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, INC.'S MOTION REQUESTING REFERRAL OF NOVEL MATERIAL QUESTIONS OF SUBSTANTIVE LAW

SoundExchange hereby opposes the Motion Requesting Referral of Novel Material Questions of Substantive Law (the "Motion") filed by RealNetworks, Inc. ("Real"). For the reasons discussed below, the Motion should be denied.

INTRODUCTION

The Motion should be denied because Real has not presented any novel material questions of substantive law that merit referral to the Register of Copyrights pursuant to 17 U.S.C. § 802(f)(1) and 37 C.F.R. § 354.1-.2. Real freely admits that there are no true questions of law at issue here. With respect to the first issue of whether § 114(f)(5) prohibits the admission into evidence of voluntary webcasting agreements not made precedential by the parties, Real states unequivocally that "there simply appears to be no ambiguity" and that it is not even "arguable" that the agreements are admissible. Mot. at 6-7. Similarly, with respect to whether the CRJs or the Register has authority to determine the constitutionality of § 114(f)(5), Real concedes that "the CRJs and the Register lack authority" to do so under unambiguous Supreme Court precedent. Mot. at 9. Indeed, with respect to both issues, Real contends that it would be

"futile" for it even to raise the issues, *see* Mot. at 10, because there so obviously is not a disputed question of law.

SoundExchange agrees with Real's characterization of the so-called "questions" presented by the Motion. Real has utterly failed to establish any legitimate basis for referral to the Register. There is no doubt about either issue, and the Motion thus does not present a novel material question of substantive law. In other words, there simply is nothing to refer.

Real contends that the true objective of its Motion is to preserve Real's rights on appeal. *See* Mot. at 10. But referral of an undisputed legal issue to the Register – in a hypothetical setting with no particular agreements or concrete set of facts before it – is not the correct vehicle for doing so. Real's interest in preserving its appellate rights does not justify the charade of referring undisputed legal issues to the Register.

DISCUSSION

Pursuant to 17 U.S.C. § 802(f)(1)(A)(ii), "a participant in a proceeding may request an interpretation by the Register of Copyrights concerning any material question of substantive law." Real's motion asserts that its questions are "novel material questions of substantive law," a category of question defined by the statute as "a question of law that has not been determined in prior decisions, determinations, and rulings described in section 803(a)." 17 U.S.C. § 802(f)(1)(B)(ii). But because Real concedes that the answers to both of its questions are crystal clear and that it would be "futile" even to raise them, there is nothing for the CRJs to refer to the Register for interpretation. Real has requested referral of two "questions" of law where no question actually exists.

A. Real Acknowledges That the Language of Section 114(f)(5) Is Clear and Unambiguous.

The language of § 114(f)(5) is unambiguous and Real has not even attempted to suggest otherwise. Section 114(f)(5) explicitly states that the agreements entered into under the Webcaster Settlement Acts shall not "be admissible as evidence or otherwise taken into account in any" ratesetting proceeding unless "the receiving agent and a webcaster that is party to an agreement . . . expressly authorize the submission of the agreement in a proceeding under this subsection."

Real has not offered an alternative reading of the statutory language that would permit the admission of the so-called "non-precedential" webcasting agreements that were executed pursuant to the Webcaster Settlement Acts of 2008 and 2009. To the contrary, Real admits that "although RealNetworks wishes it were otherwise, there simply appears to be no ambiguity in this provision that would permit RealNetworks to argue that" the non-precedential webcasting agreements "may be admitted into evidence."[1] Real further states that there is not "any reasonable construction of Section 114(f)(5) that permits the CRJs to consider" the non-precedential agreements. Mot. at 10.

SoundExchange agrees with Real's reading of the statute – the provision is unambiguous. According to Real, it has filed the Motion solely "out of an abundance of caution." Mot. at 7. But Real's interest in exercising caution is insufficient to justify referral. Real cannot ask this Court to pretend that ambiguity exists so that Real can meet its statutory burden. The referral procedure should not be used to waste the time and resources of the CRJs, the Register of

[1] Throughout its Motion, Real repeatedly refers to "the agreements with low rates" that SoundExchange has exercised unilateral veto power over in order to exclude from consideration in this proceeding. SoundExchange disagrees with Real's description of the non-precedential agreements as well as the motivations, both theoretical and actual, that might have resulted in a particular agreement being deemed precedential or non-precedential.

Copyrights and interested parties on questions for which the answer is already known and agreed upon.[2] Absent any doubt about how to interpret § 114(f)(5), there is nothing to refer. Referring this non-question to the Register is unnecessary.

B. Real Concedes That the CRJs and Register of Copyrights Lack the Authority to Rule on the Constitutionality of Section 114(f)(5).

SoundExchange also agrees with Real's conclusion that "the CRJs and the Register lack authority to determine that the statute is unconstitutional." Mot. at 9. As Real concedes in its Motion, the "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (quoting *Johnson v. Robison*, 415 U.S. 316, 368 (1974)). Rather than attempt to argue that the present circumstances somehow offer an exception to this general jurisdictional limitation of administrative agencies, Real acknowledges that "[n]othing about the provisions at issue suggests that either the CRJs or the Register has authority to determine whether Section 114(f)(5) is constitutional." Mot. at 10.

Real claims that referral is necessary because "disputes sometimes arise on appeal as to whether an appellant should be barred from presenting a constitutional challenge because it failed to raise it during an administrative proceeding." Mot. at 9. But the D.C. Circuit, in a case cited by Real, has explained that "[i]t would make little sense to require exhaustion where an agency 'lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute.'" *Hettina v. United States*, 560 F.3d 498, 506 (D.C. Cir. 2009)

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[2] Comparison of Real's Motion to its recent motion for the issuance of subpoenas to nonparticipants and the resulting dispute around that issue highlights the flimsiness of Real's present request. In the dispute over the nonparticipant subpoenas, both sides offered competing interpretations of the statutory and regulatory authority at issue, and the CRJs requested an interpretation from the Register. But that request arose out of the need to resolve a specific and concrete material dispute between the parties. In contrast, Real's present Motion is intended to obtain confirmation of answers the parties already agree upon.

(quoting *McCarthy v. Madigan*, 503 U.S. 140, 147 (1992)). Precisely because, as Real argues, the adjudication of the constitutionality of § 114(f)(5) is beyond the CRJs' and Register's jurisdiction, *see* Mot. at 10, it makes no sense for Real to request that the CRJs refer the question to the Register. Referral to the Register would be pointless.

C. Real's Motion Is an Incorrect Approach to Preserving an Issue for Appeal.

Real's Motion is also an improper way of trying to preserve an issue for appeal. Real's Motion presents a hypothetical request without concrete facts. For example, it is unclear which agreements Real would like to move into evidence, and Real offers scant explanation of whether and how it could establish that the agreements are sufficiently relevant to be deemed admissible. Referral to the Register of a vague hypothetical issue – not to mention an *undisputed* legal issue — is not the correct method of preserving an appellate issue.

D. Contrary to Real's Claim, Section 114(f)(5) Had – and Largely Achieved – a Legitimate Legislative Objective.

Because it cannot legitimately argue that the two questions it raises should be referred for any other reason than an "abundance of caution," Real devotes much of its Motion to arguments about the importance of the non-precedential agreements, including unsupported assertions about SoundExchange's alleged price discrimination, Mot. at 3, SoundExchange's general motivation and ability to veto the admission of certain agreements, Mot. at 3-6, and two full pages dedicated to the merits of Real's constitutional argument. Mot. at 7-9. These arguments are made despite the clear prohibition of 37 C.F.R. § 354.1(b)(2)(i) against "includ[ing] argument[s] on the merits of the issue" in a motion to refer.

Because this is not the appropriate time to address the merits of Real's constitutional claims, *see* 37 C.F.R. § 354.1(b)(2)(i), SoundExchange will not argue the merits here, but

expressly reserves its right to argue the issue at the appropriate time if the Motion is referred or if otherwise requested by this Court or the Register.

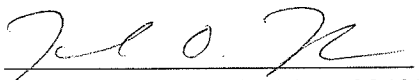
Nonetheless, SoundExchange feels compelled to respond to Real's claim that § 114(f)(5) is infirm because it does not bear a rational relationship to a legitimate legislative end. Mot. at 8. That argument ignores the facts. Section 114(f)(5) was amended as part of the Webcaster Settlement Acts of 2008 and 2009. Those Acts were passed with a clear and legitimate legislative objective: to facilitate settlements in this proceeding and the Webcasting II proceeding. Congress viewed settlements as a desirable objective, but recognized that the particular circumstances of some webcasters might require experimental settlements, and that if settlements were automatically deemed precedential, then parties might be deterred from entering into them – a concern borne out by the facts given the relative lack of meaningful settlements in the webcasting rate-setting proceedings. Accordingly, Congress explained that non-precedential agreements "shall be considered as a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers rather than as matters that would have been negotiated between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(5).

The Webcaster Settlement Acts were remarkably successful in achieving their objective. Numerous webcasters have opted into WSA settlements for the royalty period at issue in this proceeding. Those webcasters account for the majority of the statutory webcasting royalties paid to SoundExchange in 2008. Real's suggestion that § 114(f)(5) was not rationally related to a legitimate legislative end is thus demonstrably false.

CONCLUSION

For the foregoing reasons, SoundExchange respectfully asks the Court to deny the Services' Motion Requesting Referral.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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