

UNITED STATES COPYRIGHT ROYALTY JUDGES

In the Matter of

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

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}
}
}

Docket No. 2009-1
CRB Webcasting III

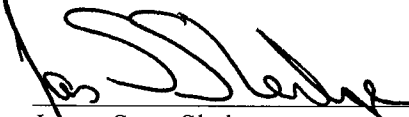
ORDER GRANTING JOINT MOTION TO ADOPT PROTECTIVE ORDER

On September 2, 2009, SoundExchange, Inc. and Real Networks, Inc. submitted a joint request for entry of their proposed protective order. The Copyright Royalty Judges hereby grant the request with the following modifications:

- (1) the proposed protective order is imposed only with respect to the discovery phase of the proceeding;¹
- (2) with respect to paragraph 2 of the proposed protective order, the Judges have excluded from the category of Protected Materials “quantitative information that was derived by aggregating quantitative information designated as Protected Materials”; nevertheless, the Judges are willing to review requests for confidential treatment of such information on a case-by-case basis; and
- (3) with respect to the definition of “Reviewing Party” in paragraph 3 of the proposed protective order, the Judges have excluded references to the Copyright Royalty Judges and any member of their staff to whom it is necessary to disclose the Protected Material for the purpose of assisting them in this proceeding, any reviewing court of competent jurisdiction, and stenographic employees or reporters recording or transcribing testimony related to the proceeding.

The proposed protective order is adopted in all other respects not inconsistent with this Order. The revised protective order is attached.²

SO ORDERED.



James Scott Sledge
Chief U.S. Copyright Royalty Judge

DATED: September 23, 2009

¹ Parties may move for application of the Protective Order, where appropriate, in other phases of the proceeding.

² The Protective Order adopted herein is modeled closely on the one adopted in the proceeding to determine the distribution of the 2004 and 2005 cable royalty funds. See *Order Granting Expedited Entry of Protective Order* in Docket No. 2007-3 CRB CD 2004-2005 (July 8, 2009).

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PROTECTIVE ORDER

This Protective Order is entered pursuant to 17 U.S.C. § 803(c)(5), and shall apply to the discovery phase of the above-captioned proceeding pursuant to the Copyright Royalty Judges’ (“Judges”) September 23, 2009, *Order Granting Joint Motion to Adopt Protective Order*. This Protective Order seeks to facilitate and expedite the handling of certain discovery in this proceeding between any party or nonparty from whom information and/or documents have been requested (“Producing Party”) and any party who would receive such information and/or discovery documents (“Reviewing Party”) as defined in Paragraph 2 below. It reflects the manner in which “Protective Materials,” as that term is defined in Paragraph 1 below, are to be treated, and how any disputes regarding such materials are to be resolved.

1. All documents and information furnished subject to the terms of this Order hereinafter shall be referred to as “Protected Materials.” Protected Materials shall include information contained in a Direct or Rebuttal Case of a party or produced in response to any discovery requests or produced at the request of the Judges (or any successor entity that is appointed to adjudicate disputes related to statutory licenses) in the form of documents or data either in hard copy or in electronic form, that is designated by the Producing Party as “RESTRICTED.” Protected Material shall also include any other information supplied by or obtained from the Producing Party that by subsequent order in this proceeding is made subject to the terms of this

Protective Order.

Protected Material shall not include any information or document contained in the public files of the Copyright Royalty Board (“Board”), the Copyright Office or any other federal or state governmental agency. Protected Material also shall not include documents or information that at commencement of this proceeding are, or prior to commencement were, public knowledge or that become public knowledge thereafter as a result of publication or disclosure, except where such publication or disclosure is prohibited, restricted or contrary to the terms of this Protective Order.

The parties are directed to respect the strong presumption in favor of the public interest in access to the records of this proceeding and will use their best efforts to designate “Protected Material” as sparingly as possible.

2. At the time a Producing Party designates or seeks to designate any Protected Material as “RESTRICTED,” the Producing Party shall, as set forth in Paragraph 10 below, submit with such Protected Material an affidavit or other sworn statement to show cause, as well as a certification under Copyright Royalty Judges Rules and Procedures, 37 C.F.R § 350.4(e)(1) (“Rule 11 Certification”), that all redacted materials meet the following definition:

“RESTRICTED” information is commercial or financial information that the Producing Party has reasonably determined in good faith that, if disclosed, would either competitively disadvantage the Producing Party or provide a competitive advantage to another party.

Protected Materials shall be deemed to include additional copies and notes and information reflecting Protected Materials. Protected Materials disclosed in this proceeding to persons authorized to review such materials pursuant to Paragraph 3 of this Order shall bear on each page thereof in bold print the legend: **“RESTRICTED - Subject to Protective Order in**

Docket No. 2009-1 CRB Webcasting III.” The Producing Party will be responsible for affixing the legend.

In the event that particular documents or disclosure to particular parties necessitate protections in addition to those provided herein, nothing in this Protective Order shall limit any party’s right to seek such additional protections from the Judges, provided, however, that absent a formal request for such protections, the provisions hereof shall apply.

3. Protected Materials will be made available by the “Producing Party” only as follows:

“RESTRICTED” Protected Material (also referred to herein as “Restricted Information”) shall be disclosed only to a “Reviewing Party” for such Material. “Reviewing Party” shall be defined as: outside counsel of record in this proceeding, including the paralegals, stenographic and clerical employees utilized by such counsel; the personnel supplied by any independent contractor (including litigation support service personnel) with whom such attorneys work that such counsel deems necessary for the sole purpose of assisting in this proceeding; and any outside independent consultant or expert who is assisting counsel or a party to the proceeding to whom counsel determines it is necessary to disclose Protected Materials for the limited purpose of assisting in, or consulting with respect to, the preparation of this proceeding. A consultant or expert is “independent” if he or she is not an employee of, and plays no ongoing role in the management of, any party or any competitor thereof, a trade association that represents parties or competitors, or a member of a trade association that is a party and has no interest, financial or otherwise, in the outcome of this proceeding.

4. Nothing herein shall prevent any counsel of record who has access to Protected Materials in accordance with the Protective Order from utilizing those Protected Materials in the

examination or cross-examination of any person who is indicated on the document as being an author, source, or recipient of the Protected Materials, irrespective of which party produced such information, or of any person in connection with whose testimony the Protected Materials were produced.

Notwithstanding any other provisions hereof, nothing in the foregoing shall restrict any party's counsel who has access to Protected Materials in accordance with this Protective Order from rendering advice to his or her clients with respect to this proceeding and, in the course thereof, relying upon Restricted Information, provided that in rendering such advice, counsel shall not disclose any other party's Restricted Information other than in a manner provided for in this Protective Order.

5. Prior to receiving a copy of or inspecting any Protected Materials from a Producing Party, each Reviewing Party who is

(a) outside counsel of record to any party to this proceeding, or

(b) an outside independent consultant or expert to any party to this proceeding

shall first complete and sign a copy of the certificate attached hereto agreeing to be bound by the terms of the Order. A corporation or non-profit membership association may sign through an officer or authorized executive; a partnership or professional corporation may sign through a member; and a sole proprietorship may sign through the proprietor. The signature of one authorized representative of such an entity shall suffice to bind each member and employee of that party to the terms of the Order, including other professional and support staff. In addition to the signature requirements described in this paragraph, a Reviewing Party, as that term is defined in Paragraph 3 above, must serve a copy of the signed certification upon counsel for the

Producing Party prior to receiving a copy of or inspecting any Protected Materials. Certificates executed by the Reviewing Parties specified in paragraph 5(b)—i.e., consultants and experts—need not be served immediately, but rather shall be maintained by the outside counsel or party to this proceeding that the Reviewing Party is assisting. Upon the earlier of the disclosure of a particular consultant or expert to all parties in the proceeding or the conclusion of the proceeding as defined in Paragraph 18, the consultant's or expert's previously signed certificate shall be provided promptly to the Producing Party. Except as otherwise provided in this paragraph, no other Reviewing Party shall be required to execute and/or serve copies of the certificate attached hereto. Certificates may be served by facsimile with a confirmation copy sent by United States mail. A Reviewing Party shall be allowed to make a reasonable number of additional photocopies of Protected Materials for case preparation, filing, and service of exhibits, subject to the provisions of this Order.

6. All Protected Materials, including the Reviewing Party's notes or other information reflecting Protected Materials, shall be treated confidentially by the Reviewing Party, using a reasonable standard of care, but no less than the same degree of security used to protect Protected Materials belonging to the Reviewing Party. Protected Materials shall not be disclosed or made available in any way except as provided herein, and shall be used by a Reviewing Party solely for the purpose of this proceeding. Protected Materials and information reflecting the same shall not be placed in the public or general files of a Reviewing Party except in accordance with provisions of this Protective Order.

7. If a Reviewing Party tenders for filing any written testimony, exhibit, brief, or other submission that includes, incorporates, or refers to Protected Materials, all portions thereof that

disclose the contents of such materials shall be served on the other parties in this proceeding in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked “**RESTRICTED - Subject to Protective Order in Docket No. 2009-1 CRB Webcasting III**” and shall be served under seal only upon authorized Reviewing Parties. Reviewing Parties shall take all reasonable precautions necessary to ensure that Protected Materials are not distributed to unauthorized persons.

8. If any Reviewing Party desires to include, utilize, or refer to any Protected Materials in testimony or exhibits during the hearing in such a manner that might require disclosure of such material, it shall serve such Protected Materials in sealed envelopes or other appropriate containers labeled “**RESTRICTED - Subject to Protective Order in Docket No. 2009-1 CRB Webcasting III**” and endorsed to the effect that they are sealed pursuant to this Protective Order. Examination of a witness concerning Protected Materials shall be conducted in camera and closed to all persons except authorized Reviewing Parties. Any portion of the hearing transcript that refers to the Protected Materials shall be sealed and subject to this Protective Order. To the extent possible, the court reporter shall segregate into separate transcripts information designated as Protected Materials, with blank, consecutively numbered pages being provided in a non-designated main transcript. The separate transcript containing Protected Materials shall have page numbers that correspond to the blank pages in the main transcript. All Protected Materials that ultimately may be admitted into evidence shall be filed in sealed, confidential envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order.

9. Any motions, pleadings, briefs, or other documents that contain Protected Materials that are filed with the Judges shall bear prominent markings indicating that the contents include Protected Materials subject to this Protective Order.

10. All written testimony, exhibits, motions, pleadings, briefs or other documents that contain Protected Materials and are filed with the Board must be redacted so that public versions excluding Protected Materials may be filed with the Board. A redacted version of a submission, including written testimony, exhibits, motions, pleadings, or other documents, shall be filed with the Board for inclusion in the public record and served on the parties within three (3) business days from the date the unredacted version is filed and served. Any disputes concerning the public filing of documents shall be resolved pursuant to the procedures set forth in Paragraph 13. The Judges will not place the redacted version of any submission into the public file until the fourth business day after it is filed with the Board. Failure to timely submit a redacted version, or submission of a redacted version that fails to comply with the requirements of this Protective Order, may result in dismissal or return of the filing.

All motions, briefs, pleadings, or other documents filed with the Board shall be filed in accordance with the following procedures.

a. Protected Materials appearing in the original or copies of the unredacted version of a motion, brief, pleading or other document shall be shaded, highlighted, or bracketed to indicate the presence of Protected Materials and such Protected Materials will be redacted for placement in the public file, and pages with Protected Materials shall be labeled accordingly.

(Examples: Chart page 5, lines 15 through 21, is shaded gray to indicate the presence of Protected Materials, and the page is labeled **“RESTRICTED — Subject to Protective Order in**

Docket No. 2009-1 CRB Webcasting III;” Witness statement on page 21, paragraph two, sentences three through nine, is bracketed by bold brackets ([]), and the page is labeled **“RESTRICTED - Subject to Protective Order in Docket No. 2009-1 CRB Webcasting III”**).

b. Any document that a party files with the Judges and that contains the party’s Protected Materials shall be accompanied by an affidavit, or other sworn statement, and a Rule 11 Certification attaching a list (“Redaction Log”) identifying the page number of each redaction and a brief description of the nature of the redacted Protected Material. The description shall include the identity of the person or entity to whom the Protected Material relates, plus a brief description of the nature of the redacted Protected Material. (Examples: “Redaction on page 5, lines 15 through 21, for chart containing projected revenues from music licensing for 2009 for Acme Corporation;” “Redaction on page 21, second through fifth paragraphs, for statement of witness Tom Jones concerning the costs of obtaining certain types of copyrighted music”). The affidavit shall state that the affiant, which can be, but is not required to be, outside counsel (i) is authorized to submit the affidavit on behalf of the party, (ii) has reviewed the redactions set forth in the Redaction Log, and (iii) states to the best of his or her knowledge, information or belief that the redacted information meets the definition of Restricted Information at the time the affidavit was made and that good cause exists for the treatment of the information as Protected Materials.

c. When producing documents, the Producing Party or its outside counsel shall submit an affidavit and a Rule 11 Certification (without a Redaction Log). The affidavit shall state that the affiant (i) is authorized to submit the affidavit on behalf of the party, (ii) is familiar with the documents being produced and (iii) states to the best of his or her knowledge,

information or belief that all documents designated “**RESTRICTED**” meet the definition of Restricted Information at the time the affidavit was made and that good cause exists for the treatment of the information as Protected Materials. Such affidavit and Rule 11 Certification subsequently shall be submitted to the Judges by any party whenever such party seeks to include the subject Protected Materials in any motion or other document filed with the Judges, and shall be made available upon request for submission to the Judges when a party seeks to use such Protected Materials in hearings before the Judges.

d. Two copies of the redacted version of the motion, brief, pleading or other document must be submitted to the Judges within three (3) business days from the date the unredacted version is filed.

11. If a Producing Party, either through its own volition or in response to an order of the Copyright Royalty Judges, produces Protected Materials in native electronic format, the following procedures shall apply and govern the treatment of such Materials:

a. The Producing Party shall produce an original and five (5) copies of discs or other recordable media (CD, DVD, hard drive, etc.) bearing the documents in native electronic format. Those discs bearing Protected Materials (per the terms of Paragraph 1 herein) shall be clearly marked with the legend identifying the enclosed contents as “**RESTRICTED.**” For clarity, Restricted Information and non-Protected Materials shall be produced on separate discs.

b. A Reviewing Party in receipt of Protected Materials in native electronic format shall view the Materials only by opening and reading them directly from the media on which it is provided, and shall not copy, transfer or otherwise store the Materials or data on another computer or other storage device.

c. A Reviewing Party in receipt of Protected Materials in native electronic format shall not email or otherwise transfer any such Materials to another person, even one eligible to view such Materials under the terms of this Protective Order except by providing that person with one of the copies of the disc (or other recordable storage media) on which the native-format Protected Materials were produced.

d. In the case that a Reviewing Party in receipt of Protected Materials in native electronic format wishes to print paper copies of those Materials, they shall mark each printed page with the legend identifying the Materials as “**RESTRICTED**” under the terms of this Protective Order.

Nothing in this paragraph shall affect or limit a Reviewing Party’s ability to use Protected Materials produced in native electronic format in any written testimony, exhibit, brief or other submission, or during any hearing related to this proceeding; such use of native-format Protected Materials shall continue to be governed by Paragraphs 7-10 herein.

At the conclusion of this proceeding, recipients of Protective Materials in native electronic format shall return or destroy all discs containing the Protected Materials in accordance with Paragraph 18 herein.

12. Each party governed by this Protective Order has the right to seek changes in it as appropriate from the Judges, upon notice and reasonable opportunity to be heard by any party to this proceeding whose interest may be affected by such change. The Judges may amend this order for good cause shown.

13. In the event a Reviewing Party wishes to disclose Protected Materials to any person to whom disclosure is not authorized by this Protective Order, or wishes to object to the

designation of certain information or materials as Protected Material, such Reviewing Party shall first serve written notice of such proposed disclosure or objection upon counsel for the Producing Party and the Board identifying with particularity each of such Protected Materials. Negotiations shall then be undertaken by counsel for the Producing Party and the Reviewing Party in order to resolve disputes as to such disclosure or the validity of the claim to protection. Where these negotiations produce agreement, such agreement shall be filed with the Board and the other Reviewing Parties authorized to examine the same may make use of the Protected Materials in the same manner, provided that they enter into the same agreement with the Producing Party.

If a Producing Party declines to acquiesce in such disclosure or to agree that the information should not be classified as Protected Materials it shall notify the Reviewing Party in writing of that position and the reasons therefor within three (3) business days of receipt of the Reviewing Party's written notice. A Reviewing Party may move the Judges either for modification of this Protective Order, a determination that the material in issue should not be considered Protected Materials, or for such other ruling as is appropriate. The Reviewing Party shall serve counsel for the Producing Party and the other Reviewing Parties with a copy of such motion. Unless otherwise ordered, the Producing Party shall have three (3) business days after receipt of such motion to file a response to the motion. Each such response shall be served on all Reviewing Parties. The Producing Party shall bear the burden of justifying the limitation it seeks to impose. Nothing contained herein shall be construed to limit the authority of the Judges to modify the deadlines provided herein during the pendency of evidentiary hearings or otherwise, and nothing herein shall be construed to modify the burden of proof provided by law.

In the event that the Judges find upon motion or *sua sponte* that materials previously

designated as Protected Materials should be re-designated as no longer subject to protection, such materials nevertheless shall be subject to the protection afforded by this Protective Order until three (3) business days after the date of issuance of any order of the Judges on the matter.

Neither the Producing Party nor the Reviewing Party waives any rights to seek additional administrative or judicial remedies after action by the Judges. After such re-designation of materials, the party who originally presented the materials shall, within ten (10) days after the re-designation has become final, file with the Judges for inclusion in the record, and serve on all parties to the proceeding, new unredacted copies of the testimony, exhibit, pleading, brief, or other documents containing the material, with the previous markings and labels indicating the prior status of the material removed to the extent appropriate in light of the re-designation.

14. Except as otherwise provided by an order of the Judges, the parties shall have two (2) business days from issuance of any written order or ruling issued by the Judges in which to request, in writing, redactions of one or more portions of such order or ruling. The party requesting redaction shall identify the specific portion or portions of the order or ruling for which redaction is requested, and shall provide detailed reasons as to why the material sought to be protected must be protected. During the two (2) business day period, and during the pendency of a request for redaction, neither the Judges nor the parties will release the order or ruling to anyone not governed by the terms of this Protective Order.

Upon receipt of a written request for redaction, parties opposing such redaction shall have two (2) business days in which to file their written objection. In circumstances where a request for redaction has been filed, the Judges, where appropriate, will indicate disposition of the request upon placement of the written order or ruling in the public file.

15. The inadvertent production or filing of any document or other information in connection with this proceeding shall be without prejudice to any claim that such material is privileged under the attorney-client or other privilege, or protected from disclosure as work product, and the producing or filing party shall not be held to have waived any rights by such inadvertent production. In the event that a document is produced or filed inadvertently that is considered by the producing or filing party to be privileged in whole or in part, such document may be retrieved by such party by giving written notice to the relevant receiving parties not later than ten (10) business days after discovery of the inadvertent production or filing of such document, that such producing or filing party claims the document, in whole or in part, to be privileged. Additionally, such notice must state the nature of the privilege.

Upon receipt of such notice, each receiving party shall promptly return the original and all copies of the document to which such notice pertains to such producing or filing party. In the event that only part of the document is claimed to be privileged, the producing or filing party shall furnish redacted copies of such document, removing only the part(s) thereof claimed to be privileged, to such receiving parties, together with such written notice. Upon receipt of the redacted copy, each such receiving party shall promptly return the original and all copies of the unredacted copy to such producing or filing party.

16. Nothing in this Order shall be construed as precluding any participant in this proceeding from objecting, consistent with the rules of the Judges, to the use of the materials subject to the provisions of this Order on grounds other than confidentiality.

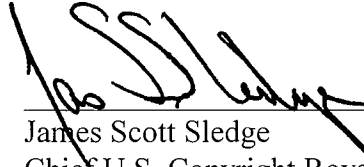
17. All notices of motions, responses, or other correspondence filed in this proceeding shall be made in a manner that protects the materials in issue from unauthorized disclosure.

18. Following the conclusion of this proceeding, which shall occur at the earlier of the exhaustion of available appeals or the running of the time for making such appeals, notice of which will be given the Reviewing Parties by a Producing Party, each Reviewing Party must, within twenty-one (21) days of such notice, return to counsel for the Producing Party all copies of the Protected Materials provided pursuant to this Order and all copies reproduced by a Reviewing Party or destroy the same; and counsel for each Reviewing Party must provide to counsel for the Producing Party a verified Certification that, to the best of his or her knowledge, information, and belief, all copies of notes, memoranda, and other documents reflecting the Protected Materials have been destroyed. Until notice of the conclusion of this proceeding is provided by the Producing Party, all Protected Materials shall be handled in accordance with the provisions of this Protective Order.

Nothing in these paragraphs shall prohibit each party's outside counsel from retaining up to four copies of any testimony, brief, motion for rehearing, or other pleading, motion or other filed document, exhibit, or internal memorandum or workpaper that reflects Protected Materials, provided that any such materials retained by counsel shall remain subject to the provisions of this Protective Order.

19. Any violation of the terms of this Protective Order may result in sanctions against the party committing the violation, including, but not limited to, dismissal of that party's case.

SO ORDERED.



James Scott Sledge
Chief U.S. Copyright Royalty Judge

Dated: September 23, 2009

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

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NON-DISCLOSURE CERTIFICATE

I certify my understanding that access to Protected Materials in the above-captioned proceeding is provided to me and any firm designated below pursuant to the terms and restrictions of the Protective Order entered into therein on [enter date], that I have been given a copy of and have read the Protective Order, that I and my firm designated below qualify to have access to Restricted Material as described in the Protective Order, and that I and any firm designated below agree to be bound by that Order. I understand that the contents of the Protected Materials, and any notes, memoranda, and any other form of information reflecting the Protected Materials, shall not be disclosed to anyone other than in accordance with the Protective Order, and shall be used only for the purpose of the above-captioned proceeding. I further understand that I shall return or destroy such Protected Materials as provided by the Protective Order and that a violation of this certificate constitutes a violation of an order of the Copyright Royalty Judges. If an "Organization" is identified below, I represent that I am authorized by that organization to make the above representations and understandings on its behalf.

By:
PRINT NAME:
Title:
Organization:
Party Represented:
Date: