

UNITED STATES COPYRIGHT ROYALTY JUDGES

| | | |
|-------------------------------------|---|--------------------|
| In the Matter of | } | |
| | } | |
| Digital Performance Right in Sound | } | Docket No. 2009-1 |
| Recordings and Ephemeral Recordings | } | CRB Webcasting III |
| _____ | } | |

ORDER DENYING ISSUANCE OF SUBPOENAS
FOR NONPARTY WITNESSES

The Copyright Royalty Judges (“CRJs”) consider a motion filed by RealNetworks, Inc. (“RealNetworks”), and joined by Live365, Inc. (“Live365”), for the issuance of subpoenas to nonparties Pandora Media, Inc.; Slacker, Inc.; and CBS Interactive, which operates webcasting services including Last.fm Ltd. RealNetworks seeks document production and deposition testimony from these nonparty witnesses to, in its view, verify the accuracy of statements made in the direct case of SoundExchange, Inc. (“SoundExchange”) by Dr. Michael Pelcovits, an economist, and W. Tucker McCrady, associate counsel for Warner Music Group.

The RealNetworks’ motion raised a legal question as to whether the Judges have authority under the subpoena provision of chapter 8 of the Copyright Act, 17 U.S.C. § 803(b)(6)(C)(ix), to issue subpoenas to nonparty witnesses. After conducting a hearing on the matter on January 12, 2010, the Judges referred the legal question to the Register of Copyrights. *Request for Interpretation of a Material Question of Law from the Register of Copyrights*, Docket No. 2009-1 CRB Webcasting III (January 28, 2010). The Register responded, on February 22, 2010, as follows:

For the above-stated reasons, the Register concludes that the CRJs do have the authority to subpoena a witness to appear and give testimony or to produce and permit inspection of documents or tangible things even when that witness is not a participant in the proceeding and his or her testimony has not yet been submitted in the proceeding. This authority is restricted to instances where the resolution of the proceeding would be substantially impaired by the absence of such testimony or production of documents or tangible things. Additionally, Congress expressly preserved the CRJ’s power to request information from nonparticipants in certain cases when the CRJs do not have the power to issue subpoenas. This power to request information may be invoked in those instances where such testimony is relevant to the resolution of a material issue of fact, even when its absence would not substantially impair the resolution of the proceeding (and, therefore, a subpoena could not be issued). The CRJs have not asked for any determination regarding what may constitute either substantial impairment of

resolution of the proceeding or relevance to the resolution of a material issue of fact, and therefore no guidance is offered on those questions. It is, however, pertinent to observe that while the statute grants the CRJs the authority to issue subpoenas in certain circumstances, it does not compel them to issue subpoenas in any circumstance. Furthermore, it is noteworthy that even under the broader grant of subpoena power in the provision initially introduced in the House [of Representatives], Congress stated that it “does not anticipate that the use of subpoena power will become a common occurrence” and that “[t]he CRJs are expected to exercise this power judiciously and only in those instances where they believe a subpoena is necessary to obtain information that the parties have not provided and that the judges deem necessary to make their decision.”

Memorandum Opinion on Material Questions of Substantive Law, Docket No. 2009-1 CRB Webcasting III, at 8 (February 22, 2010) (citation omitted). In light of the Register’s opinion, we examine RealNetworks’ motion to determine whether the resolution of the proceeding would be substantially impaired by the absence of the documents and testimony sought in the requests. For the reasons stated below, we determine, at this time, that it would not.

Section 351.9(e) of the Judges’ rules, 37 C.F.R., provides that parties to a proceeding may file motions for subpoenas. There is good reason that this provision is located in the portion of Judges’ rules dealing with the conduct of hearings, and not in earlier provisions governing discovery of the written direct statements.¹ It would be the rare instance where, at the initial stage of the filing of written direct statements before *any* testimony had been admitted into the record, that it was evident that certain testimony was so unlikely to be introduced that it was necessary to compel its production. Further, it would also be the rare instance where it would be evident, at this stage of the proceeding, that the absence of such testimony would ultimately substantially impair the Judge’s resolution of the proceeding. The documents and testimony sought by RealNetworks are not that rare instance.

Dr. Pelcovits’ filed written direct testimony makes generalized statements about the webcasting popularity and success of Pandora, Inc., his opinion that the services of Slacker, Inc. make a good proxy for section 114 statutory webcasting, and how the success of Last.fm, Ltd. led to its purchase by CBS Interactive for \$280 million. Mr. McCrady states that Slacker offers a custom radio service which, in his view, weakens Warner Music Group’s ability to negotiate with Slacker in light of a recent decision of the United States Court of Appeals for the Second

¹ The Judges disagree with SoundExchange that the absence of a corresponding subpoena provision in the discovery provision for rate adjustment proceedings, 37 C.F.R. § 351.5, prohibits them from issuing a subpoena at that stage, or any stage, of the proceeding. *See, SoundExchange’s Opposition to RealNetworks’ and Live 365’s Motions for Issuance of Subpoenas to Non Party Witnesses*, Docket No. 2009-1 CRB Webcasting III, at 4-5 (December 17, 2009).

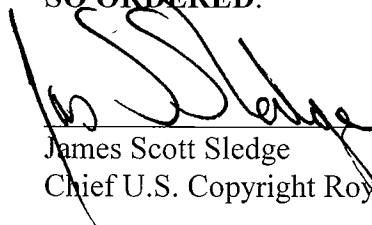
Circuit. RealNetworks argues that it must have the requested information from Pandora, Slacker and CBS Interactive to test the veracity of these statements. As the Register's opinion makes clear, subpoenas may not be issued for the purpose of preparing for witness cross-examination. It is only where the absence of the sought-after testimony or documents would substantially impair the Judge's ultimate resolution of the case. We cannot determine, at this stage of the proceeding, that the accuracy and weight of Dr. Pelcovits' and Mr. McCrady's opinions are crucial to our determination and therefore warrant the issuance of subpoenas.

Furthermore, we are not persuaded that neither Real Networks nor Live365 can adequately prepare for cross-examination of these two witnesses without the requested testimony and documents. By our rules, it is SoundExchange's burden to produce the documentation supporting these witnesses' assertions, 37 C.F.R. § 351.5(b), which they contend they have produced. *SoundExchange's Opposition to RealNetworks' and Live 365's Motions for Issuance of Subpoenas to Nonparty Witnesses*, Docket No. 2009-1 CRB Webcasting III, at 6-8 (December 17, 2009). The weight to be afforded the statements of these witnesses, which has yet to be determined, is dependent in part upon such production. If further supporting documentation is necessary, it may be compelled by motion or *sua sponte* by the Judges.

While joining in RealNetworks' motion, Live365 argues that the information sought in the subpoenas is necessary to the presentation of its direct case. *Live365, Inc.'s Joinder in RealNetworks Inc.'s Motion for Issuance of Subpoenas to Nonparty Witnesses*, Docket No. 2009-1 CRB Webcasting III, at 2 (December 10, 2009)(information obtained from Pandora, Slacker and CBS Interactive "could easily be incorporated into the economic model proffered by Live 365's expert witness, Dr. Mark Fratrick"); *Live 365, Inc.'s Reply in Support of Motion for Issuance of Subpoenas to Nonparty Witnesses*, Docket No. 2009-1 CRB Webcasting III, at 2 (December 23, 2009)(record would be incomplete if financial information from only two commercial webcasters, RealNetworks and Live365, is included in the record). Subpoenas are not permitted for purposes of building one or more party's direct cases. Without any testimony yet admitted in this proceeding, it is not possible for the Judges to determine that the sought-after information from Pandora, Slacker and CBS Interactive substantially impairs our determination of this proceeding.

Wherefore, the motion of RealNetworks **IS DENIED**.

SO ORDERED.



James Scott Sledge
Chief U.S. Copyright Royalty Judge

DATED: March 5, 2010