WSA. 17 U.S.C. § 114(f)(5)(C) (providing that non-precedential agreements entered into pursuant to WSA shall not be "taken into account" in any rate-setting proceeding). Congress made clear that information about those agreements should not be considered in this proceeding. RealNetworks and Live365 should not be allowed to use nonparty discovery as a means to circumvent Congress's intent.

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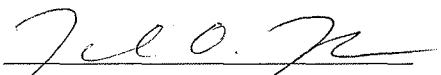
proceeding"). There is no guarantee that a party's information produced in discovery will remain confidential when it is submitted in that party's or another party's written testimony or exhibits, or when it is used at trial.

CONCLUSION

For the foregoing reasons, the motions filed by RealNetworks and Live365 for the issuance of subpoenas to Pandora, Slacker and CBS Interactive should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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