

**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**

**REPLY IN SUPPORT OF MOTION FOR ISSUANCE OF  
SUBPOENAS TO NONPARTY WITNESSES<sup>1</sup>**

In a classic attempt at misdirection, SoundExchange seeks to cast RealNetworks, Inc. (“RealNetworks”) as an unscrupulous litigant striving to implicate nonparties for no reason other than corporate espionage. In reality, of course, it is SoundExchange itself – not RealNetworks – that chose to build its direct case on facts related to the purported marketplace successes and experiences of Slacker, Pandora, and Last.fm. These three companies are not participating in this proceeding because they have each opted into commercial agreements with SoundExchange to bypass the very statutory rates and terms that the Copyright Royalty Judges (“CRJs”) will determine, and yet SoundExchange supports its rates and terms proposal here with purported facts related to them.

It would be unfair to allow SoundExchange to build its case on these alleged facts unless RealNetworks has an opportunity to verify them. SoundExchange essentially argues that RealNetworks must simply take SoundExchange’s word that its assertions about these third parties are truthful and accurate. To test the validity of

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<sup>1</sup> RealNetworks, Inc. files this reply pursuant to 37 C.F.R. § 350.4(f) (“Oppositions to motions shall be filed within five business days of the filing of the motion, and replies to oppositions shall be filed within four business days of the filing of the opposition.”).

SoundExchange's assertions related to these companies – and thus to ensure that the CRJs have a sufficiently complete record to enable them to “achieve a just resolution of the proceeding,” 37 C.F.R. § 351.5(c); *see also* 17 U.S.C. § 803(b)(6)(C)(ix) – RealNetworks should be afforded an opportunity to depose representative witnesses from these nonparties and to obtain pertinent records from them. Accordingly, RealNetworks respectfully urges the CRJs to grant its pending Motion for Issuance of Subpoenas to Nonparty Witnesses.

**I. THE CRJs HAVE AUTHORITY TO ISSUE SUBPOENAS TO NONPARTIES**

As RealNetworks explained in its motion, the CRJs' regulations and the Copyright Act authorize the CRJs to issue subpoenas to nonparties when, without access to the information the nonparties possess, the CRJs' ability to reach a just resolution of the proceeding would be “substantially impaired.” 37 C.F.R. § 351.5(c); 17 U.S.C. § 803(b)(6)(C)(ix). While it recognizes the CRJs' authority as a general matter, SoundExchange suggests an unduly cramped interpretation, arguing that the CRJs' subpoena power extends only to participants and to the specific witnesses the participants have designated to testify. *See* SoundExchange's Opposition to RealNetworks' and Live365's Motions for Issuance of Subpoenas to Nonparty Witnesses at 2-3 (filed Dec. 17, 2009) (“SoundExchange Opp'n”).

The plain text of the statute undermines SoundExchange's argument. Section 803(b)(6)(C)(ix) empowers the CRJs to issue subpoenas “commanding a participant or witness to appear and give testimony, or to produce and permit inspection of documents or tangible things,” without any further qualifiers or limitations that might suggest that

“witness” should be understood to mean only a witness *previously designated* by a participant to give evidence *in court*.<sup>2</sup>

The common meanings of “witness” and “testimony” support this plain language interpretation of the statute. Black’s Law Dictionary defines “witness” to be “[o]ne who gives testimony under oath or affirmation (1) in person, (2) *by oral or written deposition*, or (3) by affidavit. *Black’s Law Dictionary* 1740 (9<sup>th</sup> ed. 2009) (emphasis added).

Black’s defines “testimony” to be “[e]vidence that a competent witness gives at trial or in an affidavit *or deposition*.” *Id.* at 1613 (emphasis added).

Here, of course, RealNetworks seeks subpoenas to depose witnesses representing the three entities identified in its motion. These witnesses clearly fall within the language of the statute, and the CRJs accordingly have the authority to issue the subpoenas that RealNetworks has requested.

Perhaps SoundExchange should be understood to argue that the statute is ambiguous on this point and that “witness” should be interpreted more restrictively than the plain statutory text would allow. But the legislative history of Section 803(b)(6)(C)(ix) undermines that argument and reinforces the plain-text interpretation of the statute, as Congress clearly intended for the CRJs to have full subpoena power. The House Report’s assessment of the provision states that the CRJs “may issue subpoenas for the purpose of obtaining evidence that is relevant and material to the task of setting

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<sup>2</sup> SoundExchange contends that the last sentence of § 803(b)(6)(C)(ix) would be superfluous if the CRJs had subpoena authority over nonparty witnesses because, according to SoundExchange, having both the power to request and the power to subpoena would be redundant. *See* SoundExchange Opp’n at [4]. But requesting information and issuing subpoenas are entirely different actions employed in different situations depending on the differing needs for the force of a court order. To suggest that one form of authority renders the other superfluous conflates two very different concepts.

rates and terms,” explaining that such authority “give[s] the decisionmakers a means to create a more complete record upon which to make their decisions.” H.R. Rep. No. 104-408 at 33 (copy attached as Exhibit 1). This authority is necessary, the report continues, to ensure that CRJs are not forced to rely on the limited record that might exist if the participants, through strategic presentation of their cases, were permitted to “circumscribe the type and amount of evidence considered.” *Id.* The subpoena authority enables the CRJs to develop a complete record, including “the most probative evidence or access to witnesses that, for example, [are] better to explain to the intricacies of a study or explain the rationale for specific provisions in a negotiated agreement.” *Id.* Finally, the House Report notes that the CRJs should exercise their subpoena power only when they “believe a subpoena is necessary to obtain information that *the parties have not provided* and that the judges deem necessary to make their decision.” *Id.* (emphasis added).

In sum, whether read separately or considered together, the plain language and the legislative history of Section 803(b)(6)(C)(ix) demonstrate that the CRJs have power to subpoena “witnesses,” not just a small subset of witnesses as SoundExchange contends.<sup>3</sup> Indeed, should the CRJs accept SoundExchange’s argument that the CRJs may only subpoena witnesses identified by participants, it would run counter to the House Report’s explanation that the subpoena power was intended to prevent a party from circumscribing the type and amount of evidence considered. H.R. Rep. No. 104-408 at 33. Accordingly, Congress has vested the CRJs with the power to issue the subpoenas that RealNetworks requests in its motion.

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<sup>3</sup> SoundExchange’s citations to case law assessing agencies’ subpoena authority when Congress has not provided for such power are therefore irrelevant.

## II. A SUBPOENA IS NECESSARY TO ASSESS THE VALIDITY OF THE ASSERTIONS ON WHICH SOUNDEXCHANGE HAS BUILT ITS CASE

As it explained in more detail in its motion, RealNetworks seeks subpoenas that would enable it to obtain discovery limited to the narrow range of factual assertions and conclusions related to Slacker, Pandora and Last.fm that appear the written direct testimony SoundExchange has submitted. *See* Mot. at 2-4, 11-12. This is hardly the unbounded fishing expedition that SoundExchange suggests it to be. It is instead a focused effort to uncover the facts underlying SoundExchange's own assertions.

The information that RealNetworks hopes to obtain is critical to assessing the merits of SoundExchange's case. SoundExchange's written direct statement refers repeatedly to the alleged experiences and successes of these three entities that are not before this tribunal. SoundExchange contends that it has supplied RealNetworks with publicly available backup documentation sufficient to support its assertions, *see* SoundExchange Opp'n at 6, but this only highlights that SoundExchange has cherry-picked the evidence that best suits its case while arguing there is no need to turn to the only reliable source to test such information: the companies themselves.

Moreover, without suggesting any basis for its claim, SoundExchange accuses RealNetworks of engaging in commercial espionage, stating that its goal in seeking this discovery is only "to peak behind the curtain at their competitors' commercially sensitive information." SoundExchange Opp'n at 1-2. SoundExchange evidently hopes that an *ad hominem* attack on RealNetworks might distract the CRJs from recognizing that *SoundExchange itself* used these purported facts to bolster its case. Moreover, as discussed in Section III, below, should the terms of the existing (or a new) Protective Order be applied to evidence from these companies, only outside counsel would see the

information in any event. The CRJs should reject SoundExchange's self-serving effort to cast aspersions on RealNetworks since this information is at issue solely by virtue of SoundExchange's own decision to use it to construct the foundation of its written direct statement.

In a similarly disingenuous argument, SoundExchange contends that RealNetworks's motion ignores Congress's goal of encouraging settlement. *See* SoundExchange Opp'n at 8. But, again, *SoundExchange itself* invoked these parties' services and purported successes in support of its own case. *SoundExchange* relies repeatedly on facts related to these companies, and yet suggests that *RealNetworks* must shoulder the blame for embroiling them in the litigation. If SoundExchange were so concerned about leaving settled parties out of the mix, it should not have built its case on facts relating to their purported experiences in the market.

Finally, SoundExchange urges the CRJs to deny RealNetworks's motion on the ground that RealNetworks seeks information that is protected under Section 114(f)(5)(C). *See* SoundExchange Opp'n at 9. But that provision states only that certain information shall not be "admissible" or "taken into account" in rate-setting proceedings. 17 U.S.C. § 114(f)(5)(C). While that language may limit a party's ability to use such information at trial, it does not in any way suggest that such information is not discoverable. Even more fundamentally, the limitation found in Section 114(f)(5)(C) does not apply to *all* information related to companies that have reached voluntary agreements. To the contrary, it applies only to the provisions of the agreements themselves, including the "rate structure, fees, terms, conditions, or notice and recordkeeping requirements." *Id.* As explained in the motion, however, RealNetworks does not seek production of the

agreements themselves or their specific terms, but rather only seeks information directly related to the assertions contained in SoundExchange's direct case. *See* Mot. at 11-12.

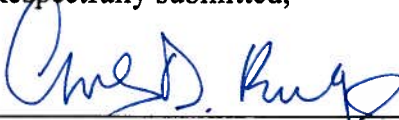
**III. THE CRJs CAN APPLY THE PROTECTIVE ORDER TO TESTIMONY AND INFORMATION PROVIDED IN RESPONSE TO THE SUBPOENAS**

To the extent SoundExchange and the potential subjects of the proposed subpoenas are concerned about the public release of confidential information, there is a straightforward solution: they can seek the application of the CRJs' Protective Order. Indeed, the CRJs have authority to apply the existing Protective Order (or a new protective order) to testimony and documents provided by parties and nonparties alike. *See* 17 U.S.C. § 803(c)(5) ("The [CRJs] may issue such orders as may be appropriate to protect confidential information."). RealNetworks would not oppose application of the existing (or a new) Protective Order to the evidence gained through the proposed subpoenas.

**IV. CONCLUSION**

For the foregoing reasons and for the reasons set forth in its motion, RealNetworks respectfully requests that the CRJs issue subpoenas *ad testificandum* and *duces tecum* to nonparties Pandora, Slacker, and CBS Interactive.

Respectfully submitted,



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December 17, 2009



## CERTIFICATE OF SERVICE

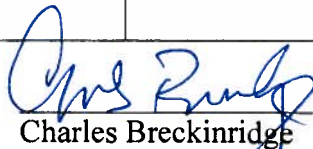
I, Charles Breckinridge, do hereby certify that copies of the foregoing Reply in Support of Motion for Issuance of Subpoenas to Nonparty Witnesses were sent via email and first class mail this 17th day of December, 2009, to the following:

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