

UNITED STATES COPYRIGHT ROYALTY JUDGES

In the Matter of

**Digital Performance Right in Sound
Recordings and Ephemeral Recordings**

**Docket No. 2009-1
CRJ Webcasting III**

**ORDER GRANTING IN PART AND DENYING IN PART
THE JOINT MOTION OF REAL NETWORKS AND LIVE365
TO COMPEL SOUNDEXCHANGE TO PRODUCE DOCUMENTS REQUESTED
IN MOVANTS' FIRST SET OF REQUESTS**

The Copyright Royalty Judges (“Judges”) have received a motion from RealNetworks and Live365 seeking to compel SoundExchange to produce certain categories of documents.

The movants have classified the documents they are seeking into seven categories: (1) documents containing forecasts and projections for the non-interactive webcasting industry for the period 2011-2015 that are in the custody or control of SoundExchange or the labels from which SoundExchange presented witnesses in its written direct case; (2) documents reflecting consideration by the SoundExchange Board and/or Licensing Committee of SoundExchange’s royalty rate proposal for this proceeding and voluntary agreements between SoundExchange and entities engaged in non-interactive webcasting; (3) documents relating to the performance complement waivers negotiated by the National Association of Broadcasters (“NAB”) with each of the major record companies at the same time it negotiated a voluntary agreement with SoundExchange, and that are in the custody or control of SoundExchange or the labels from which SoundExchange presented witnesses in its written direct case; (4) documents relating to financial audits of SoundExchange going back to 2006; (5) documents relating to the terms, negotiations, drafting, or entry into the non-precedential agreements entered into between SoundExchange and entities engaged in non-interactive webcasting; (6) agreements between record labels and webcasting services that were reviewed, relied on and/or referenced in connection with the written direct testimony of SoundExchange witnesses, but not yet produced; and (7) documents containing investor statements, valuations, accounting statements and other financial reporting provided by webcasting services in which an equity interest is or has been held by any of the record labels from which SoundExchange presented witnesses in its written direct case.

With respect to the third and fourth category of documents, the motion is **denied as moot**, inasmuch as the movants have indicated that SoundExchange has subsequently provided the requested documents.

With respect to the first category of documents, the motion is **granted to the extent that SoundExchange has not already complied with the movants' request**, inasmuch as SoundExchange has agreed to provide this category of documents.

With respect to the second category of documents, the motion is **denied as overbroad and nonspecific with respect to Requests 29, 61, 66 and 68**; however, the motion is **granted with respect to Request 67 for such nonprivileged documents as have not yet been produced by SoundExchange**.

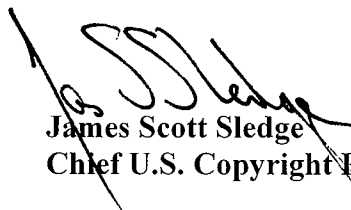
With respect to the fifth category of documents, the motion is **granted to the extent that SoundExchange has not already complied with the movants' request**. SoundExchange objects to this request as not directly related to its written direct statement because its witnesses do not mention or rely on the non-precedential agreements in their written testimony, but the movants seek the requested documents for a different purpose – i.e., to test the relevance of the precedential agreements that SoundExchange does rely on in its written testimony. SoundExchange further objects that the non-precedential agreements are inadmissible as evidence in this proceeding as a matter of law and therefore seems to imply that alone is enough to make the negotiating documents related to such agreements undiscoverable. However, at the same time, SoundExchange admits acquiescing to the production of the non-precedential agreements despite clearly maintaining their non-admissibility. See, *SoundExchange's Opposition To RealNetworks' and Live 365's Motion to Compel SoundExchange to Produce Documents*, at 2 (February 5, 2010) Therefore, having complied with respect to the discovery of the non-precedential agreements, SoundExchange cannot now object to the production of related negotiating documents.

With respect to the sixth and seventh categories of documents, the motion is **granted to the extent that SoundExchange has not already complied with the movants' request**. Full production of these two categories of documents have not been made to date due to the lack of consent from some third party copyright owners. Yet, SoundExchange's witnesses have, for example, reviewed or relied upon the agreements referenced in these categories above in preparing their written testimony. The requested documents are not burdensome to produce, and relevant to this proceeding. SoundExchange's effort to use documents to support its testimony but to cite to its lack of authority to produce said documents, will not be permitted. In an analogous situation in *Webcasting II* in which SoundExchange had sought to rely on audit data in its written testimony while shielding its production by claiming a lack of authority to produce said data, the Judges similarly required production. See *Order on Motion by DiMA, RadioBroadcasters, National Public Radio and Corporation for Public Broadcasting to Compel SoundExchange to Produce Documents Related to the Testimony of Barry Kessler*, Docket No. 2005-1 CRB DTRA at 2 (November 7, 2006).

All documents must be provided no later than ten (10) days after the date of this order.

SO ORDERED.

DATED: March 5, 2010


James Scott Sledge
Chief U.S. Copyright Royalty Judge