

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

RECEIVED

FEB 22 2010

COPYRIGHT OFFICE
PUBLIC OFFICE

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' AND LIVE365'S
SECOND MOTION TO COMPEL SOUNDEXCHANGE TO PRODUCE DOCUMENTS**

SoundExchange hereby opposes the Second Motion to Compel SoundExchange to Produce Documents (the "Motion") filed by RealNetworks and Live365 (the "Services"). For the reasons discussed below, the Motion should be denied.

INTRODUCTION

The Services seek to compel SoundExchange to produce three categories of documents. First, the request for documents related to equity interests that Sony Music Entertainment ("Sony") has in webcasting services should be dismissed because it is duplicative of the seventh category of document requests in the Services' First Motion to Compel. The Services are wasting the Court's and SoundExchange's time by filing a second motion to compel the same documents. This request should also be dismissed because SoundExchange, in a good faith effort to compromise, has produced (or agreed to produce, subject to a court order) a reasonable range of responsive documents that are more than sufficient to enable the Services to "test assumptions and assertions" made by SoundExchange. Mot. at 2.

Second, the request for monthly and annual forecasts related to Sony's digital revenues should be dismissed as moot because SoundExchange has produced the responsive documents that the Services seek.

Third, as SoundExchange has informed the Services, SoundExchange is willing to produce documents responsive to the two requests related to Mr. McCrady's testimony, though after a reasonable and diligent search SoundExchange has not identified any documents responsive to the first of the two requests.

DISCUSSION

1. Documents Related to Sony's Equity Investments in Webcasting Services

The Services seek to compel SoundExchange to produce "valuations, investor reports, projections and financial assessments related to those webcasting services in which Sony has an equity interest." Mot. at 3. As an initial matter, this request is duplicative of the seventh category of documents that the Services requested in their First Motion to Compel. *See* Services' First Mot. at 23 (moving to compel "investor statements, valuations, accounting statements, and other financial reporting" from webcasting services in which Sony and WMG have equity interests). The current request is narrower than the request in the First Motion to Compel insofar as it seeks documents only from Sony, as opposed to from Sony and WMG. But the documents that the Services seek in the current Motion are encompassed by the documents the Services requested in their First Motion. Such a duplicative request is a waste of the Court's and SoundExchange's time, and it should be denied. *See, e.g., Order Granting in Part and Denying in Part the Motion of XM Satellite Radio Inc., Sirius Satellite Radio Inc., and Music Choice to Compel SoundExchange to Produce Documents Directly Related to the Testimony of Expert Witnesses*, Docket No. 2006-1 CRB DSTR, at 1 (May 17, 2007) (declining to address request

for documents that was also raised in another motion to compel, and noting that such duplicative requests “implicate the valuable resources of the Judges and the parties”).

As SoundExchange explained in response to the same request in the Services’ First Motion to Compel, the documents related to webcasting services in which Sony has an equity interest are not directly related to Mr. Kooker’s written direct testimony. Mr. Kooker’s testimony does not discuss Sony’s equity interest in any service. Nor does it discuss the financial condition of any webcasting service. Rather, his testimony describes the investments and contributions that Sony makes in the creation of sound recordings.

The Services now highlight the fact that at Mr. Kooker’s deposition they asked him about Sony’s equity interest in webcasting services. Mot. at 4 and 6. But Mr. Kooker’s deposition testimony about such services does not expand the scope of document discovery to which the Services are entitled -- parties may seek documents directly related to written testimony, not directly related to deposition testimony.

Nonetheless, in a good faith effort to compromise and try to avoid the need for motions practice, SoundExchange agreed to produce a reasonable range of responsive documents related to webcasting services in which Sony holds an equity interest. At his deposition, Mr. Kooker mentioned three webcasting services in which he believed Sony has an equity interest. SoundExchange produced responsive documents related to the first of those services. *See* SXW3_00016483 - SXW3_00016525. SoundExchange also located a responsive document related to the second of those services, and indicated at the meet and confer and in its Opposition to the Services’ First Motion to Compel that while it cannot produce the document due to a lack of third party consent, SoundExchange will produce it if ordered by this Court to do so. SoundExchange reaffirms that position here. With respect to the third webcasting service

identified by Mr. Kooker at his deposition, SoundExchange has determined that the service does not operate in the United States, and SoundExchange thus has not produced documents related to this service. This is consistent with the parties' general practice in this proceeding of producing U.S., but not international, information.

Given the tangential relationship of this request to SoundExchange's written direct case, SoundExchange's production of responsive documents related to the two webcasting services described above that operate in the U.S. and in which Sony has an equity interest, is entirely reasonable. The Services have not specifically identified other webcasting services for which they seek responsive documents, nor have they established a compelling need for any additional documents. Nothing further should be required.

2. Sony's Monthly and Annual Forecasts Related to Digital Revenues

The Services seek "[a]ll monthly and annual forecasts related to Sony's digital revenues, of the kind" that Mr. Kooker referred to at his deposition. Mot. at 2. This request should be dismissed as moot because SoundExchange has produced the documents the Services are seeking, including the particular documents to which Mr. Kooker referred at his deposition.

Before the Services filed their Motion, SoundExchange produced numerous documents from Sony that contain forecasts related to the digital distribution of music, *see, e.g.*, SXW3_00012476 - SXW3_00012479; SXW3_00015733 - SXW3_00015741; SXW3_00016119 - SXW3_00016145; SXW3_00016146 - SXW3_00016172; SXW3_00016173 - SXW3_00016195, as well as commercially available forecasts, SXW3_00016051 - SXW3_00016071; SXW3_00016210 - SXW3_00016217; SXW3_00016218 - SXW3_00016223; SXW3_00016224 - SXW3_00016228.

At the meet and confer on February 5, 2010, counsel for the Services indicated that they sought production of certain monthly forecasts from Sony. SoundExchange produced those documents, which amount to over 200 pages of detailed forecasts, last week. *See* SXW3_00017325 - SXW3_00017540. In addition, at the meet and confer, counsel for the Services identified a particular forecast document that, according to Mr. Kooker's deposition testimony, was issued four or five months ago. *See* Mot. at 8. SoundExchange has produced the particular document he referred to, both for the worldwide and U.S. markets. *See* SXW3_00012501 and SXW3_00016261.

Because SoundExchange has complied with this request, it should be dismissed as moot.

3. Documents Related to W. Tucker McCrady's Testimony

The Services seek to compel SoundExchange to produce two categories of documents from WMG. First, pursuant to Document Request No. 82, they seek studies, analyses and other documents related to the rates in the agreement between SoundExchange and the NAB. Mot. at 10. In response to other document requests, SoundExchange has already produced negotiating documents related to WMG's performance complement waiver with the NAB. SoundExchange has also recently located a small number of nonprivileged internal WMG communications related to the NAB agreement, and will produce those, as well. SoundExchange told the Services at the meet and confer that while it was willing to produce documents responsive to this request, it had not located any and believed it was unlikely any such documents exist. After an additional reasonable and diligent search, SoundExchange has not located any studies, analyses or other documents responsive to Document Request No. 82.

Second, pursuant to Document Request No. 85, the Services seek documents related to Mr. McCrady's testimony that WMG "has explored an experimental business model" for "on-

demand” streaming that is ad-supported, *see* McCrady WDT at 15, and that WMG views ad-supported services with caution because they have yet to generate stable revenue streams. Mot. at 10. As SoundExchange informed the Services at the meet and confer, it is willing to produce nonprivileged responsive documents that are located after a reasonable and diligent search. SoundExchange reaffirms that position here. Some responsive documents, however, such as financial reporting from streaming services, are subject to confidentiality provisions that prohibit the disclosure of the documents absent third-party consent or a court order. As SoundExchange stated at the meet and confer, if it is ordered to do so by this Court, SoundExchange would produce such documents.

CONCLUSION

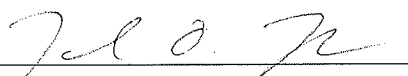
For the foregoing reasons, SoundExchange respectfully asks the Court to deny the Services’ Motion to Compel.

Respectfully submitted,

Michael J. Huppe (DC Bar 455161)
General Counsel
C. Colin Rushing (DC Bar 470621)
Senior Counsel
SoundExchange, Inc.
1121 14th Street, N.W., Suite 700
Washington, D.C. 20005
(v) 202-640-5858
(f) 202-640-5883
mhuppe@soundexchange.com
crushing@soundexchange.com

Of Counsel

February 22, 2010


David A. Handzo (DC Bar 384023)
Michael B. DeSanctis (DC Bar 460961)
Jared O. Freedman (DC Bar 469679)
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Washington, D.C. 20001
(v) 202-639-6000
(f) 202-639-6066
dhandzo@jenner.com
mdesanctis@jenner.com
jfreedman@jenner.com

Counsel for SoundExchange, Inc.

CERTIFICATE OF SERVICE

I, Albert Peterson, do hereby certify that copies of the foregoing opposition were sent via email and First Class Mail this 22nd day of February, 2010 to the following:

<p>William Malone James Hobson Matthew K. Schettenhelm MILLER & VAN EATON, PLLC 1155 Connecticut Avenue, NW, Suite 1000 Washington, DC 20036-4306 wmalone@millervaneaton.com mschettenhelm@millervaneaton.com</p> <p><i>Counsel for Intercollegiate Broadcasting System, Inc. and Harvard Radio Broadcasting Co. Inc.</i></p>	<p>Angus M. MacDonald Ara Hovanesian Abraham Yacobian HOVANESIAN & HOVANESIAN 301 E. Colorado Blvd., Ste. 514 Pasadena, CA 91101-1919 Fax: 626/795-8900 angusm@hovlaw.com arah@hovlaw.com abrahamy@hovlaw.com</p> <p><i>Counsel for LIVE365, Inc.</i></p>
<p>Thomas G. Connolly Mark A. Grannis Christopher J. Wright Timothy J. Simeone Charles D. Breckinridge Kelley Shields WILTSHIRE & GRANNIS LLP 1200 18th Street, NW Washington, DC 20036 Fax: (202) 730-1301 tconnolly@wiltshiregrannis.com mgrannis@wiltshiregrannis.com cwright@wiltshiregrannis.com tsimeone@wiltshiregrannis.com cbreckinridge@wiltshiregrannis.com kshields@wiltshiregrannis.com</p> <p><i>Counsel for RealNetworks, Inc.</i></p>	<p>David D. Oxenford Adam S. Caldwell Ronald G. London DAVIS WRIGHT TREMAINE, LLP 1919 Pennsylvania Ave., NW, Suite 200 Washington, D.C. 20006 Fax: 202/793-4499 davidoxenford@dwt.com adamcaldwell@dwt.com ronaldlondon@dwt.com</p> <p><i>Counsel for LIVE365, Inc.</i></p>
<p>William B. Colitre ROYALTY LOGIC, LLC 21122 Erwin Street Woodland Hills, CA 91367 Bcolitre@RoyaltyLogic.com Fax: 818/558-3484</p>	<p>Catherine R. Gellis, Esq. P.O. Box 2477 Sausalito, CA 94966 cbi@cathygellis.com</p> <p><i>Counsel for College Broadcasters, Inc.</i></p>

Mitchell L. Stolz
CONSTANTINE CANNON LLP
1627 Eye Street N.W. 10th Fl.
Washington, D.C. 20006
Fax: (202) 204-3501
mstolz@constantinecannon.com

Counsel for College Broadcasters, Inc.



Albert Peterson