

**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**

MOTION FOR ISSUANCE OF SUBPOENAS TO NONPARTY WITNESSES

RealNetworks, Inc. (“RealNetworks”) hereby moves pursuant to 17 U.S.C. § 803(b)(6)(C)(ix) and 37 C.F.R. § 351.5(c) for the issuance of subpoenas *ad testificandum* and *duces tecum* to nonparties Pandora Media, Inc. (“Pandora”), Slacker, Inc. (“Slacker”), and CBS Interactive (which operates webcasting services including Last.fm Ltd. (“Last.fm”)).¹ RealNetworks moves for the issuance of subpoenas directing these nonparties to present corporate representative witnesses competent to present documents and testify at deposition with respect to factual assertions in the Written Direct Statement of SoundExchange Inc. (“SoundExchange”) as to which SoundExchange’s witnesses have no firsthand knowledge. Proposed subpoenas for the three entities are attached as Exhibits 1 to 3.

RealNetworks seeks document production and deposition testimony from these nonparty witnesses to ensure an accurate factual record in this proceeding. SoundExchange’s Written Direct Statement is replete with assertions couched as fact about, among other things, the success

¹ Apart from this footnote, the date, the signature, and the service list, this motion is unchanged from the motion that RealNetworks filed on December 1, 2009. The Copyright Royalty Judges denied that motion on the ground that RealNetworks did not serve the three nonparties that are the subject of the motion. To comply with that ruling, RealNetworks is filing its motion anew and serving copies on the nonparties.

these nonparty entities have experienced in the marketplace, the ease with which they can evolve to meet consumers' demands, and the degree to which their service offerings are comparable to those of other webcasting services. By implication, SoundExchange's witnesses are asserting that these services can exist in the marketplace and pay the level of royalties that SoundExchange proposes. To test these assertions and implications, and the conclusions that SoundExchange draws from them, RealNetworks requires direct access to these companies' representative witnesses in discovery, as they are the only sources of reliable and potentially admissible evidence related to these assertions.

I. SOUNDEXCHANGE'S WRITTEN DIRECT STATEMENT NECESSITATES NONPARTY DISCOVERY

Testimony advanced by SoundExchange in its Written Direct Statement makes repeated factual assertions regarding Pandora, Slacker, and Last.fm. SoundExchange relies heavily on these assertions in its case in chief, extrapolating conclusions from them that bear directly on the task before the Copyright Royalty Judges ("CRJs") in this proceeding. But SoundExchange's witnesses do not have firsthand knowledge of Pandora, Slacker, and Last.fm sufficient to competently establish facts relating to these companies. To the extent that such facts could assist the CRJs here, it is critical that the parties have access to these three companies during discovery. To ensure that the CRJs receive reliable testimony and evidence, RealNetworks should have the opportunity to test any relevant factual assertions, to probe the reliability of the witnesses who make them, and to gather information (via limited deposition testimony and document production) from these entities themselves.

SoundExchange's witnesses refer repeatedly in their written direct statements to Pandora, Slacker, and Last.fm. Dr. Michael Pelcovits, one of SoundExchange's expert economists, states

that Pandora is the “largest webcasting service” and is “growing fast,” *see* Pelcovits WDT at 12, and that Pandora’s experience and its “popularity” in the market demonstrate “significant demand” for non-interactive services that “provide a continuous stream of music programmed to suit the subscriber’s tastes.” *Id.* Dr. Pelcovits similarly comments on the purported popularity of Slacker’s service, *see id.*, as well the way in which it has purportedly “rapidly adapted its service” to changing marketplace dynamics. *See id.* at 10. Dr. Pelcovits further asserts that Slacker alone “is a good proxy for plays-per-subscriber for statutory subscription services,” even though (according to Dr. Pelcovits himself) Slacker’s streaming services are “not necessarily statutory.” *Id.* at 32. With respect to Last.fm, Dr. Pelcovits states that the company was able to grow quickly in the midst of the dynamic webcasting market, *see id.* at 10, that it was purchased by CBS Interactive for \$280 million in 2007, *see id.*, and that the fact it was purchased for that price demonstrates “the ability of a new entrant to succeed in the market.” *Id.* Based largely on these second-hand observations about these companies, Dr. Pelcovits concludes that the webcasting market is “robust and evolving” and that there is “compelling evidence of an industry that has both short and long-term viability.” *Id.* at 11. Notably absent, however, is any direct evidence of the actual financial success of these companies – despite Dr. Pelcovits’s assertion that new entrants have “succeed[ed] in the market.” *Id.* at 10.

In addition, W. Tucker McCrady, Associate Counsel for Warner Music Group (“WMG”), states that Slacker provides a “custom radio” service, *see* McCrady WDT at 16-17, that Slacker offers several different service tiers that “offer different user experiences,” *see id.* at 18, and that the customizable nature of Slacker’s service “substantially weak[ens]” WMG’s negotiating position with Slacker due to a recent decision from the Second Circuit. *See id.*

Again, these factual assertions regarding the alleged experiences and supposed successes of parties not before this tribunal go to the heart of SoundExchange's case. In order to assess these assertions and the sweeping conclusions that SoundExchange believes flow from them, RealNetworks needs access in discovery to representative witnesses from these three companies – witnesses who actually possess the facts as to which SoundExchange's witnesses can only speculate. RealNetworks believes that this discovery would bear directly on SoundExchange's assertions and would be fundamentally important in cross-examination and impeachment of SoundExchange's witnesses. Absent access to these companies in discovery, RealNetworks will have no ability to probe SoundExchange's witness statements, and SoundExchange will effectively be permitted to rely on its witnesses' own characterizations of unverifiable facts pertaining to entities that are not participating in the proceeding. Moreover, depending on the information obtained through this discovery, RealNetworks may need to call the representative witnesses from one or more of these companies to appear before the CRJs during the rebuttal stage of the proceeding.

II. A SUBPOENA IS NECESSARY BECAUSE THESE ENTITIES CANNOT VOLUNTARILY TESTIFY

A court-issued subpoena is necessary to engage in discovery with respect to Last.fm because it is reportedly subject to an agreement that forecloses it from testifying (via a corporate representative witness) or providing information unless it has been subpoenaed to do so. As noted in Dr. Pelcovits's written testimony, CBS Interactive acquired Last.fm in 2007. *See* Pelcovits WDT at 10. Last.fm may therefore be subject to the voluntary license agreement that SoundExchange reached with the National Association of Broadcasters ("NAB") in February 2009. *See* Notification of Agreements Under the Webcaster Settlement Act of 2008, 74 Fed.

Reg. 9293, 9294 (March 3, 2009) (noting that SoundExchange and NAB informed the Copyright Office of their agreement on February 15, 2009). Under that settlement, digital music services that are subject to its terms “shall not . . . give evidence or otherwise support or assist” in this proceeding “unless subpoenaed on petition of a third party (without any action by [the service] to encourage or suggest such a subpoena or petition) and ordered to testify or provide documents in such proceeding.” *Id.* at 9301-02 (App. B, Art. 6.2). Accordingly, Last.fm may be prohibited by this or another agreement from producing documents or making a corporate representative witness available for deposition unless the CRJs issue a subpoena ordering it to do so.

Like Last.fm, Slacker and Pandora are also reportedly subject to a voluntary license agreement. *See* Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34,796, 34,797 (July 17, 2009) (noting that SoundExchange informed the Copyright Office on July 7, 2009, that it had reached a voluntary agreement related to performances by commercial webcasters). Like the NAB agreement described above, this agreement bars the entities subject to it from providing evidence or documents in this proceeding absent a subpoena and order to do so. *See id.* (App. A, Art. 6.3). Therefore, Slacker and Pandora are barred from producing documents or providing testimony via a corporate representative witness unless subpoenaed and ordered to do so.

Moreover, regardless of the agreements described above, none of these three companies is a party to this proceeding, and it is highly unlikely that they would be willing to produce documents voluntarily or make witnesses available. Accordingly, “to ensure that litigation proceeds with ‘the fullest possible knowledge of the issues and facts before trial,’” *Wyoming v. Dep’t of Agric.*, 208 F.R.D. 449, 452 (D.D.C. 2002) (quoting *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)), the CRJs should issue subpoenas and orders to all three companies.

III. THE CRJs’ RULES, LIKE THE FEDERAL RULES OF CIVIL PROCEDURE, PERMIT NONPARTY DISCOVERY

The Copyright Act and the CRJs’ rules do not limit discovery only to participants in the proceeding. To the contrary, they empower the CRJs to authorize additional discovery when necessary to protect their ability to achieve a just resolution. In this respect, the CRJs’ rules parallel the Federal Rules of Civil Procedure, which focus most attention on discovery between parties but also recognize that nonparty discovery is necessary to ensure the development of a full and accurate evidentiary record. Accordingly, the CRJs have the authority to issue the subpoenas that RealNetworks requests.

Rule 351.5(b)(2) provides that participants obligated to pay royalties (*i.e.*, entities like RealNetworks) are “collectively . . . permitted to take no more than 10 depositions,” without any limitation suggesting that the deponents must be witnesses who have prepared written testimony submitted by other participants. 37 C.F.R. § 351.5(b)(2). The same provision states further that “[p]arties may obtain such discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party” – again without limiting the reach of such discovery to participants or witnesses who have prepared written testimony. *Id.*² The testimony that Slacker, Pandora, and Last.fm could provide is unquestionably “relevant” to SoundExchange’s claims in support of its requested rates and terms. Accordingly, Rule 351.5(b)(2) allows for the discovery that RealNetworks seeks to procure through this motion.

Moreover, the Copyright Act provides that the CRJs “may issue a subpoena commanding a participant or witness to appear and give testimony, or to produce and permit inspection of

² In this respect Rule 351.5(b)(2) mirrors the corresponding language in Federal Rule of Civil Procedure 26(b)(1).

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." 17 U.S.C. § 803(b)(6)(C)(ix); *see also* 37 C.F.R. § 351.5(c). RealNetworks' request for the issuance of subpoenas satisfies these standards. Absent an opportunity to depose corporate representative witnesses from Slacker, Pandora, and Last.fm, and an opportunity to obtain specific documents from them, RealNetworks will be unable to test many of the fundamental assertions contained in the written testimony submitted by SoundExchange, including, for example, the unsupported allegation that Slacker "is a good proxy for plays-per-subscriber for statutory subscription services." Pelcovits WDT at 32. In that circumstance, the CRJs would face an evidentiary record reflecting SoundExchange's unverified and unverifiable characterizations, with no prospect of firsthand information or meaningful cross examination relating to Slacker, Pandora, and Last.fm. Because such a record would "substantially impair[]" the CRJs' resolution of the proceeding, the subpoenas that RealNetworks seeks are warranted under § 803(b)(6)(C)(ix).³

Reflecting § 803(b)(6)(C)(ix), the Rules also empower the CRJs to authorize additional discovery when "absent the discovery sought, their ability to achieve a just resolution of the proceeding would be substantially impaired." 37 C.F.R. § 351.5(c)(1). The Rules provide that

³ Pandora and CBS Interactive have the two largest market shares among webcasting services. *See* Ando Media October webcasting ratings, *available at* <http://query-origin.andohs.net/8000A6/content-root3.andomedia.com/origin/mp3/stations/1/OctoberRankerRelease.pdf>. It is therefore important to examine verifiable evidence of their ability to pay the royalties proposed by SoundExchange, particularly because Pandora reportedly devotes 75 percent of its revenues to royalty payments. *See, e.g.,* Alex Nesbitt, Pandora's Tim Westergren On From Competition to Interdependence, *available at* <http://www.digitalpodcast.com/podcastnews/2009/10/08/pandoras-tim-westergren-on-from-competition-to-interdependence-dmf/>.

the CRJs “may consider” three factors when considering such discovery motions, each of which counsels in favor of issuing the requested subpoenas in this case. 37 C.F.R. § 351.5(c)(2).⁴

First, the CRJs’ may assess “[w]hether the burden or expense of producing the requested information or materials outweighs the likely benefit, taking into account the needs and resources of the participants, the importance of the issues at stake, and the probative value of the requested information or materials in resolving such issues.” 37 C.F.R. § 351.5(c)(2)(i). With respect to RealNetworks’ request, the burden and expense would be minimal. As explained in section IV below, RealNetworks’ would direct discovery solely at testing the assertions and conclusions that SoundExchange’s witnesses have made regarding these three companies.

Moreover, RealNetworks would endeavor to schedule depositions at times that are convenient for the companies’ corporate representative witnesses, and it would be willing to travel to the companies’ locations to take the depositions and review and copy documents. Moreover, the issues underlying this discovery request are fundamentally important to this proceeding, and the discovery that RealNetworks seeks would have great probative value. SoundExchange’s witnesses have employed their own characterizations of these companies’ services, their purported successes, and their alleged similarity to participants in this proceeding to support a dramatic increase in royalty rates. Without an ability to depose corporate representative witnesses from these companies and request specific documents from them, RealNetworks will be unable to probe the merits of SoundExchange’s witnesses’ statements, leaving the CRJs with the prospect of a record that contains only the untested and untestable characterizations of a single participant.

⁴ The factors identified in the CRJs’ Rules mirror the considerations identified in Federal Rule of Civil Procedure 26(b)(2)(C).

Second, when considering a motion for additional discovery, the CRJs may also consider “[w]hether the requested information or materials would be unreasonably cumulative or duplicative, or are obtainable from another source that is more convenient, less burdensome, or less expensive.” 37 C.F.R. § 351.5(c)(2)(ii). This factor too counsels in favor of granting RealNetworks’ motion. RealNetworks’ fundamental rationale for filing this motion is that reliable information about Pandora, Slacker, and Last.fm is available *only* from the three companies themselves. The CRJs are entitled to the facts from witnesses at those companies with firsthand knowledge. Since these facts – as opposed to SoundExchange’s speculations – are not available in any other way or from other sources, this discovery is not cumulative or duplicative in any sense.

Third, the CRJs may consider “[w]hether the participant seeking the discovery had an ample opportunity by discovery in the proceeding or by other means to obtain the information sought.” 37 C.F.R. § 351.5(c)(2)(iii). As explained above, RealNetworks has no opportunity to obtain the information it seeks other than via the subpoenas that it has requested. While SoundExchange has submitted written testimony that characterizes these companies, their services, and their experiences in the marketplace, none of SoundExchange’s own witnesses has firsthand knowledge regarding any of those subjects. The only means through which RealNetworks can obtain the information it seeks is deposition testimony and document production. Accordingly, the third factor identified in the CRJs’ rules also supports granting RealNetworks’ request.

Beyond directly authorizing the discovery that RealNetworks seeks, the CRJs’ Rules also authorize nonparty discovery by implication, as they closely parallel provisions in the Federal Rules of Civil Procedure that have long been understood to authorize nonparty discovery that

“would . . . assist[] in exploring [a] material issue.” *CSC Holdings, Inc. v. Redisi*, 309 F.3d 988, 993 (7th Cir. 2002) (directing district court to grant motion to compel deposition of nonparty witness) (internal citation and quotation omitted); *see also Peskoff v. Faber*, 230 F.R.D. 25, 32 (D.D.C. 2005) (refusing to issue a protective order to prevent the deposition of a nonparty witness because the deposing party had shown that such discovery was “reasonably calculated to lead to the discovery of admissible evidence,” and the opposing party had “failed to show undue burden or expense”).

For instance, CRJ Rule 351.5(b) – which authorizes depositions – closely parallels Federal Rule of Civil Procedure 26(b)(1), which “appl[ies] equally with respect to depositions of parties and non-parties.” *Bell v. Bd. of Educ.*, 225 F.R.D. 186, 193 (S.D. W. Va. 2004); *see also United States v. Sensient Colors, Inc.*, 2009 U.S. Dist. LEXIS 62728 at *34 (D.N.J. July 22, 2009) (construing Rules 26(b)(1) and 45 and noting that “[d]epositions of parties and non-parties alike serve as efficient tools in this discovery process [because t]hey elicit key facts, thereby progressing cases from complaint to settlement or judgment”) (copy attached as Exhibit 4); *Wilson v. Kautex*, 2008 U.S. Dist. LEXIS 1287 at *4-6 (N.D. Ind. Jan. 7, 2008) (authorizing nonparty discovery where (as here) the information sought was relevant because it was raised by the opposing party in the proceeding) (copy attached as Exhibit 5). Likewise, CRJ Rule 351.5(c)(2) – which lists the factors that the CRJ may consider when assessing requests for additional discovery – closely parallels Federal Rule 26(b)(2)(C), under which courts have expressly authorized nonparty discovery. *See, e.g., Aurelius Capital Partners, LP v. Argentina*, 2009 U.S. Dist. LEXIS 30207 at *10-13 (S.D.N.Y. Apr. 3, 2009) (copy attached as Exhibit 6).

Because the CRJs’ Rules themselves permit nonparty discovery, and because they closely parallel federal rules under which nonparty discovery is a well-established component of

litigation, the CRJs are empowered to grant RealNetworks' motion and issue the requested subpoenas.

IV. SCOPE OF SUBPOENAS

RealNetworks seeks the issuance of subpoenas that would authorize discovery tailored to address the factual assertions and conclusions related to Slacker, Pandora, and Last.fm that appear in the written testimony that SoundExchange has submitted in this proceeding. Accordingly, the proposed discovery would not impose an undue burden or expense on the nonparties to which it would be directed or on any participant in this proceeding. *Cf.* 37 C.F.R. § 351.5(c)(2)(i) (stating that the CRJs may assess burden and expense when considering whether to authorize additional discovery).

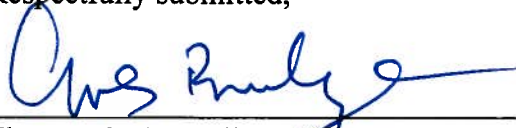
As reflected in the proposed subpoena attached as Exhibit 1, RealNetworks would depose a corporate representative witness from Pandora about its position in the marketplace, its experience in evolving its services over time, demand for the services it offers, the factors that have influenced that demand, and limited financial information (*e.g.*, annual costs and revenues) to assess the impact of the proposed royalty rates; RealNetworks would request documents related to the same subjects. *See* Exhibit 1. RealNetworks would use a deposition of a corporate representative witness from Slacker to inquire about evolutions in the company's offerings, the popularity of and demand for its services, the degree to which it enables customization, the characteristics of its service tiers that make them similar or dissimilar to other participants in the marketplace, and limited financial information to assess the impact of the proposed royalty rates; RealNetworks would request documents related to the same subjects. *See* Exhibit 2. Finally, with respect to CBS Interactive, RealNetworks would depose a corporate representative witness about the circumstances of Last.fm's sale to CBS Interactive in 2007, the company's

experiences and alleged success in the marketplace before and after the sale, and financial information regarding its alleged success in the market; RealNetworks would request documents related to the same subjects.

V. CONCLUSION

For the foregoing reasons, RealNetworks requests that the CRJs issue subpoenas *ad testificandum* and *duces tecum* to nonparties Pandora, Slacker, and CBS Interactive.

Respectfully submitted,



Thomas G. Connolly, DC Bar No. 420416
Mark A. Grannis, DC Bar No. 429268
Christopher J. Wright, DC Bar No. 367384
Timothy J. Simeone, DC Bar No. 453700
Charles D. Breckinridge, DC Bar No. 476924
Kelley Shields, DC Bar No. 978140
WILTSHIRE & GRANNIS LLP
1200 18th Street, NW
Washington, DC 20036
T (202) 730 1300
F (202) 730 1301
tconnolly@wiltshiregrannis.com
mgrannis@wiltshiregrannis.com
cwright@wiltshiregrannis.com
tsimeone@wiltshiregrannis.com
cbreckinridge@wiltshiregrannis.com
kshields@wiltshiregrannis.com

Counsel for RealNetworks, Inc.

December 10, 2009

EXHIBIT 1

**BEFORE THE
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
WASHINGTON, DC**

In the Matter of:

Digital Performance Rights in
Sound Recordings and Ephemeral
Recordings

Docket No. 2009-1
CRB Webcasting III

SUBPOENA: *Requesting Testimony* **SUBPOENA DUCES TECUM:** *Requesting the Production of Records or Things*

THE COPYRIGHT ROYALTY BOARD TO:	<i>(name and address of person being subpoenaed)</i> Pandora Media, Inc. 2101 Webster Street Suite 1650 Oakland, CA 94612
1. At the request of : <i>(party name)</i> RealNetworks, Inc.	<i>(name, address and telephone number of contact person)</i> Charles Breckinridge Wiltshire & Grannis LLP 1200 18 th Street, NW Washington, DC 20036 202-730-1300

2. You are hereby commanded, business and excuses being set aside, to appear as a witness on:

(date) January 11, 2009, *at (time)* 9:00 am, **and then and there to testify at:** *(location)*

Intercontinental San Francisco Hotel
888 Howard Street
San Francisco, CA 94103

Or, if so agreed in writing prior to January 5, 2009, on another date and time and/or at another location acceptable to the witness and the parties wishing to attend the deposition.

- | | |
|-------------------------------------|---|
| <input checked="" type="checkbox"/> | 3. As a deponent who is not a natural person , you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 5. |
| <input checked="" type="checkbox"/> | 4. At the deposition , you will be asked questions under oath. The deposition will be recorded stenographically and you may read the written record and change any incorrect answers before you sign the deposition. |
| <input checked="" type="checkbox"/> | 5. If the witness is a representative of a business or other entity , the matters upon which the witness is to be examined are as follows:

(a) Pandora's past and present position in the webcasting marketplace, and the business factors to which it attributes that position;
(b) Pandora's experience regarding demand for the services it offers, and the market factors it has understood to influence that demand; and
(c) Annual financial information (e.g., costs, revenues, number of users, total listening hours) from January 1, 2005, through the present. |





6. **You are further ordered to produce business records set forth as follows.** The personal appearance of the custodian or other qualified witness is required by this subpoena:

- (a) Documents sufficient to illustrate Pandora's past and present position in the webcasting marketplace, including documents identifying numbers of subscribers and numbers of non-subscriber listeners on a monthly or quarterly basis, from January 1, 2005, through the present.
- (b) Documents sufficient to illustrate Pandora's experience regarding demand for the services it offers, including analyses of demand for ad-supported and/or subscription-supported webcasting.
- (c) The agreement (or agreements) setting forth the rates and terms under which Pandora has paid royalties for non-interactive streaming, from January 1, 2005, through the present;
- (d) Annual financial information from January 1, 2005, through the present.

Issuing Officer Signature and Title:	Date
Issuing Officer's Name, Address and Phone Number:	

PROOF OF SERVICE			
SERVED	Date	Place	
Served on (Print Name)	Manager or Service		
Served by (Print Name)	Title		
DECLARATION OF SERVER			
I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof Of Service is true and correct.			
Executed on this ___ day of ____, 20____.			
			_____ Signature of Server
			_____ Address of Server

EXHIBIT 2

**BEFORE THE
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
WASHINGTON, DC**

In the Matter of:

Digital Performance Rights in
Sound Recordings and Ephemeral
Recordings

Docket No. 2009-1
CRB Webcasting III

SUBPOENA: *Requesting Testimony* **SUBPOENA DUCES TECUM:** *Requesting the Production of Records or Things*

THE COPYRIGHT ROYALTY BOARD TO:	<i>(name and address of person being subpoenaed)</i> Slacker, Inc. 16935 W. Bernardo Dr. Suite 270 San Diego, CA 92127
1. At the request of : <i>(party name)</i> RealNetworks, Inc.	<i>(name, address and telephone number of contact person)</i> Charles Breckinridge Wiltshire & Grannis LLP 1200 18 th Street, NW Washington, DC 20036 202-730-1300

2. You are hereby commanded, business and excuses being set aside, to appear as a witness on:

(date) January 12, 2009, *at (time)* 9:00 am, **and then and there to testify at:** *(location)*

Omni San Diego Hotel
San Diego, California 92101

Or, if so agreed in writing prior to January 5, 2009, on another date and time and/or at another location acceptable to the witness and the parties wishing to attend the deposition.

3. **As a deponent who is not a natural person**, you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 5.
4. **At the deposition**, you will be asked questions under oath. The deposition will be recorded stenographically and you may read the written record and change any incorrect answers before you sign the deposition.
5. **If the witness is a representative of a business or other entity**, the matters upon which the witness is to be examined are as follows:
- (a) The degree to which Slacker's services allow for end-user customization;
 - (b) Slacker's understanding of the characteristics of its service tiers that make them similar or dissimilar to those of other participants in the marketplace;
 - (c) Slacker's experience regarding the popularity of and demand for its services over time and the factors it understands to have influenced that demand; and
 - (d) Annual financial information (e.g., costs, revenues, number of users, total listening hours) related to streaming since January 1, 2007.



6. **You are further ordered to produce business records set forth as follows.** The personal appearance of the custodian or other qualified witness is required by this subpoena:

- (a) Documents sufficient to illustrate the degree to which Slacker's services allow for end-user customization;
- (b) Documents sufficient to illustrate Slacker's experience regarding the popularity of and demand for its services over time and the factors it understands to have influenced that demand;
- (c) The agreement (or agreements) setting forth the rates and terms under which Slacker has paid royalties for performances of sound recordings, from January 1, 2007, through the present; and
- (d) Annual financial information (e.g., costs, revenues, number of users, total listening hours) related to streaming since January 1, 2007.

Issuing Officer Signature and Title:	Date
Issuing Officer's Name, Address and Phone Number:	

PROOF OF SERVICE			
SERVED	Date	Place	
Served on (Print Name)	Manager or Service		
Served by (Print Name)	Title		
DECLARATION OF SERVER			
I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof Of Service is true and correct.			
Executed on this ___ day of ____, 20____.			

		Signature of Server	

		Address of Server	

EXHIBIT 3

**BEFORE THE
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
WASHINGTON, DC**

In the Matter of:

Digital Performance Rights in
Sound Recordings and Ephemeral
Recordings

Docket No. 2009-1
CRB Webcasting III

SUBPOENA: *Requesting Testimony* **SUBPOENA DUCES TECUM:** *Requesting the Production of Records or Things*

THE COPYRIGHT ROYALTY BOARD TO:	<i>(name and address of person being subpoenaed)</i> CBS Interactive 235 Second Street San Francisco, CA 94105
1. At the request of : <i>(party name)</i> RealNetworks, Inc.	<i>(name, address and telephone number of contact person)</i> Charles Breckinridge Wiltshire & Grannis LLP 1200 18 th Street, NW Washington, DC 20036 202-730-1300

2. You are hereby commanded, business and excuses being set aside, to appear as a witness on:

(date) January 11, 2009, *at (time)* 2:30 pm, **and then and there to testify at:** *(location)*

Intercontinental San Francisco Hotel
888 Howard Street
San Francisco, CA 94103

Or, if so agreed in writing prior to January 5, 2009, on another date and time and/or at another location acceptable to the witness and the parties wishing to attend the deposition.

- | | |
|-------------------------------------|---|
| <input checked="" type="checkbox"/> | 3. As a deponent who is not a natural person , you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 5. |
| <input checked="" type="checkbox"/> | 4. At the deposition , you will be asked questions under oath. The deposition will be recorded stenographically and you may read the written record and change any incorrect answers before you sign the deposition. |
| <input checked="" type="checkbox"/> | 5. If the witness is a representative of a business or other entity , the matters upon which the witness is to be examined are as follows:

(a) CBS Interactive's experiences and level of success in the marketplace before and after its acquisition of Last.fm in 2007;
(b) The motivations for and circumstances surrounding that sale;
(c) Changes to Last.fm's operations and offerings since January 1, 2005; and
(d) CBS Interactive's annual financial information (e.g., costs, revenues, number of users, total listening hours), from January 1, 2005, through the present. |



6. **You are further ordered to produce business records set forth as follows.** The personal appearance of the custodian or other qualified witness is required by this subpoena:

- (a) Documents sufficient to illustrate CBS Interactive's level of success in the marketplace before and after its acquisition of Last.fm in 2007, including documents identifying numbers of Last.fm's subscribers and numbers of non-subscriber listeners on a monthly or quarterly basis, from January 1, 2005, through the present;
- (b) Documents sufficient to illustrate Last.fm's motivations for engaging in the 2007 sale to CBS Interactive, including but not limited to internal and external correspondence and analyses regarding the sale;
- (c) Documents sufficient to illustrate changes to Last.fm's operations and offerings since January 1, 2005;
- (d) The agreement (or agreements) setting forth the rates and terms under which CBS Interactive entities engaged in streaming have paid royalties for non-interactive streaming, from January 1, 2005, through the present; and
- (e) CBS Interactive's annual financial information (e.g., costs, revenues, number of users, total listening hours), from January 1, 2005 through the present, broken down by CBS Interactive entities engaged in streaming.

Issuing Officer Signature and Title:	Date
Issuing Officer's Name, Address and Phone Number:	

PROOF OF SERVICE			
SERVED	Date	Place	
Served on (Print Name)	Served by (Print Name)		Manager or Service Title
DECLARATION OF SERVER			
I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof Of Service is true and correct.			
Executed on this ___ day of ____, 20____.			
			_____ Signature of Server
			_____ Address of Server

CERTIFICATE OF SERVICE

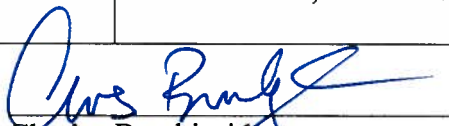
I, Charles Breckinridge, do hereby certify that copies of the foregoing Motion for Issuance of Subpoenas to Nonparty Witnesses were sent via email and first class mail this 10th day of December, 2009, to the following:

<p>David A. Handzo Michael DeSanctis Jared Freedman JENNER & BLOCK LLP 1099 New York Avenue, NW Washington, DC 20001 Fax: (202) 639-6066 dhandzo@jenner.com mdeanctis@jenner.com jfreedman@jenner.com</p> <p><i>Counsel for Sound Exchange</i></p>	<p>Colette E. Vogele VOGELE & ASSOCIATES 12 Geary Street Suite 701 San Francisco, CA 94108 Fax: (415) 358-4975 colette@vogelelaw.com</p> <p><i>Counsel for College Broadcasters, Inc.</i></p>
<p>William B. Colitre ROYALTY LOGIC, LLC 21122 Erwin Street Woodland Hills, CA 91367 Fax: (818) 558-3484 Bcolitre@RoyaltyLogic.com</p>	<p>William Malone James Hobson Matthew K. Schettenhelm MILLER & VAN EATON, PLLC 1155 Connecticut Avenue, NW Suite 1000 Washington, DC 20036-4306 Fax: (202) 785-1234 wmalone@millervaneaton.com mschettenhelm@millervaneaton.com</p> <p><i>Counsel for Intercollegiate Broadcasting System, Inc. and Harvard Radio Broadcasting Co. Inc.</i></p>

<p>Ara Hovanesian Angus McDonald Abraham Yacobian HOVANESIAN & HOVANESIAN 301 Colorado Blvd., Suite 514 Pasadena, CA 91101 Fax: (626) 795-8900 angusm@hovlaw.com arah@hovlaw.com abrahamy@hovlaw.com</p> <p>David Oxenford Adam Caldwell Ronald London DAVIS WRIGHT TREMAINE, LLP 1919 Pennsylvania Ave., NW Suite 200 Washington, DC 20006 Fax: (202) 973-4499 davidoxenford@dwt.com adamcaldwell@dwt.com ronaldlondon@dwt.com</p> <p><i>Counsel for Live365, Inc.</i></p>	
--	--

I, Charles Breckinridge, do hereby certify that copies of the foregoing Motion for Issuance of Subpoenas to Nonparty Witnesses were sent via overnight mail this 10th day of December, 2009, to the following:

<p>Milton E. Olin Altschul & Olin, LLP 16133 Ventura Blvd., Suite 1270 Encino, CA 91436-2408 Fax: (818)990-1429 molin@altolinlaw.com</p> <p><i>Counsel for Pandora Media, Inc.</i></p>	<p>General Counsel Slacker, Inc. 16935 W. Bernardo Dr. Suite 270 San Diego, CA 92127</p>
	<p>General Counsel CBS Interactive 235 Second Street San Francisco, CA 94105</p>



Charles Breckinridge
WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W., 12th Floor
Washington, D.C. 20036
T: (202) 730-1300
F: (202) 730-1301