

**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**

**REALNETWORKS, INC.'S AND LIVE365, INC.'S  
FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS FROM  
SOUNDEXCHANGE, INC.**

Pursuant to 17 U.S.C. § 803(b)(6)(C), 37 C.F.R. § 351.5(b) and the Discovery Schedule issued by the Copyright Royalty Judges, RealNetworks, Inc. (“RealNetworks”) and Live365, Inc. (“Live365”) hereby request that SoundExchange, Inc. (“SoundExchange”) produce the documents described herein no later than December 21, 2009.

**DEFINITIONS**

1. “And” and “or” have both conjunctive and disjunctive meanings as required by the context to elicit all information discoverable within the broadest scope of these document requests.
2. “Any” and “all” shall mean “each and every.”
3. “Communication” means the transmittal or disclosure of information or inquiries electronically or in writing.
4. “Correspondence” means any writing or document, prepared, sent, or received by any medium, whether handwritten, person to person, in a group, by telephone, by letter, by notice, by telex, by telecopier, or by any other process related to or referring to any topic or

thing, including verbal, written, electric, electronic communication such as e-mail, together with any attachment, enclosures, exhibits, files, and/or any other writing or document referenced by or transmitted with such correspondence.

5. The terms “concerning,” “discussing,” “relating to,” or “reflecting” mean anything that embodies, constitutes, comprises, evidences, reflects, identifies, states, refers to, comments on, responds to, relates to, describes, analyzes, contains information concerning, or in any way directly or indirectly bears upon or deals with the subject matter of the document request.

6. “Document(s)” is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a), including, without limitation, electronic or computerized data compilations. A draft or non-identical copy is a separate document within the meaning of this term.

7. “Including” is illustrative and not limitative and shall be construed to elicit all information discoverable within the broadest scope of these document requests.

8. “Pelcovits” and “Dr. Pelcovits” means Dr. Pelcovits himself and any persons assisting him, working with him or acting under his direction in connection with the preparation of his written direct testimony.

9. “Performance” means each instance in which any portion of a sound recording is publicly performed via webcasting.

10. “Service” means any online digital music service that offers webcasting.

11. “Royalty payments” means payments of royalties to SoundExchange for (1) the reproduction and performance of sound recordings pursuant to Section 114 of the Copyright Act

or pursuant to agreements in lieu of Section 114 or (2) any other royalty paid to SoundExchange for use of copyrighted works.

12. “SoundExchange” refers to SoundExchange, Inc., its subsidiaries, corporate affiliates, business units, divisions, predecessors, parents, business units and divisions, and their representatives, officers, agents, servants, counsel, employees, consultants, and any person authorized to act, acting, or purporting to act on behalf of SoundExchange, including but not limited to the persons who submitted witness statements as part of the Written Direct Statement, Witness Statements, and Exhibits of SoundExchange, Inc. submitted on behalf of SoundExchange in this proceeding.

13. “Webcasting” shall be construed broadly to include public performances of sound recordings by Internet transmission and retransmissions of radio broadcast transmissions over the Internet (simulcasts), including both subscription and non-subscription transmissions.

“Webcaster” refers to a service that offers webcasting.

14. The terms “you” and “your” refer to SoundExchange.

### **INSTRUCTIONS**

1. These requests are continuing in character. If at any time up to and including the time of trial, any documents responsive to these requests are discovered, created, or obtained, you are requested to produce such documents promptly.

2. If you object to any request, identify the number of the request to which you object, state the basis for your objection in sufficient detail so as to permit adjudication of the validity of the objection, and produce any documents responsive to the portion of the request that you do not find objectionable.

3. Documents sought in these requests include (a) documents currently or previously within your knowledge, possession, or control; (b) documents currently or previously within the knowledge, possession, or control of the persons who submitted the witness statements attached to SoundExchange's Written Direct Statement in this proceeding; and (c) documents which come into your possession, or into the possession of persons who submitted the witness statements attached to SoundExchange's Written Direct Statement, subsequent to service hereof.

4. When any request calls for the production of any portion of any document, the entire document containing any such portion must be produced.

5. If any document request cannot be complied with in full, it shall be complied with to the extent possible, with an explanation as to why full compliance is not possible.

6. More than one paragraph of this request may ask for the same document. The presence of such duplication is not to be interpreted to narrow or limit the normal interpretation placed on each individual request. When a document is requested in more than one numbered paragraph, you need only produce non-identical copies of the document.

7. Unless otherwise stated, the document requests contained in this First Set of Requests for Production of Documents cover the time period January 1, 2002, to the present.

8. In accordance with the Discovery Schedule (issued November 10, 2009), RealNetworks and Live365 must receive all written responses and objections to this First Set of Requests for Production of Documents no later than December 21, 2009. Please deliver one set of all responsive documents, responses and objections to Wiltshire & Grannis LLP at the address below and one set to Hovanesian & Hovanesian at the address below:

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## **DOCUMENTS TO BE PRODUCED**

### ***Requests Related to Witness Statement of Michael D. Pelcovits***

1. All unredacted written testimony provided by Dr. Pelcovits and all unredacted transcripts of oral testimony provided by Dr. Pelcovits (including any exhibits attached to or admitted through such testimony) in all prior proceedings before the Copyright Royalty Board (“CRB”), the Federal Communications Commission, the Office of Telecommunications (“OfTel”) in the United Kingdom, the European Commission, the Ministry of Telecommunications in Japan, and all other testimony provided by Dr. Pelcovits in any form related to setting rates.
2. All documents relied upon by Pelcovits to update his knowledge of the webcasting industry over the past four years, as referenced in Pelcovits’ testimony in the third paragraph on page 6.
3. All documents, including but not limited to notes and emails, related to any communications between Pelcovits and any record company employees, as referenced in Pelcovits’ testimony in the first full paragraph on page 7.
4. All agreements (including any amendments thereto, and any summaries, abstracts or other information about the terms of such agreements) between record companies and services that were provided to Pelcovits, including those referenced in Pelcovits’ testimony in the first full paragraph on page 7.
5. All agreements (including any amendments thereto) between record companies and services, whether or not provided to Pelcovits or referenced in Pelcovits’ testimony, which give services the right to stream music on a non-interactive basis.
6. All industry reports, studies and/or articles referred to or reviewed by Pelcovits in connection with his testimony in this CRB proceeding – including those cited in Section 4 of Pelcovits’ testimony.
7. All documents (including notes and emails) reflecting communications with authors and/or publishers (or their agents or employees) of all industry reports, studies and articles referred to or reviewed by Pelcovits in connection with his testimony in this CRB proceeding.

8. All documents regarding Katz Online Network relating to the webcasting industry – as referenced in the bottom paragraph on page 10 of Pelcovits’ testimony – including but not limited to documents reflecting communications between Pelcovits and Katz Online Network employees.
9. All agreements (including any amendments thereto) entered into by SoundExchange under either the Webcaster Settlement Act of 2008 or Webcaster Settlement Act of 2009 (“WSA agreements”), including but not limited to non-precedential agreements and agreements referenced by Pelcovits in the second full paragraph on page 14.
10. All documents and communications in the possession of SoundExchange or any SoundExchange employee or agent (including all members of the SoundExchange Board of Directors and all members of any committee which deals with music licensing issues) relating to the terms, negotiations, drafting or entry into the WSA agreements.
11. All documents related to forecasts, studies, projections and/or “expectations as to the rates [the CRB] would set” for the 2011-2015 time period, as referenced in Pelcovits’ testimony in the third full paragraph on page 15.
12. All documents related to any analysis, study or report, whether or not conducted by Pelcovits, regarding the market power of SoundExchange, record companies and/or services, as referenced in Pelcovits’ testimony in the first full paragraph on page 17.
13. All agreements (including any amendments thereto) between the National Association of Broadcasters (“NAB”), its members and/or its agents on one hand and SoundExchange, its members, and/or any record company on the other hand that relates to the WSA agreements and/or the sound recording performance complement waiver, as referenced in Pelcovits’ testimony in footnote 20 on page 20, and all correspondence, communications, memoranda or other documents that relate to the terms, negotiation, drafting or entry into these agreements.
14. All documents related to the “forty-one webcasting services now available in the market” – as referenced in Pelcovits’ testimony in the second full paragraph on page 24 – including documents sufficient to identify the WSA agreements, if any, under which such services make royalty payments.
15. All documents (including notes) reflecting calculations, analyses (including sensitivity analyses), results and/or adjustments – including but not limited to regression analyses – presented, discussed, referenced, and/or performed in connection with Pelcovits’ written testimony.
16. All documents reflecting the underlying data used in the tables, charts, calculations, analyses (including sensitivity analyses), results and/or adjustments that are presented, discussed, referenced, and/or performed in connection with Pelcovits’ testimony, including but not limited to (a) all data sufficient to replicate fully and completely all such calculations, analyses, results and/or adjustments; (b) any intermediate datasets created in

the processing of data; and (c) any output files resulting from data manipulation or calculations. To the extent responsive documents are Excel spreadsheets or other files containing embedded analyses or calculations, please provide copies in native format, identifying the applicable program (e.g., Excel) and maintaining all embedded formulas and settings.

17. All agreements (including any amendments thereto) since 2004 between the four major record companies and services, including those referenced in the first full paragraph on page 29 and Appendix IV of Pelcovits' testimony.
18. All data and documents provided by record companies to Pelcovits in connection with his testimony in the second paragraph on page 30.
19. All data from interactive webcasting services considered by Pelcovits in connection with his testimony in the third paragraph on page 30.
20. All documents supporting Pelcovits' use of a "12% present value factor" and "an assumed 6% annual growth rate in plays," as referenced in Appendix II of Pelcovits' testimony.

***Requests Related to Witness Statement of Dennis Kooker***

21. All studies, forecasts, valuations, and projections issued since January 1, 2005, related to "revenues from digital exploitations of [Sony Music Entertainment's] repertoire," as referenced in Dennis Kooker's ("Kooker") testimony in the third paragraph on page 6.
22. All agreements (including any amendments thereto) between Sony Music Entertainment ("Sony") and webcasters or other services (whether they use the Internet or other digital technology to distribute the music) related to the digital exploitation of Sony's repertoire in the U.S., including but not limited to Napster, Zune, and Rhapsody, as referenced in Kooker's testimony in the second paragraph on page 7.
23. All studies, forecasts, valuations, and projections related to Sony's "performance revenues from ... statutory licenses," as referenced at the bottom of page 7 of Kooker's testimony.
24. Financial statements (including all balance and income statements) reflecting the costs and investment numbers referenced in Kooker's testimony on page 5.
25. Financial statements (including all balance and income statements) reflecting the revenue numbers referenced in Kooker's testimony on page 7.
26. Financial statements (including all balance and income statements) reflecting the sales figures attributable to digital and physical products, as referenced in Kooker's testimony on page 9.

27. All agreements (including any amendments thereto) between Sony and the NAB or its members related to the waiver of the sound recording performance complement, and all correspondence, communications, memoranda or other documents that relate to the terms, negotiation, drafting or entry into these agreements.
28. All financial forecasts, projections, valuations, and studies relating to Sony's agreements with the NAB or its members in connection with sound recording performance royalties and/or waiver of the sound recording performance complement.

***Requests Related to Witness Statement of W. Tucker McCrady***

29. All meeting minutes, agendas and notes in Warner Music Group's ("WMG") possession related to meetings of SoundExchange's Board of Directors and/or the Licensing Committee from 2002 to the present, as referenced in the second paragraph on page 1 of the testimony of W. Tucker McCrady ("McCrady").
30. All agreements (including any amendments thereto) between WMG and the NAB or its members related to the waiver of the sound recording performance complement as referenced in pages 5-6 of McCrady's testimony, and all correspondence, communications, memoranda or other documents that relate to the terms, negotiation, drafting or entry into these agreements.
31. All financial forecasts, projections, valuations, and studies relating to WMG's agreements with the NAB or its members in connection with sound recording performance royalties and/or waiver of the sound recording performance complement.
32. All agreements (including amendments thereto) between WMG and services since 2002 related to online streaming in the U.S., including those referenced starting at page 9 of McCrady's testimony.
33. All financial forecasts, projections, valuations, and studies related to the online streaming of WMG's copyrighted sound recordings in the U.S.
34. All documents supporting McCrady's testimony in the first full paragraph on page 15 that WMG "view[s] the ad-supported audio business model with caution, because it has yet to generate stable revenue streams."
35. All forecasts, projections, valuations, and studies related to revenues generated by ad-supported services.
36. All agreements (including amendments thereto) between WMG and imeem in connection with WMG's copyrighted sound recordings, as referenced on page 15 of McCrady's testimony.



37. All forecasts, projections, studies, business plans, valuations, and accounting statements relating to WMG's investment in imeem.
38. All documents related to WMG's decision to write down its investment in imeem as reported in WMG's March 31, 2009 10Q report.
39. Documents sufficient to show the sound recording performance royalties paid by imeem annually since January 1, 2005.
40. Documents sufficient to show amount of imeem's annual revenues since January 1, 2005.
41. All agreements (including amendments thereto) between WMG and MySpace Music in connection with WMG's copyrighted sound recordings, as referenced on page 15 of McCrady's testimony.
42. Documents sufficient to show the sound recording performance royalties paid by MySpace Music annually.
43. Documents sufficient to show amount of MySpace Music's annual revenues.
44. Documents sufficient to show WMG's monthly revenues derived from its relationship with MySpace Music since September 2008.
45. All financial forecasts, projections, valuations, and studies related to the WMG's agreements with imeem and MySpace Music in connection with audio streaming of WMG's copyrighted sound recordings.
46. Income statements and other financial documents in WMG's possession, custody or control that are sufficient to identify monthly revenues, costs, profits, losses and other financial information regarding imeem and MySpace Music since January 2007.
47. All documents supporting McCrady's testimony in the second full paragraph on page 15 that imeem and MySpace Music have "limited ability to generate significant per-user revenue."
48. All agreements (including amendments thereto) between WMG and "custom radio" services, including those referenced on page 16 of McCrady's testimony.
49. All documents supporting McCrady's testimony in the second full paragraph on page 16 that "the existence of the statutory licensing option has depressed the market rates for the use of copyrighted music in customized audio streaming deals."
50. All internal and external emails, letters, reports, analyses and other documents in WMG's possession related to the negotiation of voluntary agreements for the reproduction and performance of sound recordings under Sections 112(e) and 114 of the Copyright Act. (McCrady at 1, 3.)

51. All internal and external emails, letters, reports, analyses and other documents related to Warner Music Group's examination of (a) the substitutional impact that statutory webcasting has on sales of physical products and on other revenue sources and (b) the substitutional impact that interactive streaming has on sales of physical products and on other revenue sources. (McCrary at 2)

***Requests Related to Witness Statement of Barrie Kessler***

52. SoundExchange's organizational chart of the 40 full-time staff members, as referenced in Barrie Kessler's ("Kessler") testimony in the second paragraph on page 4.
53. Documents sufficient to show SoundExchange's annual administrative expenses – as referenced in Kessler's testimony in the second paragraph on page 4 and at pages 22-26 – from 2002 to the present.
54. All reports, documents or other records related to audits of SoundExchange from 2002 to the present, including but not limited to (a) audits of financial performance and audits of royalty distribution, and (b) those referenced in Kessler's testimony in the second paragraph on page 4.
55. Documents sufficient to show the aggregate webcasting royalty payments distributed by SoundExchange in each year from 2002 through the present, including (a) the aggregate number of artists who have received webcasting royalty payments from SoundExchange each year from 2002 to the present, and (b) the aggregate number of artists who have received webcasting royalty payments from SoundExchange from 2002 to the present (i.e., in aggregate, not year by year).
56. Documents sufficient to show the aggregate webcasting royalty payments received by SoundExchange in each year from 2002 through the present, including (a) the identity of each service whose webcasting performances generated webcasting royalty payments received by SoundExchange for each such year, (b) the volume of performances attributed to each such service in each such year, and (c) the webcasting royalty payments received by SoundExchange attributable to each such service in each such year.
57. Documents sufficient to identify the 500 artists who received the largest aggregate webcasting royalty payments from SoundExchange in each year from 2002 through the present, including (a) the aggregate webcasting royalty payments made to each such artist in each such year, and (b) the aggregate number of performances attributable to each such artist in each such year.
58. All industry analyses, forecasts, valuations, and studies in SoundExchange's possession related to the sound recording performance royalty for non-interactive statutory webcasting.

59. All analyses, forecasts, valuations, reports or studies from 2002 to present in SoundExchange's possession relating to or estimating demand, and/or the elasticity of demand, for services subject to Section 114 of the Copyright Act.
60. All analyses, forecasts, valuations, reports or studies from 2002 to present in SoundExchange's possession relating to the extent to which (a) statutory webcasting substitutes for sales of music (e.g., sales of CDs, MP3s, or other formats) and substitutes for subscriptions to interactive services, and (b) statutory webcasting enhances or promotes sales of music (e.g., sales of CDs, MP3s, or other formats) and/or enhances or promotes subscriptions to interactive services.
61. All meeting minutes, agendas and notes related to meetings of SoundExchange's Board of Directors and/or the Licensing Committee, from 2002 to the present.
62. Documents sufficient to identify: (a) which services pay royalties under the current statutory license (as determined by the CRB for the 2006-2010 time period), and (b) which services pay royalties under other license agreements (i.e., WSA agreements).
63. For those services that pay royalties under WSA agreements, documents sufficient to identify the WSA agreement under which each service pays.
64. For those services that pay royalties to SoundExchange as a percentage of revenue pursuant to a license agreement, documents sufficient to show (a) how the subject revenue is defined, (b) the total amount of such subject revenue for each such service for each year since 2002, and (c) the percentage of subject revenue those particular services pay.
65. For those services that pay royalties to SoundExchange based on the number of subject performances, documents sufficient to show how many performances each service had each year since 2002.
66. All documents in the possession of SoundExchange or any of its agents (including members of its Board of Directors or of its licensing committee), which relate to the revenues, costs and profits (or lack thereof) of services which pay it a royalty.
67. All documents in the possession of SoundExchange or any of its agents (including members of its Board of Directors or of its licensing committee), which relate to the relative value of the performance royalty of Section 114 of the Copyright Act and the ephemeral rights of Section 112 of the Copyright Act.

***Requests Related to Witness Statement of Kim Roberts Hedgpeth***

68. All documents in AFTRA's possession related to SoundExchange Board meetings, including all meeting minutes, agendas and notes related to meetings of SoundExchange's Board of Directors and/or the Licensing Committee.
69. All studies, forecasts, valuations, and projections in AFTRA's possession related to the "compulsory license fees at issue in this case," as referenced in Kim Roberts Hedgpeth's ("Hedgpeth") testimony on the top of page 3.
70. All communications between Hedgpeth and/or AFTRA on one hand and SoundExchange and/or its agents on the other hand related to statutory webcasting royalties and/or this CRB proceeding.
71. Documents sufficient to identify the 100 AFTRA artists who received the most revenues from webcasting royalty payments from SoundExchange each year from 2002 through the present, and the amount each such member received in the given year.

***Requests Related to Witness Statement of George Ford***

72. All documents pertaining to Dr. George Ford's "understanding . . . that the recording artists and record companies reached an agreement that five percent (5%) of the payments for activities under Section 112(e) and 114 should be allocated to Section 112(e) activities," *see* Ford at 15, including the agreement or agreements (and amendments thereto) referenced in Dr. Ford's statement.

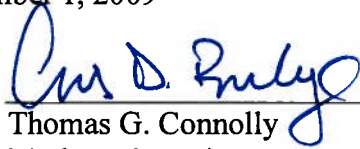
***Requests Related to All Witness Statements Submitted by SoundExchange***

73. All documents referred to by SoundExchange's six witnesses in their written direct testimonies submitted in this CRB proceeding.

Respectfully submitted,

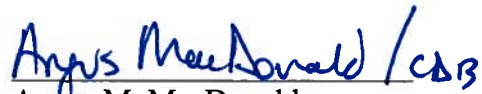
December 1, 2009

By



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## CERTIFICATE OF SERVICE

I, Charles Breckinridge, do hereby certify that copies of the foregoing “RealNetworks, Inc.’s and Live365, Inc.’s First Set of Requests for Production of Documents from SoundExchange, Inc.” were sent via email and first class mail this 1<sup>st</sup> day of December, 2009, to the following:

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