

**Before the  
COPYRIGHT ROYALTY BOARD  
LIBRARY OF CONGRESS  
Washington, D.C.**

**In the Matter of:**

**Digital Performance Right in Sound  
Recordings and Ephemeral Recordings**

**Docket No. 2009-1  
CRB Webcasting III**

**LIVE365, INC.'S JOINDER IN REALNETWORKS, INC.'S  
MOTION FOR ISSUANCE OF SUBPOENAS TO NONPARTY WITNESSES**

Live365, Inc. (“Live365”) hereby submits notice of its joinder in RealNetworks, Inc.’s (“RealNetworks”) motion for the issuance of subpoenas to nonparties Pandora Media, Inc., Slacker, Inc., and CBS Interactive Music Group.<sup>1</sup> Live365 adopts, as if fully set forth herein, the arguments and requested relief set forth in RealNetworks’ motion.

In addition to the arguments presented in RealNetworks’ motion, Live365 asserts that the information sought from the proposed subpoenas will provide highly relevant information that will assist the Board in “establish[ing] rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.” 17 U.S.C. § 114(f)(2)(B). Specifically, the limited financial information requested in these subpoenas will help the Board to assess the economic impact of the royalty rates to webcasting services and whether these services would ever consider – much less voluntarily agree to – the rates proposed by SoundExchange, Inc. (“SoundExchange”) in its Written Direct Statement. Indeed, it is expected that this first-hand financial information from these webcasting

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<sup>1</sup> With the exception of this footnote and the accompanying certificate of service, this joinder is identical to the one filed by Live365 on December 3, 2009. The certificate of service has been amended to include the three nonparties that are the objects of the proposed subpoenas.

services – as opposed to the selectively-chosen blog entries and other secondary sources relied upon by Dr. Pelcovits – will provide further evidence of an industry that is suffering from low advertising rates, an inability to convert users to paid subscribers, and questionable financial viability in the face of current royalty rates and the economic conditions. This is in stark contrast to Dr. Pelcovits’ unverified, Panglossian assertions of “a robust and evolving market for webcasting” that shows “compelling evidence of an industry that has both short and long-term viability.” Written Direct Testimony of Michael Pelcovits, at 11.

Similarly, it is also expected that the narrowly-tailored information will readily demonstrate that despite “the ability of a new entrant to succeed in the market” (*id.* at 10), “the popularity” of these services (*id.* at 12), and their “significant demand” (*id.*) – assuming all of these assertions are true – these three webcasting services have *not* been financially successful under the current statutory rates (which SoundExchange seeks to increase by another 160% over the next five years). This is particularly alarming considering that these services have substantial scale and are – as Dr. Pelcovits acknowledges – among the largest webcasting services in the industry. *See id.* at 10, 12.

Further, the requested financial information is also particularly pertinent to Live365’s direct case, which provides an economic analysis of the webcasting industry using estimated costs, revenues and operating margins from industry data and company-specific sources. The requested information, if obtained from the webcasting services at issue here, would provide highly relevant data points – especially given the acknowledged scale of these companies – and such data could easily be incorporated into the economic model proffered by Live365’s expert witness, Dr. Mark Fratrick. *Cf.* 37 C.F.R. § 351.4(c) (permitting CRB participants an opportunity to amend their written direct statements based on new information received during the discovery

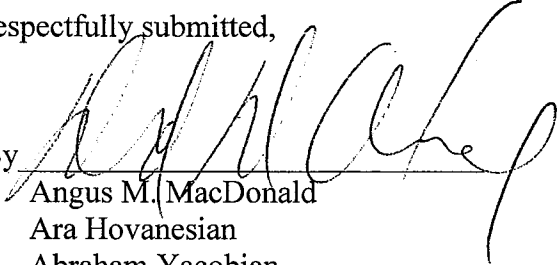
process). Moreover, such information would further assist the Board in making an informed decision regarding the economic facts facing this industry.

However, as explained in RealNetworks' motion, neither Live365 nor any other party to this proceeding can obtain this information directly from these services because of the license agreements entered into under the Webcaster Settlement Acts of 2008 and 2009, which expressly prohibit these services from "giv[ing] evidence or otherwise support[ing] or assist[ing]" any of the participants in this proceeding "unless subpoenaed on petition of a third party." 74 Fed. Reg. 9293, 9301-02. Accordingly, issuance of the proposed subpoenas is critical, and "resolution of the proceeding would be substantially impaired by the absence of such testimony or production of documents." 17 U.S.C. § 803(b)(6)(C)(ix).

For all of the reasons presented here and in RealNetworks' motion, which Live365 hereby joins, Live365 respectfully requests that the CRJs issue the proposed subpoenas.

Respectfully submitted,

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December 10, 2009

**CERTIFICATE OF SERVICE**

I, Rhea Lytle, a secretary with the law firm of Davis Wright Tremaine LLP, do hereby certify that copies of the foregoing “**Live365, Inc.’s Joinder in RealNetworks, Inc.’s Motion for Issuance of Subpoenas to Nonparty Witnesses**” were sent via electronic email and via first-class, postage prepaid, United States mail, this 10<sup>th</sup> day of December, 2009 to the following:

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