PUBLIC VERSION

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

In re **DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)**	**DOCKET NO. 14-CRB-0001-WR (2016-2020)**

NATIONAL ASSOCIATION OF BROADCASTERS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Bruce G. Joseph (D.C. Bar No. 338236)
Karyn K. Ablin (D.C. Bar No. 454473)
Michael L. Sturm (D.C. Bar No. 422338)
Jennifer L. Elgin (D.C. Bar No. 432975)
Christopher M. Mills (D.C. Bar No. 492840)
WILEY REIN LLP
1776 K St. NW
Washington, DC 20006
Phone: 202-719-7000
Facsimile: 202-719-7049

Counsel for the National Association of Broadcasters

June 19, 2015

TABLE OF CONTENTS

NATIONAL ASSOCIATION OF BROADCASTERS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. EXECUTIVE SUMMARY

1. The evidence presented by the National Association of Broadcasters ("NAB") demonstrates the urgent need for a significant reduction in the royalty rates for radio broadcasters who simulcast their programming. The widespread availability of simulcasting would benefit not only broadcasters, record labels, and performers, but also the listening public that relies on this uniquely free and locally-focused medium whether it is received over-the-air or online. After nearly a decade under the current rate structure, the results are clear—simulcasting is unprofitable and as a result growth is stagnating. The Judges should recognize the prohibitive effect of current rates and set a new course for simulcasting to the benefit of the entire music ecosystem, as well as broadcast listeners.

2. Notwithstanding the evidence that rates already are essentially confiscatory, SoundExchange argues once again for even higher rates. SoundExchange's asserted justification can be summarized in one word: convergence. According to SoundExchange, technologically sophisticated music services are now probing the boundaries of the statutory license, becoming more and more interactive and capable of targeting favored artists and recordings to listeners in ways previously limited to interactive services. As a result, according to SoundExchange, rates for unprofitable statutory services should be set even closer to the stratospheric levels at which unprofitable interactive services have struggled to survive.

3. The services have collectively proven, over the course of the trial, that SoundExchange's convergence theory is unsupported and has numerous flaws. Even beyond this, one fact is very clear: the convergence theory is completely inapplicable to simulcasting. In every material respect, simulcasting is unique and differs from the custom and interactive services that SoundExchange alleges are converging:

- Simulcasting is not becoming more and more interactive or customized, it is programmed entirely by the broadcaster and cannot be influenced by the listener;
- Simulcasting is radio, not a music service, and simulcast programming (even on music-formatted radio stations) relies heavily on personalities, news/talk/sports/weather, and other non-music content;
- Simulcasting is community focused and locally based, not nationally;
- Simulcasting serves as an important community resource, particularly in times of need, and embodies radio's obligations to serve the public interest, unlike music-only services;
- Simulcasting has no feedback loops, thumbs up/thumbs down, or any other mechanism to increase the likelihood of hearing a particular sound recording or even artist at a particular time;
- Simulcasting is one-to-many, not one-to-one; and
- Because it is radio programming received through an alternative means, simulcasting has the same promotional effects that are conceded by SoundExchange with respect to terrestrial broadcasts, and does not substitute for sales or on-demand plays of sound recordings.

For the same reasons that SoundExchange argues that alleged convergence with interactive services justifies an increase in license fees, these essentially undisputed facts showing the "non-convergence" of simulcasting demonstrate that it is sufficiently distinct from other statutory services to justify a significantly lower rate.

4. Other record facts also confirm the need for a dramatic reduction in the rates applicable to simulcasting. The undisputed testimony from radio broadcasters

demonstrates that simulcasting is unprofitable now and is unlikely ever to become profitable at anything approaching the current rates. As a result, radio broadcasters are not simulcasting sound recordings at all (Julie Koehn), only simulcasting a small minority of their music-formatted stations (Steve Newberry), limiting or downplaying access to the stream (Ben Downs), or not actively promoting the stream for fear of increasing their simulcast audiences (John Dimick). The relative unavailability of simulcasting is not in the public interest. Consumers should be able to access their local radio stations—and all the essential information and services they provide—as widely as possible. Nor are the interests of the record labels and artists served, because they would be paid more if broadcasters had a reason to promote their simulcasts aggressively. Only a significant rate reset will alter will these economics that are preventing the growth of simulcasting.

5. In this respect, simulcasting is not alone. The high CRB webcasting rates have taken a heavy toll on the webcasting industry generally. The evidence indicates that not a single webcaster has ever achieved profitability – due primarily to the high sound recording royalty rates. Even Pandora, far and away the largest and most successful statutory service, has never had a single year of profitability – and it pays the pure play rates that are 40% below the statutory rate and 44% below the rates paid by simulcasters. In other words, the system is broken and should be fixed.

6. The testimony of Michael Katz, lead economist for the NAB, and the other economists also demonstrates the reasons why a per play rate much lower than the current rate is appropriate for simulcasting. Professor Katz demonstrated that the current rates are largely the product of an analysis of interactive service agreements in the *Web II*

and *Web III* proceedings. That analysis was technically flawed, failed to account for the demonstrated differences between subscription interactive services and ad-supported webcasting services, and ignored evidence of the major labels' extraordinary market power. New evidence from the labels' Federal Trade Commission ("FTC") submissions in connection with Universal's acquisition of EMI, which was unavailable in both *Web II* and *Web III*, now proves that the repertoires of the labels are complements, that the labels do not compete with one another with respect to licensing of interactive services (indeed, [[ ]]), and as a result the interactive services market is not effectively competitive as required for a proper benchmark market. And, as Steve Newberry testified, the rates agreed to by NAB in its 2009 WSA agreement were the direct result of the flawed analysis and outcome of *Web II*, and were heavily influenced by the shadow of *Web III*.

7. Professor Katz also explains why a proper royalty rate for simulcasting is at the low end of any reasonable range, consistent with a rate of approximately $0.0005 per performance. As Professor Katz discussed, in an effectively competitive market, prices would be pushed towards the seller's marginal costs, including opportunity costs. It is undisputed that, as with many intellectual property licenses, the out-of-pocket marginal costs of the statutory license are near zero. Moreover, for simulcasting, the evidence shows that the opportunity costs for the labels also are near zero and are likely, in many cases, to be negative due to the promotional value of simulcasting.

8. As Professor Katz explained, in this context, the concept of opportunity cost is essentially synonymous with promotional and substitutional effects with respect to licensing and sales of sound recordings through different channels. The record proves

unequivocally that radio is promotional—indeed, that is conceded by SoundExchange—and that the same attributes that make it so are equally present in simulcasting. Direct evidence from the labels, including Aaron Harrison's admission that the substitution continuum runs from simulcasting to custom to interactive, and SoundExchange's overall "convergence" theory all confirm that simulcasting is the least substitutional and the most promotional of the statutory services, and therefore licensing simulcasting has little or no opportunity cost (if not a "negative" opportunity cost). Thus, it is in the interest of the recording industry and artists to establish a rate for simulcasting that is sufficiently low that it will encourage broadcasters to start and to promote aggressively their simulcast streams—every listener who converts from over-the-air broadcasting to the simulcast is found money for labels and artists.

9. The NAB's rate proposal is also consistent with and is corroborated by (i) Professor Fischel and Lichtman's analysis of the iHeartMedia direct webcasting licenses, (ii) Professor Shapiro's analysis of the Pandora/Merlin agreement, (iii) proper consideration of the interactive-service and Apple iTunes Radio benchmarks advanced by SoundExchange; and (iv) the effective per play rate actually paid by [[ ]].

10. For its part, although SoundExchange belatedly pays lip-service to the governing requirement that license fees under the statutory license reflect "effective competition," SoundExchange's case is actually premised on the supra-monopoly market power of the major labels. Thus, SoundExchange (for the fourth time before the CRB) again relies primarily on the license fees charged by the major record labels to interactive

on-demand services. This time, however, the record is clear—those licenses do not reflect competitive forces:

- The major label witnesses now admit that they do not engage in price competition when licensing interactive services;
- SoundExchange's lead economist, Professor Rubinfeld, admits that the catalogs of the majors are "must haves" and economic complements for the interactive services; and
- Presentations by SoundExchange's lead advocates to the Federal Trade Commission in support of the UMG/EMI merger conclusively demonstrate the lack of competition. Those submissions convinced the FTC that the merger would not harm competition in licensing interactive services, because there already was no meaningful competition:
  - Professor Rubinfeld advised the FTC that after analysis of the industry, [[ ]];
  - He further told the FTC that the labels [ ];
  - UMG and EMI demonstrated to the FTC that they, and the other majors, [[ ]]; and
  - Indeed, UMG did not mince words, telling the FTC that [[ ]

A market with these characteristics is decidedly not one that reflects effective competition.

11. SoundExchange presses its anti-competitive theme in other ways, as well. SoundExchange's theory is that any bargaining power on the part of the services, as demonstrated by concessions by the labels in negotiation, is equivalent to "competition."

But Professor Rubinfeld admits that even monopolists negotiate, and, in any event, a system in which only a small share of any surplus flows to consumers is not consistent with "effective competition." SoundExchange attempts to argue that a lack of effective competition in the interactive service market (or the majors being must haves) is not a problem because the same is true for noninteractive services. This is just another way of saying that it is appropriate to set non-competitive prices, which is contrary to the law. Another of SoundExchange's economists, Dr. Blackburn, opines that the Judges should not pay attention to what he calls "diversionary promotion"—promotion in which the labels compete with each other for market share—should only consider promotion that expands record sales in the aggregate. In other words – the Judges should not consider normal competitive forces. SoundExchange witness Darius Van Arman objects to having to compete for fear that it might lead to what he calls a "race to the bottom"—what others call "price competition."

12. SoundExchange's analysis of its preferred benchmarks suffers from additional fatal flaws. For example,

- Professor Rubinfeld's analysis of his primary interactive service benchmark suffers from the same flaws as prior iterations of the benchmark, failing properly to account for the overwhelmingly dominant business model for statutory webcasting – the free to the consumer, ad-supported model;

- Professor Rubinfeld's analysis depends critically on an assumption that license fees will be a constant percentage of revenue, an assumption that lacks any economic support (and for which he presented none in his written testimony);

- Professor Rubinfeld's analysis fails to account for licensees' costs (other than license fees), dramatically reducing any margin that may ultimately be available for ad-supported services;

- Professor Rubinfeld fails to account for any difference between the promotional or substitutional effect of interactive and noninteractive services, claiming to be "agnostic," although he admits that the Judges must account for any differences between the two types of services; and

- Professor Rubinfeld uses biased weighting in his computation of average per-performance fees, and applies an invalid adjustment for short plays and skips for which interactive services do not pay but for which he proposes statutory licensees pay.

Correcting only the reasonably easily quantified errors results in a license fee far closer to NAB's proposal than to SoundExchange's.

13. In addition, Professor Rubinfeld's analysis of SoundExchange's secondary iTunes Radio benchmark fails the red-face test, as he claims it supports rates that even he concedes that no service that could opt for the statutory license would pay. Moreover, Professor Rubinfeld's analysis: (i) is based on an invalid *ex post* view of the service's performance and not the parties' expectations; (ii) includes certain [[ ]] that appear not to be properly attributable to the service; (iii) ignores [[ ]]; (iv) ignores the effect of the shadow of the statutory license and [[ ]], which biases the license fees upward; and (v) improperly ignores evidence in his possession about the [[ ]] noncompensable plays allowed under the iTunes Radio agreements. Adjusting for Professor Rubinfeld's mistreatment of the [[ ]] and the number of non-compensable plays allowed to Apple, brings the actual effective rate implied by the iTunes licenses below [[ ]], a number that still fails to correct for other flaws in the analysis.

14. Not satisfied with a per play rate that begins at an astronomical level ($0.0025) and escalates annually from there, SoundExchange now is arguing it should

also be entitled to a "greater of" rate structure that would require payment of the per-play rate or 55% of the service's revenue, whichever is higher. This assertion once again is based solely on agreements in the flawed interactive services market.

15. Professor Katz explained the reasons that such a percentage of revenue component in the fee structure would distort investment incentives and would fail, as an economic matter, to implement the statutory mandate that fees reflect the relative contributions of the parties. Simply put, the percentage of revenue tax would discourage innovation and, contrary to the law, a service that contributed more and enhanced the value of its service would actually pay higher royalties than if it had not made the contribution.

16. At a more practical level, the evidence shows that a percentage of revenue fee structure -- at any rate, let alone the 55% demanded by SoundExchange—would be both unprecedented and totally unworkable for simulcasters in the current environment. There is no agreement between a simulcaster and a major record label that provides for a percentage of revenue component in determining a fee for simulcasting; [[ ]] And apart from [[ ]], which the record proves is a unique entity, there is no evidence of any market agreement in which a simulcaster has agreed to pay any percentage of revenue for simulcasting.

17. The absence of marketplace agreements is not happenstance, but reflects a host of unanswered questions as to how a percentage of revenue royalty would be administered in the unique context of simulcasting. While SoundExchange's proposal recognizes that terrestrial revenues should be immune from SoundExchange, it sheds

almost no light on how bundled revenues (*e.g.*, a commercial that is heard on both the broadcast and stream) should be allocated between terrestrial operations and streaming, other than to say it should be "fair" and "in accordance with GAAP." Apart from invoking "fairness," SoundExchange neither specifies a metric for allocation nor the required proof that data are uniformly available to broadcasters to implement whatever metric supposedly applies.

18. SoundExchange also provides no express exclusion for revenues from non-music programming, which is pervasive in simulcasting, even though its own expert Professor Rubinfeld acknowledged that SoundExchange has no economic basis to demand a share of those revenues. Nor does it make any provision for allocating between the music and non-music portions of any particular simulcast program. And when SoundExchange's designated witness on percentage of revenue issues was queried as to a situation in which a morning program streamed a single sound recording in the midst of hours of talk, he had no idea whether SoundExchange would claim 0%, 55%, or some pro-rated percentage of the revenue; his only suggestion was that the matter could be discussed with SoundExchange. In sum, as Professor Weil explained, in the present scenario and on the present record, a percentage of revenue fee is unworkable for simulcasters and would constitute an invitation to unending audits and disputes. Indeed, if simulcasters needed a final push to put an end to their losses and shut off their streams, and thereby further disadvantage both the public and even the record companies, the imposition of a percentage of revenue fee component could well be the catalyst for that determination.

19. Finally, the NAB addresses a number of issues with respect to terms. Most importantly, and consistent with the evidence presented at trial, the NAB includes a new proposed definition of "broadcast retransmission" that conforms to the intent that a lower simulcast rate should apply to non-customized streaming that is, with certain limited flexibility, the same as that being performed over the air. This definition expressly prohibits the type of customization of the stream that SoundExchange claims would increase substitutional effects, but allows substitution of advertisements that may be necessary for simulcasters who are attempting to sell separate advertising on the stream, programming for which the simulcaster does not have Internet rights, and programming that does not rely on the statutory license.

20. The NAB also explains why the Judges should reject SoundExchange's latest attempt to remove the requirement that audits be performed by CPAs and the request that the reporting and payment period be shortened from 45 to 30 days. The NAB also asks the Judges (i) confirm that only a single late fee, tied to 26 U.S.C. § 6621, be allowed in the event of late submission of a payment or report; (ii) limit the duration of any audits to a period of six months or less, to avoid undue expense and harassment; (iii) exclude short performances from the fee calculation; (iv) add a notice and cure provision common to commercial agreements in the event of alleged breach; and (v) allow broadcasters to recover any overpayments made to SoundExchange. SoundExchange opposes all of these proposals. The NAB also asks that the Judges confirm, consistent with marketplace agreements and common sense, that Music Aggregate Tuning Hours do not include discrete programming segments and half hour segments that do not include performances of sound recordings.

II. THE NATIONAL ASSOCIATION OF BROADCASTERS AND ITS WITNESSES

21. The National Association of Broadcasters ("NAB") represents local radio broadcasters nationwide, many of which stream their broadcasts over the Internet and who will therefore be directly and significantly affected over the next five years by the rates set by the Judges in this proceeding. NAB Written Direct Statement, Introductory Memorandum at 1.

A. NAB'S FACT WITNESSES

22. **Steve Newberry** is the President and Chief Executive Officer of Commonwealth Broadcasting Corporation, which is a twenty-station radio group located in Kentucky. He is an owner and operator of radio stations and a longtime veteran of the radio industry. Mr. Newberry testified that local radio serves the community of which it is a part and is not just a music service. Mr. Newberry also discussed the 2009 negotiations between the NAB and SoundExchange under the Webcaster Settlement Act, in which he led the NAB negotiating team, and described the various factors that influenced the WSA agreements and explained why it does not reflect reasonable license fee rates. Mr. Newberry's Written Direct Testimony ("Newberry WDT") was admitted into evidence. *See* NAB Ex. 4001.

23. **John Dimick**, who has 35 years of experience in the radio industry, is the Senior Vice-President of Programming and Operations at Lincoln Financial Media Company ("LFMC"), which operates radio stations in the Atlanta, Miami/Ft. Lauderdale, Denver, and San Diego markets. Mr. Dimick's testimony described the economics of Internet simulcasts of LFMC's over-the-air radio broadcasts, including that, while LFMC

has been attempting to make streaming of its music-formatted stations profitable for many years, streaming is not now profitable and it never has been. Mr. Dimick also testified how over-the-air radio and simulcast streams provide enormous promotional value to labels and artists. Last, Mr. Dimick testified that simulcasting is distinct from other webcasting and lacks the customization that SoundExchange relies upon to support its fee proposal. Both Mr. Dimick's Written Direct Testimony ("Dimick WDT") and his Written Rebuttal Testimony ("Dimick WRT") were admitted into evidence. *See* NAB Exs. 4002, 4009 (respectively).

24. **Robert Francis Kocak**, who is known professionally as Buzz Knight and has spent nearly 35 years in the radio industry, is the Vice President of Program Development at Greater Media, Inc., which is a privately owned company that operates radio stations in the Boston, Charlotte, Detroit, and New Jersey markets. Mr. Kocak provided testimony regarding how most successful radio stations, including most music-formatted stations, owe their success principally to elements other than music. Mr. Kocak's testimony also addressed his interaction with record labels and their efforts to promote their artists and recordings. Mr. Knight's Written Direct Testimony ("Knight WDT") was admitted into evidence. *See* NAB Ex. 4003.

25. **Johnny Chiang** is the Program Director at Cox Media Group in Houston, Texas. Mr. Chiang has been a commercial radio Program Director and Content Producer for over 25 years in various radio formats and he provided testimony regarding the significant effort expended by record labels to ensure airplay and artist exposure and his experience with record label promoters and independent music promoters. Mr. Chiang's

Written Direct Testimony ("Chiang WDT") was admitted into evidence. *See* NAB Ex. 4004.

26. **Ben Downs** is Vice President and General Manager of Bryan Broadcasting Corporation ("Bryan Broadcasting"), which owns and operates nine radio station formats located in and around College Station, Texas. Mr. Downs, who has over 45 years of experience as a broadcaster, has been managing these stations for nearly 25 years. Mr. Downs testified regarding his company's inability to make streaming a viable business operation, including the revenue and expenses associated with streaming. Mr. Downs also described how the success of his music-formatted radio stations is largely driven by non-music related factors. Mr. Down's Written Direct Testimony ("Downs WDT") was admitted into evidence. *See* NAB Ex. 4005.

27. **Julie Koehn** is President and General Manager of Lenawee Broadcasting Company, the licensee of WLEN Radio, in Adrian, Michigan. Ms. Koehn has held that position since 1990. Ms. Koehn provided testimony regarding why radio broadcasters and the programming they transmit are so important to the communities they serve. Ms. Koehn also provided testimony that Lenawee Broadcasting made a conscious decision not to stream music on the Internet because it believes that the current rate structure for SoundExchange royalties could result in unpredictable financial losses to the company. Ms. Koehn's Written Direct Testimony ("Koehn WDT") was admitted into evidence. *See* NAB Ex. 4006.

28. **Jean-Francois Gadoury** is the Chief Technology Officer of Triton Digital, which provides streaming-related technology services to many leading radio broadcasters. Mr. Gadoury's testimony described how certain situations can lead to

overcounting of sound recording performances on a stream. Mr. Gadoury's Written Direct Testimony ("Gadoury WDT") was admitted into evidence. *See* NAB Ex. 4007.

B. NAB'S EXPERT WITNESSES

29. **Michael Katz** is NAB's expert economist. He holds the Sarin Chair in Strategy and Leadership at the University of California at Berkeley. He also holds a joint appointment at the Haas School of Business Administration and the Department of Economics at Berkley. He specializes in the economics of industrial organizations, which includes the study of competition and pricing, as well as antitrust and regulatory policy. He has published numerous works in the field of economics and has previously served as Chief Economist at the Federal Communications Commission and as Deputy Assistant Attorney General for the United States Department of Justice. He earned his A.B. in economics from Harvard University and his doctorate in economics from Oxford University.

Professor Katz testified regarding the detailed economic analysis he conducted of critical issues in the current proceeding. Professor Katz addressed economic issues central to this case, including: (i) economic principles that should guide application of the willing-buyer/willing-seller standard, (ii) the characteristics of effectively competitive prices and how they promote consumer welfare and economic efficiency, and (iii) characteristics of effectively competitive markets.

Professor Katz testified that the rates adopted in *Web II* were based on a severely flawed interactive services benchmark analysis that led to rates well in excess of those that would have been negotiated by a willing buyer and willing seller in an effectively competitive market. Professor Katz also testified that the negotiated license fees in the

NAB/SoundExchange Agreement under the Webcaster Settlement Act do not reflect rates that would exist in an effectively competitive market and are also not a valid benchmark. He offered boundary limits for statutory rates for simulcasting based on the record companies' extensive efforts to promote radio airplay and his analysis of the Judges' decision in the *SDARS II* case.

Professor Katz also described the flaws in Professor Rubinfeld's interactive service benchmark analysis. He testified that, with the most quantifiable flaws corrected, an interactive services analysis would conservatively lead to a per-performance rate on the order of $0.0005, as proposed by NAB, not the $0.0025 - $0.0029 that SoundExchange now seeks. Professor Katz discussed numerous other flaws in Professor Rubinfeld's benchmark calculation, each of which creates significant upward bias and all of which together result in an indefensibly high per-performance rate. Professor Katz also demonstrated that Professor Rubinfeld's analysis of the iTunes Radio license agreements was invalid and dramatically overstated the per-performance fees implied by those licenses. He further explained the flaws in Professor Rubinfeld's analysis of the royalties paid by four services that Professor Rubinfeld considered "corroborating." Finally, Professor Katz discussed the flaws in SoundExchange's proposal for a "greater of" royalty structure and demonstrated why the proposed percentage of revenue fee would be distortionary and contrary to the statutory goal of having license fees reflect relative contributions to value. Both Professor Katz's Written Direct Testimony ("Katz WDT") and his Amended Written Rebuttal Testimony ("Katz AWRT") were admitted into evidence. *See* NAB Exs. 4000, 4015 (respectively).

30. **David B. Pakman** is a Partner at the capital firm Venrock, where he has worked since 2008. At Venrock, Mr. Pakman focuses on investing in, and helping build, early-stage internet, digital media, and consumer companies. He also has extensive prior experience in the digital music industry, not only as an investor, but also as the founder of a digital music services company and as a CEO and employee of others, including Apple (co-founder of the original Apple Music Group), N2K, Myplay, Inc., and eMusic. He has spent more than 14 years in the digital music industry, negotiated hundreds of licensing agreements with major and independent labels, music publishers and performing rights organizations, sold music and music-related services to millions of consumers, and built and launched multiple successful digital consumer products. Mr. Pakman explained that high sound recording royalties were crippling the webcasting industry and restricting growth and investment. Mr. Pakman's Written Direct Testimony ("Pakman WDT"), which was co-sponsored by NAB and iHeartMedia, Inc., was admitted into evidence. *See* IHM Ex. 3216.

31. **Roman Weil** is a Certified Public Accountant and the V. Duane Roth Professor Emeritus of Accounting at the Booth School of Business at the University of Chicago. He is also currently a visiting professor at the Department of Economics at Princeton University and the McDonough School of Business at Georgetown University. He holds a B.A. in economics and mathematics from Yale University and an M.S. in industrial administration and Ph.D. in economics, both from Carnegie-Mellon University. Professor Weil has served on the faculties of numerous leading universities and has published extensively, including co-editing four professional reference works and authoring more than 80 articles in academic and professional journals. Professor Weil's

testimony addressed the difficult allocation issues, burdens, and controversies that would arise if radio simulcasters were required to pay sound recording royalties under a fee structure that included a percentage of revenue component. Professor Weil also addressed the reasons that some of SoundExchange's other proposed changes to rates and terms should not be adopted, including removing the current requirement that a CPA conduct any audits, which could compromise the integrity of the audit process. Professor Weil's Written Rebuttal Testimony ("Weil WRT") was admitted into evidence. *See* NAB Ex. 4011.

32. **Dominique M. Hanssens** is the Bud Knapp Distinguished Professor of Marketing at the University of California at Los Angeles Anderson School of Management. He holds M.S. and Ph.D. degrees in management from Purdue University. Professor Hanssens' research is focused on strategic marketing problems, to which he applies his expertise in data-analytics methods such as econometrics and time series analyses. He has co-authored a book on market response models and is the author of numerous papers that have appeared in academic and professional journals. He is also the recipient of the Churchill Lifetime Achievement Award of the American Marketing Association, among other awards. Professor Hanssens testified regarding a consumer survey he conducted to determine the relative value assigned to music and other programming elements by listeners to Internet simulcasts of AM/FM music-formatted stations. Professor Hanssens presented the survey methodology and results, which found that approximately 43% of total value on simulcasts of music-formatted stations was attributed by listeners to features other than music, such as news/talk/sports updates,

contests, and morning talk. Professor Hanssens' Written Rebuttal Testimony ("Hanssens WRT") was admitted into evidence. *See* NAB Ex. 4012.

33. **John R. Hauser** is the Kirin Professor of Marketing at the Massachusetts Institute of Technology Sloan School of Management and is an expert in survey design and evaluation. Professor Hauser has co-authored two books and has published numerous articles that have been recognized with national and international awards, including several articles concerning conjoint analysis. iHeartMedia and NAB jointly presented Professor Hauser's testimony in rebuttal of the Testimony of Daniel L. McFadden, who designed and performed a complex survey in an attempt to estimate the relative value that consumers place on certain features of music streaming services. Professor Hauser explained the reasons that Professor McFadden's survey was unreliable; this testimony was supported by a qualitative study performed by Professor Hauser. Professor Hauser's Written Rebuttal Testimony ("Hauser WRT"), which was co-sponsored by NAB and iHeartMedia, Inc., was admitted into evidence. *See* IHM Ex. 3124.

34. **Steven R. Peterson** is an Executive Vice President at Compass Lexecon, a leading economic consulting firm. Dr. Peterson has an A.B. from the University of California, Davis, and Ph.D. from Harvard, both in economics. He focuses his work on the economics of competition and antitrust, valuation, and the licensing of intellectual property. Dr. Peterson testified in response to the claims of SoundExchange's expert Dr. Blackburn about the health of webcasting, demonstrating that Dr. Blackburn's analysis was invalid and that, when properly analyzed, the data show that webcasters paying the full commercial rates fail at a much higher rate than other webcasters. Dr. Peterson also

rebutted Dr. Blackburn's claim that statutory services do not promote sales of sound recordings.

Dr. Peterson also responded to the survey presented by SoundExchange expert Professor McFadden, and the use of that survey's results by SoundExchange expert Professor Rubinfeld. Dr. Peterson testified that the McFadden results show a low willingness to pay for streaming, contrary to SoundExchange's claim that consumers would migrate to high-cost interactive services if statutory services were unavailable. Dr. Peterson demonstrated that the average willingness to pay for certain features reported by Professor McFadden both masks divergent preferences and cannot be used to provide insight into market prices or how consumers will respond to market prices. Dr. Peterson also explained why Professor Rubinfeld's "interactivity adjustment," is not supported by the McFadden survey data. Dr. Peterson's Corrected Written Rebuttal Testimony ("Peterson WRT"), which was co-sponsored by NAB and Pandora, was admitted into evidence. *See* NAB Ex. 4013.

III. SIMULCASTING IS FUNDAMENTALLY DIFFERENT FROM THE OTHER FORMS OF WEBCASTING AT ISSUE IN THIS PROCEEDING.

35. As reflected in the written testimony, and as also demonstrated at the hearing, simulcasting is vastly different from other types of webcasting. Broadcasters are heavily regulated by the FCC and must operate in the public interest. Broadcasters have a fundamentally different approach to their service—they create a package of content consisting of many programming elements, including music, news, traffic, weather, sports, talk, and contests, and deliver that package to their audience as a whole. The

simulcast is programmatically identical to the over-the-air broadcast; it is oxymoronic to characterize a simulcast as "customized."

36. Because it is an extension of the over-the-air broadcast, simulcasting is also inherently local. Programming such as local news, traffic, and weather, is only valuable to a local audience. The evidence presented at the hearing reflected broadcasters that are unwaveringly focused on the local audience and their communities. Indeed, their success is tied to successfully establishing and maintaining a "local" connection.

37. Another by-product of the correspondence between broadcasting and simulcasting is that simulcasting is promotional in the same way that over-the-air broadcasting is promotional. The latter principle has been conceded by SoundExchange. With respect to the former, while simulcasting does not have the same size audience as over-the-air broadcast, and therefore it does not have the same overall promotional impact, on a per-listener basis, the effect is the same. It strains logic and credulity to argue that an individual listening to a brand new song on her favorite local Top 40 radio station experiences the promotional effect of that song differently on her home FM radio as opposed to her home personal computer. For these same reasons, simulcasting is less substitutional than other forms of webcasting, as SoundExchange witnesses admit.

38. In the end, all of these factors militate to a lower rate for simulcasters. Simulcasting is more promotional, less substitutional, less reliant upon music, includes substantial other programmatic elements, and serves the public in numerous ways that other forms of webcasting do not. Indeed, the record label witnesses acknowledge the differences of simulcasting, which they simply would not do unless they were plainly

evident. The NAB respectfully requests that these acknowledged and important differences be recognized in the simulcasting rates.

A. SIMULCASTING IS NOT A MUSIC SERVICE; IT HAS THE SAME NON-MUSIC PROGRAMMING AS TERRESTRIAL RADIO, AND REFLECTS BROADCASTERS' PUBLIC INTEREST OBLIGATIONS AND LOCAL FOCUS.

1. Background

39. Five broadcaster/simulcaster witnesses provided testimony in this proceeding regarding their broadcast stations and streaming operations: John Dimick of Lincoln Financial Media Corporation, which has sixteen stations (ten music-formatted stations and six sports, comedy or talk), all of which are currently streamed; Steve Newberry of Commonwealth Broadcasting Corporation, which operates ten music-formatted stations, only two of which are currently streamed, and seven news, sports, and talk-formatted stations; Buzz Knight of Greater Media, Inc., which currently operates seventeen stations, of which ten are music-formatted and all but one (a music-formatted station) currently stream; Ben Downs of Bryan Broadcasting, which operates nine stations (five talk and four music-formatted) all of which are streamed (although Bryan Broadcasting recently removed the streaming link for its Top 40 station from that station's website); and Julie Koehn of Lenawee Broadcasting Company, which operates one music-formatted station but does not stream music programming. Dimick WDT ¶ 8; 5/26/15 Tr. 5796:6-5797:2 (Dimick); Newberry WDT ¶¶ 7, 14 & App. A; 5/20/15 Tr. 5071:19-21, 5073:6-5074:2 (updating testimony regarding the number of Commonwealth Broadcasting's stations that stream) (Newberry); Knight WDT ¶ 13; Downs WDT ¶¶ 6-7; 5/21/15 Tr. 5211:5-22 (Downs); Koehn WDT ¶¶ 4, 9-11.

40. Messrs. Dimick, Newberry, Downs, and Knight all testified that, to the extent that their music-formatted stations are streamed, the programming content (everything that goes over the air except the commercials) is the same on the stream as it is on the terrestrial broadcast of the same station. Dimick WDT ¶ 11; Dimick WRT ¶ 5; 5/26/15 Tr. 5798:15-5799:9 (Dimick); 5/20/15 Tr. 5104:1-12 (Newberry); Knight WDT ¶¶ 13, 29; Downs WDT ¶ 14; 5/21/15 Tr. 5217:24-5218:12 (Downs). Accordingly, their testimony regarding radio programming applies equally to the broadcast and the associated stream.

41. As the NAB's witnesses explained, local radio is not a music service or a substitute for listening to recorded music. Rather, local radio is characterized by other programming elements that seek to integrate a station into its local community and obtain differentiation from other local stations. Newberry WDT ¶¶ 12, 13; 5/20/15 Tr. 5076:17-5077:5, 5078:12-19 (Newberry); Dimick WDT ¶¶ 4, 30-40; Knight WDT ¶¶ 2, 14-26; Downs WDT ¶¶ 24-34; 5/21/15 Tr. 5218:13-5219:16 (Downs); Koehn WDT ¶¶ 3, 9-19.

2. Operating in the Public Interest/Developing a Connection with the Local Audience

42. Unlike music services, radio broadcasters are licensed and regulated by the FCC and are required to operate in the public interest. Newberry WDT ¶ 14; 5/20/15 Tr. 5075:12-14 (Newberry). LFMC takes "seriously our obligation to operate our stations in the 'public interest, convenience and necessity.'" Dimick WDT ¶ 33.

43. Steve Newberry explained his view of the key to success in radio:

> Q. Now, Mr. Newberry, in your written direct testimony you talk about the importance of your radio stations connections to their communities.
>
> Could you elaborate on why that connection is important for the court?
>
> A. We are licensed by the FCC to operate in the public interest. Since [I] was 14, I've been used to that ethic, that responsibility. But it's really about developing a connection with the listeners through service, making sure that we are where they want us to be, we're giving them the information and the entertainment that they expect from us, providing a mix of programming and services. But it's very important for us to differentiate ourselves by really being that locally-connected radio station.

5/20/15 Tr. 5075:6-22 (Newberry).

44. In an interview approximately two years ago, Buzz Knight summarized his view as to the critical elements that characterize great radio:

> At the beginning and still to this day, I come away with the feeling that as much as technology has changed things, it all still comes back to great brand management and a meticulous attention to detail in managing those brands. . . . <u>It's still about things that make great radio tick – great content from great personalities who have a great understanding of the market. That's the localism that's really important is the ability to always build your programming to the point where your listeners feel that if they miss a day from your station, they feel like they've missed a lot</u>.

Knight WDT ¶ 26 (emphasis added).

45. The local focus of radio is not changed by the availability of the stream. Even though streams often are accessible outside the local broadcast area, radio broadcasters generally are not interested in targeting out-of-market listeners through their streams. Steve Newberry explained the two reasons for this:

> Q. Now, do you target out-of-market or non-local listeners?
>
> A. We don't.
>
> Q. Why not?
>
> A. Two reasons. One is our advertisers. The advertisers that I'm dealing with and in Glasgow and Bowling Green and Elizabethtown, Kentucky, they're not interested in trying to reach potential customers for their businesses that are outside the local market area. So there is no value to me to try to have listeners that are in Los Angeles or Idaho or anywhere else.
>
> The second thing is to maintain that connection. We really want to make sure that our programing is unique to our local communities, and so I doubt very seriously someone that's in Los Angeles wants to hear about Western Kentucky University or what [is happening] at the Corvette plant[] or other local activities. We -- we really focus our programming and our connection to the local [community].

5/20/15 Tr. 5077:25-5078:19 (Newberry); *accord* Newberry WDT ¶ 15; 5/26/15 Tr. 5803:1-17 (Dimick); Downs WDT ¶ 24; 5/21/15 Tr. 5218:13-5219:16 (Downs).

46. The local focus of broadcast simulcasts is not confined to commercial radio stations but extends to noncommercial ones as well. Joe Emert, for example, testified that NewLife FM "emphasize[s] its availability to the communities it serves" and has participated in multiple community charitable events that enable NewLife FM's staff to connect with its listeners. Emert WDT ¶¶ 15, 23. NewLife FM's local focus carries over to its simulcast. It simulcasts its programming "to serve [its] local broadcast

listeners by making it easier for them to connect with [its] ministry and the content that they know and trust through a variety of devices other than an AM/FM radio." *Id*. ¶ 27; *accord* Henes WDT ¶ 13. Not only is NewLife FM's target online audience local, but its actual online audience is overwhelmingly local as well. Emert WDT ¶ 28; *see also* Henes WDT ¶¶ 11, 15 (retaining a local focus is especially important to The Praise Network, as over 90% of its donors come from within the terrestrial listening area). "For each month from June through September 2014, of the top 10 U.S. markets generating the most listener sessions, some 75-80% of those sessions originated in [NewLife FM's] core Atlanta and Macon communities, where [its] stations are located." Emert WDT ¶ 28; NRBNMLC Ex. 7009.

3. Role of Personalities on Radio

47. As Mr. Dimick testified, "the success of radio, even music-formatted radio stations, depends primarily on how we differentiate our stations from other radio stations." Dimick WDT ¶ 3; Downs WDT ¶¶ 24-26. Part of that differentiation is "developing a relationship with" local listeners. Dimick WDT ¶ 3; *see also* Downs WDT ¶ 27.

48. One of the "critical elements" in developing a relationship with the audience is the use of on-air personalities, which can be the "number one priority in terms of programming," depending on the station. Dimick WDT ¶¶ 3, 30-32; Downs WDT ¶ 28 (On-air talent "are the people that listeners keep tuning in to spend time with and with whom they form loyalties."). As Mr. Dimick emphasized, a "great morning show can even draw listeners from outside the base music demographic of the station." Dimick WDT ¶ 32; *see also* 5/26/15 Tr. 5812:13-5813:18 (Dimick) (providing testimony that the

morning show on KQKS (FM 107.5) in Denver, is a rhythm top 40 station, aimed at the 18-34 music listening audience, but that the morning show there performs well in the 18-54 demographics, which success he interprets as "in spite of the music that we play."); *accord* Downs WDT ¶ 28 (the host of Bryan Broadcasting's Candy 95 morning show uses the slogan "less music more talk"). WLEN's "on-air talent and the loyalty [its] listeners develop towards those personalities is another reason WLEN stands out in a crowded market." Koehn WDT ¶¶ 13, 14.

49. Buzz Knight likewise explained why personalities are important and provided examples of the role that personalities play at Greater Media's music-formatted stations:

> While morning drive is generally considered to be the most important day part for personalities, in my view, they are important in building a successful station throughout the day. Our on-air personalities consistently wear a lot of hats; they are curators, they are concierges, and they are companions and friends. We feature personalities who have built their audiences over the course of decades on the air.

Knight WDT ¶ 16 (providing examples of Greater Media personalities who have been on the air for decades). Personalities are exclusive to particular stations and can build brand loyalty. *Id.* With the rise of social media, there are even more opportunities for radio personalities to become connected to their audience. *Id.* ¶ 18; Downs WDT ¶ 33 and NAB Exs. 4122, 4123. There are, however, significant costs and risks to a personality-based approach. Knight WDT ¶ 19.

50. As Julie Koehn discussed, Lenawee's "announcers and staff volunteer hundreds of hours, both on and off the clock, sitting on nonprofit boards, emceeing local fundraising auctions, running coat and blanket drives, and collecting funds for homeless

veterans and socks and pjs for … unattended youth." Koehn WDT ¶ 15. Likewise, Bryan Broadcasting's on-air personalities and staff are very active in their community. Downs WDT ¶ 29; 5/21/15 Tr. 5218:13-5219:16 (Downs).

51. Other evidence confirms that on-air personalities and personality-driven shows, such as those common during the morning drive hours, are an important draw to radio programming. *See, e.g.*, Katz AWRT ¶ 65, Table 4 (presenting the results of the Jacobs Techsurvey 10 Total Results, which reflects [[ ]]" as a main reason for "why you listen to AM/FM radio"). NAB introduced a survey performed by Professor Hanssens, which found that, for simulcast listeners, 12.2% of the value they obtain from listening to their favorite music-formatted stations comes from "Hosts, DJs, and other on-air personalities." Hanssens WRT ¶ 62, App. 8; Katz AWRT ¶ 67, Table 5.

52. Webcast music services do not rely on on-air personalities in this way and there is no evidence in the record to the contrary. 5/20/15 Tr. 5099:25-5100:10 (Newberry).

4. News, Traffic, Weather and Sports; Service During Crises

53. Local radio stations routinely provide local news, traffic, weather, and sports updates. Knight WDT ¶ 20; Newberry WDT ¶ 12; Downs WDT ¶ 30. Knight notes that "[o]ur listeners expect to receive this type of information, and it is part of the basic value package that attracts listeners to our stations." Knight WDT ¶ 20. Music services, on the other hand, provide none of this information.

54. Julie Koehn, the President and General Manager of Lenawee Broadcasting Company, the licensee of WLEN Radio in Adrian, Michigan, described the vital role that WLEN plays in the community. WLEN has received extensive national, regional, and state recognition for the news, public service, and promotions it brings to its community. Koehn WDT ¶ 8. In the absence of a local television station in WLEN's community, WLEN keeps its listeners informed of local news, weather, and community events. Koehn WDT ¶ 9.

55. Studies also reflect that this type of programming resonates with audiences and plays an important role in attracting listeners. *See, e.g.*, Katz AWRT ¶ 65, Table 4 (presenting the results of the Jacobs Techsurvey 10 Total Results, which reflects [[ ]]; *id*. ¶ 66, Figure 1 (presenting [[ ]]. The Hanssens survey found that, for simulcast listeners, 12.5% of the value they obtain from listening to their favorite music-formatted station comes from "News/ traffic/weather/sports information." Hanssens WRT ¶ 62, App. 8; Katz AWRT ¶ 67, Table 5.

56. Local radio's commitment to the public interest is particularly evident in times of crisis. Buzz Knight explains how Greater Media's cluster of stations in Boston responded to the Marathon bombing and the citywide lockdown that followed during the ensuing manhunt. Knight WDT ¶ 21. He also notes that Greater Media's rock station in

New Jersey, WRAT, became a primary news source and won an award for its coverage during the Hurricane Sandy crisis. *Id*.

57. Similarly, Steve Newberry details how Commonwealth Broadcasting supported the community when the major employer in its hometown of Campbellsville, Kentucky, closed its plant that employed 4,500 people. Newberry WDT ¶ 13. As Mr. Dimick testified at the hearing, an important element of LFMC's community service is LFMC's assistance during times of emergency. 5/26/15 Tr. 5814:5-5815:22 (Dimick). LFMC provides general disaster information to listeners and, during times of emergency, acts as a hub for receiving information from individuals in the community and disseminating information from emergency response personnel. *Id*.

5. Community Involvement

58. As one element of developing a connection to and integrating with the local community, there is a long tradition of community involvement by local radio stations. The broadcaster witnesses detailed the ways that station employees and personalities participate in community events. Knight WDT ¶ 18; Newberry WDT ¶ 12; Dimick WDT ¶¶ 33-35; Downs WDT ¶ 29. Broadcasters regularly appear in the community, announcing and attending local events, providing information on the air, on their station websites regarding local activities. Dimick WDT ¶ 34. Broadcasters organize, sponsor and fundraise for local and national charities. Dimick WDT ¶ 35; Downs WDT ¶ 29.

59. Broadcasters also report extensively on community events and activities. Dimick WDT ¶ 33, NAB Exs. 4102, 4103; Downs WDT ¶ 30; 5/21/15 Tr. 5219:24-5220:14 (Downs) ("The difference is what we do other than the music. We'll have – the

announcers will talk about the Christmas Parade on Sunday, or they'll talk about where the fireworks are going to be on the 4th of July. They'll invite people to come out for something at one of the parks. The news—all of the things that we do that make us different, that make us College Station, Texas, is what really is what's important.").

60. Mr. Downs attributes the success of Bryan Broadcasting to its "close ties with the local community that come from [its] staff's community involvement, listener loyalty and on-air programming." Downs WDT ¶ 24. Bryan Broadcasting provides news, talk, teaching, and local sports programming to its listeners. Downs WDT ¶ 25. Mr. Downs believes it important to have a "full-time, local staff" that "connect with the communities that our stations serve." Downs WDT ¶¶ 27, 29.

61. In 2013 alone, WLEN broadcast thousands of public service announcements "and generated more than 400 hours of community affairs programming." Koehn WDT ¶ 15; *accord* Downs WDT ¶ 30 ("[a]ll three of our broadcast music stations feature local public service announcements every hour . . ."). WLEN also has helped local non-profit organizations raise over $2,000,000 in that year. Koehn WDT ¶ 17.

6. Music Alone Cannot Differentiate

62. Buzz Knight explained why music alone is insufficient to make a radio station successful:

> I continue to believe that . . . the key to success in radio is to make your listeners feel that, if they miss a day at your station, they have missed out on something. Music alone cannot inspire that feeling. . . . we cannot give people that "I don't want to miss that" feeling with respect to music, because we do not have music exclusivity, and it is readily

> available from many other sources. Instead, we create that feeling by the content we create and the relationships that we build with our listeners.

Knight WDT ¶ 26.

63. No local station has exclusivity with respect to the music that it plays. Musical niches can be copied by competitors. Accordingly, stations must do more than just play music to be successful. Knight WDT ¶ 2. There are numerous other sources to which listeners can turn if they are only interested in hearing music. Newberry WDT ¶ 11. As Mr. Dimick also explained:

> Q. Okay. Can you have a successful station with just music?
>
> A. In my 35 years of experience, no.
>
> Q. Why not?
>
> A. Primarily because you know, music, while it's important, is for us in radio sort of the least – it's the least unique thing that we have. Every radio station can play Katy Perry if they want to. So just the fact that I play a song doesn't mean that it's unique to me. I'd love it if it could be, if I was on the receiving end of all that exclusivity. But it's not.
>
> So everything else is – it's kind of like music just sort of levels the playing field. It's what you do after that that really starts to help separate you from your competition in the market.

5/26/15 Tr. 5810:13-5811:4 (Dimick); *accord* 5/21/15 Tr. 5219:17-23 (Downs) ("Katy Perry sounds exactly the same in [] College Station as . . . in Los Angeles."). For Mr. Downs, the "success of Bryan Broadcasting's stations, including its music formatted stations, is the result of their close ties with the local community that come from our staff's community involvement, listener loyalty, and on-air programming. There are a

number of elements that contribute to the success of our radio stations, most of which have little or nothing to do with music content." Downs WDT ¶¶ 24-25.

64. WLEN plays a mixed format that includes music, but "music is not the number one reason why people listen to WLEN, and it is not what makes [WLEN] unique." Koehn WDT ¶ 10. Rather, its focus is on local news, weather, and community information, and the public depends on it for that information given that there is no local television station in the community. Kohen WDT ¶ 9; *see also* NAB Ex. 4124. WLEN also "carries more local sports than any other local station in [the] area." Koehn WDT ¶ 10. "If listeners were only interested in hearing wall-to-wall music, there are many other ways for them to do so" than to listen to a community-focused mixed-format radio station online. *Id*. Even the music programming on WLEN "is live and local, with the exception of two weekend specialty shows." *Id*.

65. Survey data confirm the importance of non-music content even on music-formatted radio stations. The Jacobs Techsurvey 10, WLEN, and Hanssens surveys all reflect the value of non-music programming to listeners:

- For the Jacobs Techsurvey 10, in addition to the data results cited above for on-air personalities, local news, and emergency notifications, [[ ]]. *See, e.g.*, Katz AWRT ¶ 65, Table 4.
- The Hanssens survey found that, for simulcast listeners, approximately 43% of the value they obtain from listening to their favorite music-formatted station, comes from non-music programming (that is, "News/traffic/weather/sports information," "Hosts, DJs, and other on-air personalities," "Local events information," "Contests," and "Advertisements."). Hanssens WRT ¶ 62, App. 8; Katz AWRT ¶ 67, Table 5. It is also important to keep in mind that the share of value attributable to

> music included all aspects of the music programming, including the value of the underlying musical work and the value of the selection and curation of the music contributed by the station. Hanssens WRT ¶ 63.

- For the WLEN survey, the category of [ ] Katz AWRT ¶ 66, Figure 1.

B. SIMULCASTING IS NOT CUSTOMIZED AND IS NOT CONVERGING.

66. SoundExchange's overall theory of the case is that statutory rates need to increase, and its use of the interactive service benchmark is justified, because statutory webcasting is "converging" with directly-licensed, on-demand streaming. That point is generally invalid (*see supra* Part III.B), and it is clearly false with respect to simulcasting.

67. For example, Aaron Harrison of Universal argues that "statutory rates need to increase over the next rate term to reflect the fact that customized webcasting services are becoming more and more personalized and competing directly with the on-demand services." Harrison CWDT ¶ 18. Dennis Kooker likewise argues that:

> That fundamental distinction – between statutory services mirroring terrestrial radio and directly licensed services enabling customized music access—is rapidly disappearing. Statutory services now provide highly customized offerings to consumers. Statutory services employ sophisticated algorithms, user-interface controls, and other computer technology that allow users to communicate their preferences to the service, and the service to customize and curate programming tailored to the individual user. . . . The result is that statutory services can and do progressively refine the individualized programs streamed to their users, thus bringing the experience of listening on statutory services ever-closer to the experience of "on-demand" listening.

Kooker WDT at 15-16.

68. Although asserted generally as to all statutory services, SoundExchange's "convergence" theory for higher rates is false with respect to simulcasting. For example, Mr. Harrison admitted that simulcast does not have the various customization features that are the basis of the convergence theory, and that a lower rate is therefore appropriate.

> Q. And you believe that if there are limited -- if customization is limited, a lower rate can be justified, correct?
>
> A. Correct.
>
> Q. And some of the factors that would be relevant to that would be whether there is thumbs up and thumbs down. That's relevant, right? If you can use that functionality -- if you can't use that functionality, you would agree rates should be lower, right?
>
> A. Yeah. There are sets of features that could make a service more interactive or less interactive. Thumbs up, thumbs down is one of them, but it depends what the entire context of what the service is in combination.
>
> * * *
>
> Q. And simulcasting -- basic simulcasting doesn't have any of those things that you've just been talking about, correct?
>
> A. I'm not aware of simulcasting having those inputs.

4/30/15 Tr. 1102:22-1104:2 (Harrison) (emphasis added).

69. Mr. Harrison also expressly admitted that he has no evidence that simulcasting is actually becoming more customized (as opposed to the theoretical possibility that it might):

> Q. Okay. So I'm looking at the last sentence of that paragraph, and you say, "As a result, I believe that the statutory rates need to increase over the next rate term to reflect the fact that customized webcasting services are becoming more and more personalized and competing directly with the on-demand services."

> But simulcasting of terrestrial radio isn't becoming more personalized than it was before, is it?
>
> A. I don't know that it is. It theoretically could, but I don't know that it is.

4/30/15 Tr. 1106:1-12 (Harrison) (emphasis added).

70. Other SoundExchange witnesses have agreed that, unlike custom radio, "simulcasting terrestrial radio literally is terrestrial radio online." 5/1/15 Tr. 1283:20-22 (Wheeler). It is the same stream for every listener. There are no algorithms that are involved, and no thumbs up, no thumbs down. A listener cannot skip songs, and if s/he joins a song late or even near the end, that's just too bad. Listeners cannot pick an artist and follow that music, and there is no mood-based programming. 5/1/15 Tr. 1283:23-1284:21 (Wheeler); *accord* 5/29/15 Tr. 6590:19-6596:1 (Kooker).

71. SoundExchange expert witness David Blackburn admits that he "would consider a pure simulcast of [a] terrestrial broadcast[] where everybody is listening to the same thing as on the least customized end of th[e] spectrum" of noninteractive services. 5/4/15 Tr. 1689:3-10 (Blackburn) (emphasis added). He agrees that "a pure simulcast where all you do is listen to the live radio feed would be on the lowest end" of the interactivity spectrum among noninteractive services. 5/4/15 Tr. 1689:11-14 (Blackburn) (emphasis added). He admitted that, when he listens to a simulcast:

- he "join[s] th[e] broadcast that's already in progress" (*id.* at 1689:22-25);
- the simulcast "does not allow [him] to skip or pause songs" (*id.* at 1690:1-4); and
- he is "not aware of any way that [he] can … have the stream customized to [his] personal taste" (*id.* at 1690:5-10).

He also is "not aware of any simulcast station that allows [him] to skip or pause songs," or "seed the simulcast station with a particular artist or mix of artist." *Id.* at 1690:11-18.

72. Simulcasting's lack of any customization is confirmed by the testimony of Mr. Dimick, who testified that "the programming of our streams is not customized to the listener or customizable by the listener; in that regard, it is the same non-customizable programming that we broadcast to our local audiences over the radio airwaves. Like our broadcasts, the same content is provided to all concurrent listeners." Dimick WRT ¶ 1. Simulcasting remains a "one-to-many" transmission, not a "one-to-one" or customized transmission. 5/26/15 Tr. 5800:22-5801:5 (Dimick). "[Broadcasters] do not 'customize and curate programming tailored to the individual user.' Essentially, we do the opposite of 'tailoring'; we attempt to make the same broadcast/stream desirable to as wide a group as possible." Dimick WRT ¶ 6.

73. LFMC does not use any technology that allows it to mimic an on-demand service. Dimick WRT ¶ 6. LFMC has no "thumb-up" or "thumb down" application that adjusts programming. Dimick WRT ¶ 7. There is no other individual feedback mechanism that can affect LFMC's programming. *Id.* The listening applications on LFMC's websites have "play" and "stop buttons. Dimick WRT ¶ 8. There is no ability to skip songs or request a specific song. Dimick WRT ¶¶ 7-8.

74. In its rebuttal case, SoundExchange attempted to defend its "convergence" theory with respect to simulcast by citing certain search functionality of two services that aggregate simulcast streams—TuneIn and iHeart Radio. *See generally,* Kooker WRT at 3-18. SoundExchange failed, however, to adduce any evidence concerning the extent to which these functions were actually used, or their significance in the marketplace.

Moreover, the record is clear that the ability to search simulcasts to find whether an artist is currently playing is far different from the on-demand services to which SoundExchange tried to analogize it and far different from even custom radio.

75. For example, Mr. Kooker asserted that:

> A user can search iHeart's simulcast radio service by genre and/or geographic area, and all simulcast stations responsive to that search will appear to that user, along with the songs currently being played on those stations. The user can then immediately listen to that song.

Kooker WRT at 3. To the extent that Mr. Kooker's reference to "that song" implies the entire song, his testimony was false. Rather, as Mr. Kooker admitted in response to questions, a song "starts where it's playing within the terrestrial feed." 5/29/15 Tr. 6559:21-6560:9 (Kooker). The screen shots provided in Mr. Kooker's WRT (at 5) confirm that the search results screen does not show how long ago the song started or how much or how little remained of the play; thus, the user would have no way of knowing.

76. Mr. Kooker admitted that there is no advance notice of what songs would be playing on the simulcast. 5/29/15 Tr. 6560:10-18 (Kooker). He further acknowledged that he "obviously understand[s] the difference between an on-demand play and what people get through customized radio or the simulcast." 5/29/15 Tr. 6645:12-15 (Kooker).

77. Mr. Kooker nonetheless claimed that, because the screen refreshes to show changes in what is currently playing, "if you're patient within – especially on hit songs, within a relatively short amount of time, you could be listening from the beginning." 5/29/15 Tr. 6560:6-9 (Kooker). There is no evidence in the record as to how close to the

actual beginning of the song one could actually get, even if one were "patient" and waited for the desired song to appear on the list. In addition, as Mr. Kooker admitted, there might be a pre-roll advertisement interposed, which would further lessen the time remaining in the song. 5/29/15 Tr. 6561:5-12 (Kooker).

78. Mr. Kooker's "experiment" was based on a song (Meghan Trainor's "All About That Bass") that was a hit at the time his rebuttal testimony was filed in February 2015. Kooker WRT at 4; 5/29/15 Tr. 6627:18-6628:6 (Kooker). This maximized the chance to find the song playing on a simulcast station. In contrast, when the experiment was repeated in court only three months later, the same song did not appear using the search function on any simulcast station on iHeart Radio. 5/29/15 Tr. 6628:24-6629:20 (Kooker) (repeating test using iPad); *id.* at 6637:11-6638:16 (same using desktop).

79. While LFMC's streams are available through Tune-in, Tune-in's third party functionality does not transform simulcasters' stations into on-demand services. While Tune-in may allow on certain devices the ability to pause or record limited portions of a simulcaster's stream, important limitations still exist – there is no way to know what song will be next, and there is no way to identify and play a specific song upon demand. Dimick WRT ¶ 9. Furthermore, even if a listener is able to locate a specific song that he or she desires to hear, he or she will have to join the stream in progress, possibly after hearing a 15-30 second pre-roll advertisement. 5/26/15 Tr. 5804:18-5805:10 (Dimick). And once that song ends, the simulcaster's normal programming will resume, which may include an undesired song or artist, local news (which may not be local to the listener), local traffic, or other non-music programming. *Id*. at 5805:11-24.

80. Dr. Blackburn also acknowledged in connection with these search functions that when a song played by the selected artist is over, if you wanted to hear another artist, "[y]ou would have to start all over again" and "go back to the search box, type in another artist's name, hit enter, [and] see what comes up." 5/4/15 Tr. 1694:7-16 (Blackburn). He acknowledged that "[t]hen when you join that live station, again, you would have all of the same problems" – *i.e.*, "the song would be in progress, when it ends, there's no way to rewind and you don't know what would be played after that song on that simulcast." *Id.* at 1694:17-23. He admitted that he doesn't "think it's the same" as listening to a song from the beginning. *Id.* at 1597:13-14. He further admitted that he "only became aware of that functionality in connection with [his] engagement in this proceeding," "had never actually used that functionality before this engagement" and that he had "not done any sort of analysis of the extent to which simulcast listeners actually search for songs or artists." *Id.* at 1690:25-1691:14, 1695:15-19.

81. Discussing the iHeart Radio search function, Dr. Blackburn admitted that when you click on a stream that appears in response to an artist search, the listener will "pick up the stream where it is. So it might be towards the end of the song, in which case you have to search again and find another one." 5/4/15 Tr. 1597:2-8 (Blackburn); *see also id.* at 1692:25-1693:3. He admitted that "you jump into the feed as if you had turned the physical radio dial on it or had just gone straight to the station website and clicked play on the simulcast link." *Id.* at 1692:16-24. He agreed that "[y]ou just don't know in advance where you'll be within that song until you click on the feed" and that "[y]ou're not able to rewind the song or play it again once it's over on that simulcast station." *Id.* at 1693:4-11. He further acknowledged that "the live radio options that appear are …

only ones where a song performed by a particular artist is actually then being played" and that "if a song is not currently being played on any of the iHeart stations by a particular artist, … you won't be able to hear that artist … on a live radio stream." *Id.* at 1691:15-1692:6. He also agreed that "when the song is over, you might hear a news or weather report or a deejay that you've never heard of or a commercial from a business you've never heard of or another song." *Id.* at 1693:12-18.

C. SIMULCASTING IS RADIO AND IS MORE PROMOTIONAL AND LESS SUBSTITUTIONAL THAN OTHER WEBCASTING.

82. As they have for decades, record labels continue to expend enormous efforts and dollars to cause radio broadcasters to play their sound recordings on radio and, now, on their associated streams. The record companies would not expend these resources if they did not believe that airplay was highly beneficial to them, even though there is no royalty paid for radio broadcasts. As Professor Katz testified, these efforts show that radio play has a "negative opportunity cost," or an "opportunity benefit" to the record companies that must be taken into account in setting license fees. *See infra* ¶ 199.

83. In his opening statement, SoundExchange's counsel admitted that "record companies try to get their music played on terrestrial radio, and that shows that terrestrial radio is promotional. They spent a lot of money to try to convince terrestrial radio to play new releases. They put a lot of effort behind it, but that -- and that's true. Other companies do try to get terrestrial radio stations to play their music. And many people at record companies believe that that helps to sell CDs and downloads. We're not here to claim otherwise." 4/27/15 Tr. 82:2-13 (Pomerantz) (emphasis added).

1. Broadcasters Have Direct Experience with the Substantial Efforts of the Record Labels To Induce Broadcasters to Play Their Recordings.

84. As discussed in the written testimony of Buzz Knight, labels engage in pervasive, multi-channel efforts to gain radio airplay:

> Record companies encourage radio stations like ours to consider playing their songs by offering prizes that radio stations use in on-air promotions. They also regularly offer backstage passes, autographed merchandise, and on-air interviews with their stars to help promote their product on-air.
>
> Record companies also drive spins through direct asks to the station personnel, particularly program directors and music directors. Local and national label representatives, independent promoters, and artist representatives will personally visit our stations to push specific recordings or artists, lobbying us to add a song, increase spins, or keep a song in the rotation because "it's not done yet." These visits often occur on a weekly basis; some stations have to limit the hours in which these visits will be accepted. It is also very common for record company representatives to email station personnel statistics linking the number of plays a certain song or artist has received on that station with record sales and downloads.

Knight WDT ¶¶ 30-31. As Knight concludes, "[n]one of this massive effort would make sense unless the record labels believed—as I believe—that radio spins promote sales of recorded music." *Id.* ¶ 31.

85. Likewise, John Dimick, who has 35 years of experience in the industry and has held numerous programming positions throughout the country, including some of the most prestigious stations, testified that record label promotional activities have "remained strong over the last decade." Dimick WDT ¶ 43. While the forms of promotion have changed over time— such as more emailing and less distribution of CDs to radio stations—the level of "intensity and focus remains the same," with attitude of the labels remaining unchanged regarding "the value of radio play for their artists." Dimick WDT ¶ 43; 5/26/15 Tr. 5815:25-5818:15 (Dimick).

86. Record labels continue to employ many methods of making connections with broadcasters in order to garner attention for their artists and obtain airplay: through promotional efforts of in-house staff and third party promotional firms (Dimick WDT ¶ 44(a); Chiang WDT ¶¶ 5-6); connecting with broadcaster programmers via in person meetings, telephone, emails and texts (Dimick WDT ¶ 44(a-b)); Chiang WDT ¶¶ 5-6; Knight WDT ¶ 31); requesting music directors to listen to unreleased music, attending recording sessions and helping to identify the best song for airplay (Dimick WDT ¶ 44(c)); asking program personnel to attend artist concerts and performances (Dimick WDT ¶ 44(d); Chiang WDT ¶ 9); sending simulcasters new music singles, CDs, and electronic audio files (Dimick WDT ¶ 46; Chiang ¶ 6); providing access to artists for interviews, attending events, in-studio performances, recording station liners and video greetings and interacting with local fans, at no charge (Dimick WDT ¶¶ 47-50; Knight WDT ¶ 30).

87. Radio promotion is not limited to established artists—promoters hope to interest stations in promoting the next big act. Therefore, labels promote established artists, such as Carrie Underwood, emerging artists such as Sam Hunt, and new artists, such as The Railers, to radio. Chiang WDT ¶ 7.

88. "Listening to live radio continues to be the primary way that Americans discover new music." Poleman WDT ¶ 7. A national survey showed that seventy-three percent "of people who listened to live FM radio via either broadcast radio or simulcast strongly or somewhat agree that 'FM radio is the main way I discover new music.'" *Id.* Another national survey concluded that of those people that consider it somewhat or very important to keep up to date with music, seventy five percent said "they use radio to

discover new artists and songs," and thirty-five percent said they "were more likely to learn about music from radio than any other source." The 2014 Edison Research Infinite Dial Survey cited by Mr. Huppe in his Written Direct Testimony, reported that seventy-five percent of overall respondents said they used AM/FM radio to keep up-to-date with music. 4/29/15 Tr. 726:6-728:11 (Huppe); *see also* PAN Ex. 5289 at 55 (national survey reporting that, of those who say that keeping up with music is somewhat or very important, terrestrial radio is the most used source to keep up-to-date with music).

89. Playing a song on the radio tends to boost the sales of that song. *See* 5/21/15 Tr. 5145:12-14 (Poleman); *see also* Poleman WDT ¶ 8 ("When listeners hear a song they like on the radio, it fosters their interest in buying it."). [[ ]] 5/21/15 Tr. 5147:10-11 (Poleman)". Indeed, an August 2013 survey conducted by iHeartMedia found that sixty-one percent of respondents agreed that "hearing a song on the radio motivates or confirms their decision to buy" and they "don't usually buy a song until they've heard it a few times on the FM radio." Poleman WDT ¶ 8. Eighty percent of respondents "agreed that they have bought a song because they heard it on the radio and liked it." *Id.*

90. To enhance its radio stations' role as music discovery platforms, iHeartMedia has established several programs to promote artists and songs over simulcast. Poleman WDT ¶ 12. The "On the Verge" program involves spinning a selected song 150 times for six to ten weeks over both terrestrial radio and simulcast. *Id.* ¶ 14. iHeartMedia also has two Artist Integration Programs that advertise new songs and albums. *Id.* ¶¶ 23-24. The Artist Integration Program, which is played on terrestrial radio and simulcast, includes promotional spots that are less than a minute in length.

Morris WRT ¶ 20. The Digital Artist Integration Program, which is exclusively played on simulcast, includes promotional spots that are three minutes in length. *Id*.

91. These promotional programs have been successful in increasing song sales. *See* Poleman WDT ¶¶ 17-19, 22 (recounting sales of songs before and after being in the "On the Verge" program); 5/21/15 Tr. 5162:7-12 (Poleman) ([[ ]]); *see also* Poleman WDT ¶ 27 ("Record labels and artists have specifically credited DAIP with increasing sales."); 5/13/15 Tr. 3575:5-13 (Morris) ([[ ]]).

92. Record label executives and recording artists have repeatedly expressed thanks to iHeartMedia personnel for promoting their music on these programs. *See* 5/21/15 Tr. 5165:6-22 (Poleman); Poleman WDT ¶¶ 21-22, 26; *see also* 5/13/15 Tr. 3573:8-10 (Morris) ([[ ]]); Morris WRT ¶ 24. Record labels have even acknowledged to iHeartMedia that the success of certain artists is attributable to radio. *See* IHM Ex. 3241 at 2 ([[ ]]); 5/21/15 Tr. 5206:3-6 (Poleman); *see also* Morris WRT ¶ 2 ("record label executives and artists tell me that having music played on iHeartMedia's platforms has been important to their success in selling music in the past, and will be even more critical to their success selling music in the future."); *accord* NAB Ex. 4108 at 9 (Trisha Yearwood writing to a radio station, "I can't thank you enough for your stamp of approval…[i]t makes other stations take notice and add the record as well."); NAB Ex. 4127 at 3 (Ray Vaughn at

Warner Atlantic Reprise Southwest Region highlighting increased sales and stating "THE POWER OF KKBQ AIRPLAY IS PRETTY DARN IMPRESSIVE!"); *id*. at 7 (Jill Burnett at Mercury Nashville stating that "[t]wo weeks ago, you went from 8 to 20 spins and [Canaan's] sales increased 125%, last week they increased another 53%.").

93. The promotional value of simulcasting extends to noncommercial broadcasts and simulcasts as well. NewLife FM, for example, "is constantly approached by music artists, their agents, and record labels asking [it] to consider airing their music," and those artists, labels, and agents frequently thank NewLife FM when that music is played. Emert WDT ¶ 25; NRBNMLC Exs. 7003-7008. One band's producer, for example, wrote NewLife FM to state:

> We are so excited to see your station add their 1st single "In Every Corner" to your playlist. Thank you so much, because of your commitment to the song, it is the #1 song in the US being played by an independent artist!"

NRBNMLC Ex. 7006.

2. Record Label Executives and Record Label Financials Tell the Same Story.

94. Charlie Walk, Executive Vice President of Republic Records, and a long-time record company promotion executive, testified that [[ ]] IHM Ex. 3242 at 8 (Walk Dep. Tr. 26:3-6); *accord id*. 106:8-10 ("[Radio] seems to be the most important place to break music and to expose our music to a large audience in a quick fashion"); 5/1/15 Tr. 1380:25-1381:5 (Harleston).

95. The testimony of Aaron Harrison of Universal explains why radio continues to be promotional:

> Terrestrial radio, I think, is seen more as a platform where we can break artists and get the DJs to, you know, pump up those artists, do interviews with those artists, and talk about new album release, so hopefully they migrate from terrestrial radio to actually purchasing the album on an a la carte -- based, you know, on individual one-by-one purchase basis.

4/30/15 Tr. 966:16-23 (Harrison). Mr. Harrison also admitted that he had no evidence that listening to statutory services had any effect on sales of downloads and CDs. *Id*. at 1116:8-12.

96. Mr. Harrison further testified that in ranking streaming services simulcast was the least substitutional. *See infra* ¶ 116.

97. Declarations filed by the major record companies confirm -- in virtually identical language—the massive scope of their radio promotion operations. For example, Julie Swidler of Sony noted that "Sony Music operates several U.S. record labels, including Columbia Records, Epic Records, RCA Records, Sony Music Nashville, Sony Music U.S. Latin, and others, and each has its own separate promotion department" that "focuses on promoting releases by that label's artists through terrestrial radio." NAB Ex. 4138 (Swidler Decl.) ¶ 3 (emphasis added). Ms. Swidler went on to note that "[t]here are currently well over a hundred employees in the radio promotion departments at Sony Music's major U.S. labels." *Id*. ¶ 8. [[ ]].

98. Universal likewise engages in radio promotion on a massive scale commensurate with its position as the world's largest record company. According to the Declaration of Rand Levin, "[t]here have been hundreds of employees from 2009 to the present in promotion-related positions at UMG's U.S. labels." NAB Ex. 4137 (Levin Decl.) ¶ 8. All of these hundreds of people in the labels' "promotion departments focus primarily on promoting releases by their artists on terrestrial radio." *Id.* ¶ 3.

99. Although it is the smallest of the three remaining major labels, Warner also has well-staffed promotions departments "within each label [that] focus on promoting releases by that label's artists through terrestrial radio." NAB Ex. 4139 (Robinson Decl.) ¶ 9. Among its three largest sublabels, Warner has some 110 employees dedicated to radio promotion (60 at Atlantic, 31 at Warner Bros. Records, and 19 at Warner Music Nashville). *Id.* ¶ 14. At a time when employment in the recording industry has declined (*see, e.g.,* SX Ex. 12 at 10), the dedication of such significant resources to radio promotion by every one of the major labels demonstrates the continuing centrality of radio to the recording industry, notwithstanding SoundExchange's protestations to the contrary.

100. Though the methods may vary, the goal of record label promotion departments "is to create awareness among consumers about the artist's music, and to increase interest and excitement surrounding the artist to incentivize consumers to purchase the music." Harleston WDT ¶ 23. Labels work to get all artists "out in front of the public in a way that will get them noticed, and will make consumers want to acquire the artists' music." *Id.* These efforts can mean the difference between success and failure for both new artist and established artists. *Id.* ¶ 28. Getting radio stations

interested in playing songs is a way to promote sales. 5/1/15 Tr. 1371:20-24 (Harleston). As Jim Burruss of Columbia Records testified, "An important part of these [promotional] operations involves the promotion of Columbia releases to terrestrial radio." Burruss WDT ¶ 1. The reason record labels promote to radio stations is because radio is "impactful." 5/1/15 Tr. 1423:7-9 (Harleston).

101. This is especially important for pop music, because Top 40 radio stations' playlists are, by their own terms, very small – 30-40 songs and difficult to break into. 5/1/15 Tr. 1423:7-13 (Harleston). Thus, radio is an integral part of almost every marketing plan. For example, Universal's Jeff Harleston admitted that having 250 million people hear Robin Thicke's "Blurred Lines" on radio advanced Universal's goal of making consumers aware of the song. 5/1/15 Tr. 1371:20-24 (Harleston); iHeartMedia Ex. 3162 (Robin Thicke "Blurred Lines" Marketing Plan). Charlie Walk of Universal [[ ]] IHM Ex. 3242 at 26-27 (Walk Dep. Tr. 101:13-20; 105:19-25). Even independent artists approach radio stations directly. 5/21/15 Tr. 5262:7-5263:2 (Henes).

102. Such promotional efforts cost substantial sums of money. Jeff Harleston admitted that Universal spends [[ ]] of dollars on radio promotion every year. 5/1/15 Tr. 1415:8-19 (Harleston). In some cases, labels will pay other labels or independent promoters who are better equipped to provide radio promotion for them. As Simon Wheeler of Beggars testified, Columbia Records promotes Beggars' most significant artist, Adele, to United States radio stations. 5/1/15 Tr. 1288:24-1291:22 (Wheeler). Charlie Walk explained that to [[

[redacted]]]

IHM Ex. 3242 at 36 (Walk Dep. Tr. 139:8-10).

103. Financial documents from the major labels show the enormous resources devoted by the labels to promote their recordings to radio broadcasters. *See* Katz AWRT ¶ 96 & n.146 (citing the out-of-pocket and overhead expenditures for UMG labels Interscope/Geffen/A&M and Republic Records and Sony labels Columbia Records, RCA Records, and Sony Music Nashville). These documents were provided in response to discovery specifically requesting breakdowns for each year of specific categories of promotional costs and expenditures directed to terrestrial radio. *See id.* n.146. The expenditures for just these labels total in the [[redacted]] dollars. For example, [[redacted]]. *Id.* Because the five labels make up about [[redacted]] of the recording industry, Katz AWRT ¶ 96 & n.147, it is reasonable to conclude that total industry expenditures to promote sound recordings to radio broadcasters totals in the [[redacted]] of dollars per year. *Id.*; Peterson WRT ¶ 6.a.

104. Labels also clearly believe in the power of radio spins to promote sales. Charlie Walk testified that radio is very valuable to the success of songs, including sales and streams. IHM Ex. 3242 at 4 (Walk Dep. Tr. 11:25-12:3). The labels constantly provide stations with details touting the success of radio airplay. Many of them send emails with information about how well the track and album are selling compared to the

number of plays, or "spins," radio stations make of those tracks – usually showing that the more the stations play those tracks, the more sales are made. Chiang WDT ¶ 11. Examples of these acknowledgements sent to Cox radio in Houston are shown in NAB Ex. 4127 ("Two weeks ago, you went from 8 to 20 spins and his sales increased 125%, last week they increased another 53%. You also moved Scotty up last week. Those 23 spins helped him increase sales 73%!"; "Cole Swindell 'Hope You Get Lonely Tonight' [up 68% nationally] - Sales double in Houston with 4 new spins" and "Hunter Hayes 'Tattoo' [up 27% nationally] - Houston up 40% with 15 new spins"; "BRETT ELDREDGE "Mean to Me" [up +11% nationally] Houston up about 5x vs. last week with 20 new spins… As always, thanks for Your Support!"). The labels even track "sales per spin, tracking MediaBase sales information with Nielsen spin data. NAB Ex. 4127. Clearly, the labels believe that radio spins are stimulating sales of the music. Chiang WDT ¶ 12.

105. Radio play and data also help labels to position music for new audiences. Shazam, a mobile application that allows a listener to identify songs they hear on the radio, provides data to record labels. For example, Charlie Walk testified that Julio Inglesias' song [[ ]] IHM Ex. 3242 at 10:25-11:12 (Walk deposition).

106. The record companies would not spend this money if they did not think that this airplay was promotional. Peterson WRT ¶¶ 6.a, 44, 48; Katz AWRT ¶ 96. Professor Katz testified that "the fact that record companies are willing to spend tens and even hundreds of millions of dollars per year on radio promotion to get their songs played on terrestrial radio suggests that, if not for legal prohibitions, the license fee for terrestrial broadcasting of a musical recording could be negative in many cases." Katz AWRT ¶ 97 (referencing Katz WDT § VIII.A); 5/26/15 Tr. 5668:20-5671:2 (Katz).

3. Simulcasting Is No Different from Broadcasting in this Regard.

107. It is logical that the same promotional value holds for an over-the-air listener and a streaming listener and the evidence supports that logical conclusion. Mr. Knight, who has been in the radio business over 35 years, explains that both radio and streaming are promotional:

> Record companies understand that radio is still vital to music discovery and engagement, and treat it as such. Never once has a label representative ever said to me "please don't play my song on the air – it might keep someone from buying it." To the contrary, they have always wanted airplay to gain sales. And, to be clear, since we started streaming, no record company representative or artist has ever indicated any aversion to being on our streams. The content on the stream is the same as it is on the broadcast, and the promotional effect should be no different.

Knight WDT ¶ 29 (emphasis added).

108. This promotional power of live radio holds true regardless of whether a listener is tuning in to terrestrial radio or simulcast because of the "talent of programmers to select the music listeners love, and the personal connection between listeners and radio personalities." Poleman WDT ¶ 11 (emphasis added). Unlike simulcasting, personalities are not a component of other forms of webcasting.

109. Mr. Walk of Universal Music Group testified [[

]] Katz AWRT ¶ 98. Indeed, each of the characteristics that Mr. Walk described as making radio attractive as a promotional vehicle – namely immediacy, curated programming, repetition, not on demand, and the trust relationship – all apply equally to simulcasting.

110. Simulcasts of terrestrial radio have the same impact, ear for ear, as their over the air broadcast counterparts. *See, e.g.*, Katz AWRT ¶ 99 (testifying that the October 2013, Nielsen Music 360 Survey reported that [[

]]). SoundExchange's

witnesses agree that simulcasts have the same components as the over the air broadcasts – at the same time, listeners hear the same music; the same ads; the same weather; the same deejays; the same traffic; and the same upcoming concert information. 6/1/15 7079:9-7080:1 (Burruss); *accord* 5/1/15 Tr. 1285:3-20 (Wheeler). In this way, simulcast just adds "extra ears" to the over the air broadcast. *Id.* 7081:9-17. Labels do not evidence any behavior that indicates that they believe simulcasts are not equally promotional as the over the air broadcasts. Mr. Burruss agreed that labels promote to radio stations with full awareness that the broadcasts will be simulcast; he has never asked a radio station not to simulcast an artist's music. *Id*. 7078:21-7079:2; 7083:5-8 (Burruss).

111. Mr. Dimick testified that the promotional activities directed to LFMC by the labels do not differentiate between the over-the-air broadcast and the stream. 5/26/15 Tr. 5818:16-5819:6 (Dimick) (further testifying that no labels have expressed an aversion to being included on LFMC's stream); *accord* Downs WDT ¶ 35 (artists "could simply put their music on YouTube and be in the digital, streaming world. But they choose to make appearances on our station and its stream."). "The promotional effect of the music played is, therefore, no different." Dimick WDT ¶ 51.

112. [[ ]]. The same would be true for any radio station that is simulcasting. [[ ]].

113. Dr. Peterson has discussed the significant promotional benefits of simulcasting, which he equates to the promotional benefits of terrestrial radio. Dr. Peterson observes that:

> the content of terrestrial broadcasts and simulcasts is typically the same and has the same lack of customizability. Thus, there is no economic basis to assert that the promotional benefit of a broadcast differs depending on whether the consumer listens online or over the air.

Peterson WRT ¶ 43; *accord* Katz AWRT ¶ 98 ("There are several reasons to expect simulcasting to give rise to promotional benefits similar to those of terrestrial radio: web simulcasts have the same content as the over-the-air broadcasts that they replicate and have the same relationship between the source and the listener (*i.e.*, they are non-interactive services in which the broadcaster/webcaster chooses the recordings to play and thus serves as an expert recommender to the listener)").

D. SOUNDEXCHANGE WITNESSES CONCEDED THAT SIMULCASTING SHOULD BE LICENSED AT A LOWER RATE.

114. In their testimony, SoundExchange's witnesses recognized that the differences in functionality between simulcasting and other statutory webcasting services justified a lower rate for simulcasting.

115. According to SoundExchange witness Dennis Kooker of Sony:

> One of the original justifications for allowing statutory services to pay [the] lower [statutory] rates was that the offering under the statutory license would provide a user experience similar to terrestrial radio. Statutory services could offer channels of particular musical genres, but the programming would be selected by the service. If listeners wanted to select their programming, they would have to pay for it through directly licensed services.

SX Ex. 12, Kooker WDT at 15 (emphasis added); *accord* 4/28/15 Tr. 416:19-417:11 (Kooker) (confirming statement in written testimony). Mr. Kooker recognized a

dichotomy between service-selected programming, which is eligible for the lower statutory rate, and listener-selected programming, which requires payment of a higher, directly licensed rate. 4/28/15 Tr. 417:12 - 24 (Kooker).

116. SoundExchange witness Aaron Harrison of Universal testified unequivocally that services that are less customized and less substitutional, like simulcasting, should be licensed at lower rates:

> Q. So, at your deposition, I asked you, question: "Does the perceived promotional or substitutional[] affect the service, affect the rates that Universal is willing to offer for a particular service?"
>
> Your answer was: "Yes." Right?
>
> A. Right.
>
> * * *
>
> Q. So the way the rate is affected is that the higher the level of interactivity, the higher the rate, right?
>
> A. That's right.
>
> Q. And the lower the level of interactivity, the lower the rate, right?
>
> A. Right.
>
> Q. And the reason for that is you think on-demand or higher levels of interactivity are more substitutional than less on-demand, correct?
>
> A. Correct.
>
> Q. And, in fact, if you were to rank streaming services from least substitutional to most, the order would be simulcast, then custom, then on-demand, correct?
>
> A. Yes.
>
> Q. So simulcast is the least substitutional, right?
>
> A. Right. The simulcast, as I understand it, which is playing the same broadcast on the Internet that's being played on terrestrial.

Q. Right.

So that's the least substitutional, right?

A. Right.

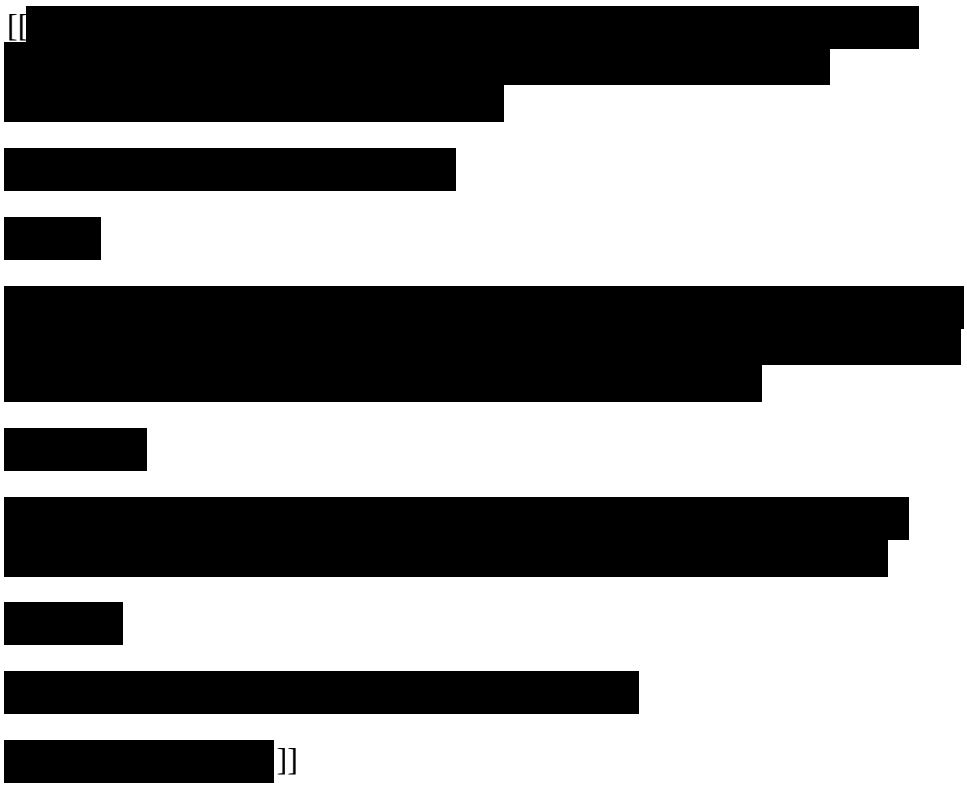
Q. On-demand is the most substitutional, right?

A. Right.

Q. And custom is somewhere in the middle?

A. That's right.

4/30/15 Tr. 1100:16-1102:12 (Harrison) (emphasis added).[1] There is no contrary evidence in the record. Mr. Harrison specifically reconfirmed this testimony when he was again cross-examined at the hearing:



[1] In his written testimony, Harrison claimed that "[o]ver the past few years, we have grown to understand that neither on-demand nor customized streaming services promote sales of recorded music." Harrison CWDT ¶ 11. Even putting aside the lack of any supporting evidence for this claim, simulcast is notable by its absence.

4/30/15 Tr. 1188:2-21 (Harrison).

117. American Federation of Musicians President Raymond Hair confirmed that he had previously expressed the opinion that the statutory license rate should vary depending on the level of functionality of the service, with the inference being that services that have a greater functionality should pay a higher rate than services that have a lesser functionality. 4/29/15 Tr. 806:6-25; 812:25-813:4 (Hair). And although Mr. Hair identified functionality as being able to hear what you want to hear, *id.* at 808:7-11, the AFM comments to the Copyright Office show that functionality refers to the degree of customization allowed by a service. *See In re Music Licensing Study*, U.S. Copyright Office, Comments of Screen Actors Guild – American Federation of Television and Radio Artists and American Federation of Musicians of the United States and Canada at 5-6, available at *http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/SAG_AFTRA_AFM_MLS_2014.pdf* ("In between the plainly non-interactive, non-customized internet radio services that work just like traditional over-the-air radio, and the plainly on-demand services that allow the listener to choose and play a specific recording at will, there now exist a variety of "customized" digital music services with a myriad of gradations of functionality . . . .").[2]

118. In sum, Messrs. Kooker, Harrison and Hair all recognize that the lack of customization in simulcasting should affect the license fee paid by simulcasters. In this regard, they are correct.

[2] The cited comments submitted to the Copyright Office are in the public record. The Judges may take official notice of their content.

IV. AT THE CURRENT RATES, SIMULCASTING IS UNPROFITABLE, WHICH IS NOT IN THE INTEREST OF CONSUMERS, BROADCASTERS, ARTISTS, LABELS OR SOUNDEXCHANGE.

A. DESPITE BROADCASTER EFFORTS TO MONETIZE THEIR STREAMS, SIMULCASTING HAS BEEN, AND REMAINS, UNPROFITABLE.

119. Radio and simulcasting are and have always been ad-supported rather than subscription-based. Dimick WRT ¶ 3 ("Broadcast radio and simulcasting have always been – and are still – free to the consumer and supported by advertising."). Contrary to the claims of Dennis Kooker, who asserted that "the wide range of streaming services (including statutory services) are competing for the potential of consumer dollars that were once spent at record stores and, decreasingly at online stores for permanent download" (Kooker WDT at 12), simulcasting is purely ad-supported and radio broadcasters compete for dollars from advertisers, not consumers. Dimick WRT ¶ 3 There is no expected change in that model. *Id.* ("I do not see any indication that that situation is changing now or that it will change during the upcoming license term, which I understand ends in 2020.").

120. Broadcasters have attempted to monetize the stream. They sell/have sold pre-roll advertising—that is, audio and video advertising that precedes the stream once a user clicks on the stream to "listen live." Dimick WDT ¶ 23; 5/26/15 Tr. 5819:16-5820:13 (Dimick); Downs WDT ¶ 12. Broadcasters insert/have inserted different ads into their streams for additional revenue ("ad-insertion"). Dimick WDT ¶ 23; 5/26/15 Tr. 5820:19-5821:11 (Dimick); Downs WDT ¶ 12. They employ/have employed third parties that specialize in these streaming ad insertion sales. Downs WDT ¶ 12; Tr. 5/21/15 Tr. 5228:16 (Downs); Dimick WDT ¶ 19 (engaging "third party brokers for this

activity (Katz and Triton)"). They employ their own sales staff to sell the stream and they set goals for streaming sales. 5/21/15 Tr. 5227:3-14 (Downs). They include the stream as part of their overall "digital strategy" and attempt to sell it as part of their advertising sales bundles. SX Ex. 1579 at 19-21 (including streaming as part of LFMC's overall digital sales package). Making streaming profitable has been a focus of broadcaster management. Dimick WDT ¶ 22 ("Growth of our digital and streaming revenue is a focus of LFMC and our executives and managers are charged with making streaming a profitable enterprise.").

121. However, a "marketplace gap" remains in how advertisers value simulcast streaming. Dimick WDT ¶ 18; Downs WDT ¶ 15 ("We have been unable to interest advertisers in even our most listened-to streaming stations."). Many advertisers are unwilling to pay anything extra for the inclusion of their advertisements on the stream. Dimick WDT ¶ 18; Downs WDT ¶ 13.

122. Mr. Dimick of LFMC testified that these extensive efforts have never resulted in streaming being profitable. Dimick WDT ¶ 16 ("cost of streaming far outweighs the revenue we can earn from the stream. This has been the case for many years, and we foresee it being the case for at least the next several years."); 5/26/15 Tr. 5822:15-20 (Dimick) ("we were able to generate some revenue for it. But the revenue versus expenses was nowhere near profitable"). Even in top 20 markets such as Miami, Denver, Atlanta and San Diego, there is no "readily available" source of "additional revenue from streaming." Dimick WDT ¶ 17.

123. LFMC demonstrated that, when comparing direct streaming revenues with direct streaming expenses for its Miami and Denver music formatted stations, all of the stations performed at a loss for 2013 and the period January through August 2014 (the most current data when the testimony was filed). Dimick WDT ¶¶ 23-27; 5/26/15 Tr. 5830:1-5833:5 (Dimick). For example, in 2013, WLYF, which is LFMC's most listened-to station for streaming, had [[ ]] is direct streaming revenue, incurred [[ ]] in SoundExchange royalties and had [[ ]] in other direct streaming expenses (bandwidth, scheduling and composer royalties), resulting in a]] for streaming for the year, as reflected in the following table from Mr. Dimick's Written Direct Testimony.

Time Period	Station	**Streaming Revenue**	**Sound Recording Royalties paid to SoundExchange**	**Streaming Bandwidth, Scheduling, Composer Royalties**	**Approximate Loss**
2013 (full year)	Miami WLYF	[[ ]]	[[ ]]	[[ ]]	[[ ]]
	Miami WMXJ	[[ ]]	[[ ]]	[[ ]]	[[ ]]
	Denver KYGO	[[ ]]	[[ ]]	[[ ]]	[[ ]]
	Denver KQKS	[[ ]]	[[ ]]	[[ ]]	[[ ]]
2014 (through 8/31)	Miami WLYF	[[ ]]	[[ ]]	[[ ]]	[[ ]]
	Miami WMXJ	[[ ]]	[[ ]]	[[ ]]	[[ ]]
	Denver KYGO	[[ ]]	[[ ]]	[[ ]]	[[ ]]
	Denver KQKS	[[ ]]	[[ ]]	[[ ]]	[[ ]]

Dimick WDT ¶ 27, Table at p. 12.

124. The ad insertion model simply did not work for LFMC. 5/26/15 Tr. 5819:16-5822:20 (Dimick). In addition to providing lackluster revenue, ad insertion degraded the streaming product because it necessarily resulted in disjointed ad insertion and filling of otherwise dead airtime (where commercials could not be sold) with repetitive Public Service Announcements. Dimick WDT ¶ 19; 5/26/15 Tr. 5820:19-5822:14 (Dimick).

125. In order to improve the streaming product and to "monetize streaming more effectively," LFMC recently moved to the new Nielsen Total Line Reporting ("TLR") system. Dimick WDT ¶ 19; 5/26/15 Tr. 5822:21-5823:11 (Dimick). Nielsen TLR allows LFMC to obtain an audience rating for its streams and to capture the streaming rating in with its total audience rating. Dimick WDT ¶ 19 (LFMC has implemented TLR on a station by station basis). The move to TLR was an investment in the future by LFMC—that is, LFMC "moved to Nielsen TLR with the goal of capturing the streaming audience within our Nielsen rating, thereby perhaps obtaining increased advertising rates." Dimick WDT ¶ 19; 5/26/15 Tr. 5831:10-22 (Dimick) (testifying that the change to TLR was a "move on our part to try something new"). Despite the change to TLR, LFMC has yet to see any material or sustained increase in its ratings from streaming. Dimick WDT ¶ 20 (testifying that the Nielsen TLR reports "reflect virtually no streaming audience since we began TLR for those stations" for key stations in Denver and Miami); 5/26/15 Tr. 5828:15-5829:13 (Dimick). For its most successful streaming station, WLYF, the stream has garnered only an occasional 0.1 audience rating blip (two months in the period January through August 20141/1-8/31/2014). Dimick WDT ¶ 20; 5/26/15 Tr. 5828:6-14 (Dimick).

126. These low and inconsistent Nielsen streaming ratings "do not allow [LFMC] to argue forcefully to advertisers that they should pay more because our over-the-air programming is also streamed. Advertisers base their buys and the rates they are willing to pay on consistent, demonstrated ratings. Dimick WDT ¶ 21. An upward flicker in the rating of 0.1 (the smallest possible increase) will not enable LFMC to demand more for its spots." Dimick WDT ¶ 21; 5/26/15 Tr. 5829:3-13 (Dimick) (testifying that advertisers are buying LFMC's "ability to sustain" the ratings).

127. The move to TLR has, at least for now, resulted in reduced direct streaming revenue. Dimick WDT ¶ 25 ("LFMC's direct streaming revenues have decreased recently because of its move to Nielsen Total Line Reporting."); *id*. at 12 (Table of LFMC Station Streaming Revenues and Expenses) (reflecting [[ ]]. This is because LFMC can no longer insert advertising spots due to TLR reporting requirements. 5/26/15 Tr. 5831:10-22 (Dimick).

128. SoundExchange royalties remain the single largest expenses for LFMC. Dimick WDT ¶ 27 (*e.g.*, for each of LFMC music formatted stations, the SoundExchange royalties exceed the Streaming Bandwidth, Scheduling and Composer Royalties combined). LFMC has seen its SoundExchange Royalties rise substantially over the past several years, from [[ ]][3] Dimick WDT ¶ 26.

[3] This decline in royalties was due to efforts by LFMC to mitigate costs through geo-fencing of its streams. Dimick WDT ¶ 26.

129. LFMC does not foresee any change in the financial results for its streaming operations without relief on the royalty rates. 5/26/15 Tr. 5833:6-5834:1 (Dimick).

130. For Bryan Broadcasting, the aphorism "Analog Dollars / Digital Dimes" remains true. Downs WDT ¶ 11; *accord* 5/26/15 Tr. 5821:18-5822:1 (Dimick) (demand for streaming ads was not "nearly as high as the demand for our over-the-air product"). For example, Bryan Broadcasting's ad insertion agreement with its streaming provider "generates revenues across all of [its] stations of less than [[ ]] per month, often much less." Downs WDT ¶ 12; 5/21/15 Tr. 5231:15-5232:3 (Downs) ("Q: What kind of annual dollars from ad insertion is Bryan Broadcasting making? A: Well, in 2012, ad insertions from Abacast—once again, I use them because I feel like that's my best shot at profitability. They are professionals at this. . . . It was [[ ]]. In 2013, it was [[ ]]. And the final numbers for 2014 came to [[ ]]"). The only other streaming revenue of note comes from the splash screen on Bryan Broadcasting's mobile streaming player and certain pre-roll advertisements—but those advertising lines have only been sold for Bryan Broadcastings' talk format stations. *Id.* (noting that this revenue is [[ ]] per month for the splash screen and [[ ]] per month from the pre-roll).

131. For the period through August of 2014, Bryan Broadcasting had total streaming revenue (including streaming revenue for its talk stations) of [[ ]], of which only [[ ]] could be attributed to its music formatted stations. Downs WDT ¶ 20 (the remaining revenue was for its splash screen on a non-music formatted station). Bryan Broadcasting's SoundExchange fees for the same period were [[ ]]. Downs WDT ¶ 20; NAB Ex. 4119. This means that Bryan Broadcasting's SoundExchange fees

were almost [[ ]] Bryan Broadcasting's simulcasting advertising revenue for that time period.

132. When advertising is sold on the stream, the average rate is simply too low to make the stream profitable given the related direct costs. For example, Mr. Downs testified that for January-August 2014, Bryan Broadcasting's streaming ad service received an average CPM (cost-per-thousand) of [[ ]] for ad impressions, of which Bryan Broadcasting would receive [[ ]]. Downs WDT ¶ 17; 5/21/15 Tr. 5229:3-5230:9 (Downs). [[ ]] the royalties Bryan Broadcasting pays to SoundExchange, which is the equivalent of $2.30 CPM (or 0.23¢ per performance). *Id.* Indeed, Mr. Downs testified that, for Bryan Broadcasting, "[s]treaming does not even have the same money-making ability as selling bumper stickers." Downs WDT ¶ 13 (reporting that he made [[ ]] from a bumper sticker campaign in July 2014, which [[ ]] Downs WDT ¶¶ 12, 13; 5/21/15 Tr. 5228:21-5229:2 (Downs).

B. THE RECORD LABELS ACKNOWLEDGE THE MARKETPLACE CHALLENGES FOR GENERATING ADVERTISING REVENUE ON THE STREAM.

133. Dennis Kooker of Sony admitted in his Written Direct Testimony that "[s]treaming services are generally unable to significantly increase their ARPU [average revenue per user] through advertising alone." Kooker WDT ¶ 14. Aaron Harrison of Universal likewise stated in his written testimony that "we have found that streaming services cannot generate sufficient ARPU [Average Revenue Per User] through advertising alone." Harrison CWDT ¶ 13.

134. Both Messrs. Kooker and Harrison claimed in their written testimony that the deficit in advertising receipts was due to services being unwilling to run the amount of advertising featured on terrestrial radio. Kooker WDT at 14 ("While there has been some growth in recent years in advertising on streaming services, neither the amounts that advertisers pay nor the average time that services run advertisements are on par with the corresponding dollar amounts and number of ads per hour on terrestrial radio"); Harrison CWDT ¶ 13 ("streaming services are reticent to play advertisements at the same frequency as terrestrial radio").

135. While Mr. Kooker and Harrison both made these assertions generically with respect to "streaming services," they admitted on cross-examination that they had no basis on which to assert that simulcasters (for whom ad breaks were already included in the programming) would intentionally play fewer ads than appeared on the terrestrial broadcast. 4/28/15 Tr. 420:9-25 (Kooker) ("I assume that they [ad availabilities] would be sold if they could"); 4/30/15 Tr. 1104:10-1105:10 (Harrison) (admitting that he had no evidence that the ad load for simulcast was less than for terrestrial radio and that simulcast was "not what I was thinking of" when he asserted that ad load was lower).

136. Mr. Downs addressed the issue of selling more advertisements on the stream. 5/21/15 Tr. 5230:10-5231:14 (Downs). He testified that at the current advertising rates he experiences, we would need to sell "about one third of each hour" in commercials just to "break even." *Id.* Tr. 5231:1-14. Normally, Bryan Broadcasting runs eight to ten minutes of commercials an hour on its stations. *Id.* Mr. Downs testified that "no one going to listen to one third of your product being commercials." *Id.*

137. Mr. Kooker also acknowledged that ad rates (as measured by CPM – cost per thousand impressions) were lower for simulcasting than for terrestrial radio. 4/28/15 Tr. 419:13-25 (Kooker); *see also* Downs WDT ¶ 17 (reflecting Bryan Broadcasting's CPM for [[ ]]). At least part of the reason for this, according to Mr. Kooker, is that advertising budgets have not started to support webcasting the way that they support terrestrial radio. 4/28/15 Tr. 420:1-8 (Kooker). While Aaron Harrison's written testimony (¶ 13) referenced uncited predictions of growth in ad support for webcasting, he likewise admitted that these predictions did not come from simulcasters. 4/30/15 Tr. 1105:11-21 (Harrison).

C. BECAUSE OF THE CURRENT COSTS, MANY BROADCASTERS ARE CHOOSING NOT TO STREAM, OR TO LIMIT STREAMING, RESULTING IN THE LOSS OF A PUBLIC BENEFIT AND ROYALTIES TO SOUNDEXCHANGE.

138. Some stations have chosen not to stream sound recordings at all given the expensive and unpredictable royalties they would incur. WLEN Radio, for example, would like to simulcast to serve its community more effectively by streaming but has chosen not to other than local sporting events, political debates, and government meetings of community interest. Koehn WDT ¶¶ 4, 20. Its main reason for this decision is the sound recording performance royalty bill it would have to pay to SoundExchange. Koehn WDT ¶ 4. Ms. Koehn is "particularly concerned about incurring expensive and unpredictable SoundExchange royalties if [WLEN's] stream were to become popular among [its] listeners." Koehn WDT ¶ 21. Ms. Koehn calculated that if WLEN had only 100 average listeners in 2014, WLEN would have owed over $22,000, and she does "not believe that streaming would generate additional revenues sufficient to cover these

significant royalties, let alone the other costs that would be incurred if [WLEN] began to stream." Koehn WDT ¶ 21.

139. Other broadcasters stream only some stations. As a consequence of the rates set in the NAB WSA agreement, Steve Newberry's company, Commonwealth Broadcasting, is streaming only two of its ten music formatted radio stations, even though Mr. Newberry would like to have them all streaming. 5/20/15 Tr. 5092:19-23 (Newberry). As he explained:

> Q. Are you saying that you're able to stream only two of your radio stations because the rates that exist make it prohibitive to stream more?
>
> A. Yes, sir.
>
> I would love to stream more of my stations so that I could ex[t]end that connection with the radio stations. The two [streaming] stations that I sold were mildly profitable in terms of what we were able to do, and I'm talking less than $1,000 for each of the stations a year. The two [streaming stations] that I retained are mildly losing money and that same thing, but we see it as a service to the listeners. We see it as maintaining that connection that we had with our existing audience. And I have ten -- eight other music-formatted stations that are [not streaming] and it's just not -- it's not practical for me to take on the expenses of those.

5/20/15 Tr. 5092:19-5093:11 (Newberry).

140. Similarly, Bryan Broadcasting has questioned whether streaming is viable. As Mr. Downs stated in his Written Direct Testimony, "[b]ased on my review of our streaming financials in connection with preparing this testimony, I have concluded that our company should seriously consider ceasing our streaming operations, as we may already have reached the point where the costs associated with streaming, particularly for our music formatted stations that generate unsupportable SoundExchange fees, is too expensive to justify." Downs WDT ¶ 23. Subsequently, Mr. Downs chose not to allow

access to the stream of his Top 40 station from the station website, although it remained available from certain other sources. 5/21/15 Tr. 5223:23-5224:55246:12-5248:1 (Downs).

141. Likewise, LFMC continues to scrutinize its streaming operations. In fact, the process of analyzing the revenues and expenses has caused LFMC to question its decision to stream. *Id.*; 5/25/15 Tr. 5834:2-6 (Dimick) ("Q: And is whether or not to continue streaming something that continues to be under discussion? A: Every month when we—you know, when we pay bills.").

142. The decision not to stream by broadcasters, or discontinue streaming, is a loss for the listening public. As discussed above, broadcasters operate in the public interest. *See, e.g.*, Newberry WDT ¶ 14. If a broadcaster does not simulcast, listeners are (and would be) missing out on the valuable programming that they are offered by simulcasters. *See supra* Part III.A.2. Furthermore, if the valuable public services of emergency broadcasts, weather warnings, amber alerts, public service announcements, etc., are not simulcast, certain listeners may lose their link to this vital information. *See supra* Part III.A.

143. The current royalty rates are also detrimental to SoundExchange. Mr. Dimick testified that he would like to encourage listeners to "[g]o listen to our stream," but if he converts an over-the-air listener to a streaming listener, that is an immediate expense for LFMC. 5/26/15 Tr. 5838:6-20 (Dimick). To make that work, Mr. Dimick testified that LFMC needs lower royalty rates. *Id.* Of course, any rate will be beneficial to SoundExchange with respect to a new simulcast listener who substitutes for a terrestrial radio listener. *See, e.g.*, 5/29/15 Tr. 6692:3-6693:8 (Lys) (recognizing, in

response to a question from Judge Strickler, that "it is certainly a possibility" that it would make sense to establish a "much lower rate" for simulcasters than to have them go out of business, assuming "no substitution away from royalty bearing performances").

D. THE CURRENT RATES HAVE THROTTLED THE GROWTH OF SIMULCASTING.

144. The lack of significant growth in performances by webcasters or simulcasters paying at or near the CRB-set commercial rates confirms the unhealthy state of the simulcasting market. As Figures 4 and 5 in Dr. Steven Peterson's written rebuttal testimony show, the vast majority of webcaster growth has been in the pureplay webcaster category, where webcasters pay rates 45-50% below the CRB-set commercial rates. Growth in fees paid by entities paying at or near the CRB-set commercial rates has been almost nonexistent when one accounts for rate increases.

145. Figure 5, reproduced below, show that both broadcasters and commercial webcasters have experienced minimal growth from 2007-2013. The figure also shows that "the types of Webcasters that are paying higher rates have substantially less growth than other Webcasters." 5/14/15 Tr. 3878:20-3879:3 (Peterson).

146. Broadcaster and small broadcaster performances have not grown appreciably over the course of the current license term, and they have actually declined significantly as a percentage of total webcasting royalties, as the table below shows:

Broadcaster Royalties and Performances

	Broadcaster Royalties	Total Webcasting Royalties	Broadcaster Royalties as % of Total Webcasting Royalties	Per Performance Rate	Broadcaster Performances
2010	$37,269,585	$106,448,094	35.0%	$0.0016	$23,293,490,494
2011	$40,195,242	$179,306,460	22.4%	$0.0017	$23,644,260,247
2012	$55,578,300	$299,896,200	18.5%	$0.0020	$27,789,149,815
2013	$68,847,979	$410,591,685	16.8%	$0.0022	$31,294,535,695
2014	$56,661,697	$482,490,896	11.7%	$0.0023	$24,635,520,574

Source: *NAB Exs. 4141, 4199*
Note: *Includes BRD and SMBRD license types*

147. Statutory performances by broadcasters other than iHeart Radio/Clear Channel have actually declined over the last several years, and the percentage of broadcaster royalties in the most recent years of the current license term, and the relative percentage of royalties paid by broadcasters of total webcasting royalties has declined from [[ ]]% in 2010 to [[ ]]% in 2014.

148. The steep downward trend of broadcaster performances excluding iHeart Radio and Clear Channel is illustrated in the chart below:

149. As Mr. Huppe said, "[F]rom my perspective, looking at the conduct in the marketplace is the best evidence of whether something is reasonable or not." 6/3/15 Tr. 7573:11-14 (Huppe). The conduct in the marketplace shows that the current rates are unreasonable and are choking off the growth of simulcasting.

V. SIMULCASTERS' UNPROFITABILITY IS CHARACTERISTIC OF THE UNIVERSAL LACK OF PROFITABILITY THROUGHOUT THE WEBCASTING INDUSTRY, WHICH IS DIRECTLY ATTRIBUTABLE TO THE CURRENT RATES.

150. The lack of profitability and growth of simulcasting is reflective of a problem throughout the entire webcasting industry. Webcasters paying at or near the rates set in the past by the Copyright Royalty Board have not been profitable; the high CRB webcasting rates have taken a heavy toll on the industry.

151. David Pakman, an expert in the economics of investment in the music industry, a former digital music entrepreneur at multiple companies and a longtime partner at Venrock, one of the oldest venture capital firms in the world, testified that he has "never seen or met with or reviewed a single company in webcasting" that is profitable. 5/27/15 Tr. 6215:13-18 (Pakman); *accord* Pakman WDT ¶ 19 ("I am not aware of a single standalone webcaster that has achieved profitability to date."). He testified that webcasting "is not a[] nascent industry" and has "been around 14, 15, 16, years" and that "when you're looking determine whether an industry is predictive of success, is it likely to be able to produce positive investment outcomes for investors, that you would see some evidence of profitability." 5/27/15 Tr. 6219:12-6220:23 (Pakman). To the contrary, Mr. Pakman observed that "we can't find a single one that's profitable." Rather, "[w]e have hundreds of very small webcasters who are unprofitable" and "a couple big ones and they're unprofitable" as well. *Id.* at 6220:7-23 . Mr. Pakman conducted an analysis of other related sectors, such as mobil, eCommerce, and SaaS companies and found that "[t]he other sectors are six to seven times more likely to produce a profitable outcome for their investors." *Id.* at 6226:18-6227:5.

152. Mr. Pakman also observed that the presence of companies in the webcasting market that primarily focus on other businesses but are willing to operate digital music services at a loss for a time is "a sign of an unhealthy market and certainly something that would discourage further entry by companies trying to make a profit." *Id.* at 6227:25-6228:10.

153. The current CRB statutory royalties are the single-biggest reason for webcasters' lack of profitability. As Mr. Pakman testified, "the largest cost that any webcaster faces are the sound recording royalties. So their ability to be profitable or not is a direct result of the royalties they pay." *Id*. at 6216:3-16; *accord* Pakman WDT ¶ 18 ("[T]he biggest cost faced by webcasters is the amount of royalties paid to sound recordings rights holders like the record labels."). Mr. Pakman further testified:

> Market evidence shows that the royalty rates that have been set in the past are extraordinarily high relative to the amount of revenue that could be generated by internet radio services. Ultimately, the cost of music licensing royalties often exceeded the revenue generated by both advertising and subscription business models, producing businesses operating with negative gross margins, unable to generate any profit.

Pakman WDT ¶ 19. Mr. Pakman details the graveyard of failed webcasters that were unable to maintain viable businesses and how the failure rate of digital music companies "is among the highest [he has] observed." Pakman WDT ¶¶ 19-26.

154. In Mr. Pakman's words:

> I don't believe it's a healthy industry. I don't believe it attracts significant amounts of venture capital. I don't believe it attracts a significant amount of entrepreneurs who are willing to start companies, build them, owing to high royalty rates. The high royalty rates are stifling the companies' ability to turn profits. They're making it impossible for companies to be profitable. As a result, we see it as a very unattractive segment into which to make investments.

5/27/15 Tr. 6234:16-6235:4 (Pakman); *see also* Pakman WDT ¶ 11 (concluding that the webcasting "industry has fared poorly due primarily to royalty rates that are too high," which is "evidenced by, among other things, a high failure rate for webcasting services and a lack of investment in these services relative to other digital industries").

155. The lack of webcaster profitability is reflected in investors' unwillingness to invest in webcasters paying royalties at or near the CRB commercial statutory rates. As Mr. Pakman testified, Venrock, one of the oldest venture capital firms in the world, "has never invested in any digital music or internet radio companies," and "the overwhelming majority of [Mr. Pakman's] venture capital colleagues have taken a similar approach by declining to invest in such services." Pakman WDT ¶ 15. Mr. Pakman himself has testified that:

> As a venture capitalist, I do not find webcasting companies operating under the Copyright Royalty Board ("CRB") rates to be attractive candidates for investment, particularly when weighed against the many other healthy internet sectors. Unlike those healthy sectors, webcasting companies are burdened by high royalty rates charged for performing sound recordings that result in unsustainable gross margins and unprofitable companies. The overwhelming majority of my venture capital colleagues agree with me an avoid investing in this sector.

Pakman WDT ¶ 29 (footnote omitted). He concludes that "Companies trying to deliver these innovative services are unsustainable under the current rates and frequently shut down once their investors grow tired of subsidizing these high rates and elusive profits fail to arrive at any scale." Pakman WDT ¶ 34.

156. While SoundExchange witness Dr. Blackburn pointed to an investment figure of $839 million for streaming services, none of that was invested in a statutory webcasting service paying rates that approximated the CRB commercial statutory rates.

5/14/15 Tr. 3879:4-3880:7 (Peterson). Rather, about $407 million was not invested in noninteractive statutory services at all, but in on-demand streaming. Peterson WRT ¶ 36; 5/4/15 Tr. 1715:1-16 (Blackburn). Of the remaining $432 million, a little over $393 million was invested in Pandora, which in 2013 paid rates that are about 43% lower than the CRB commercial statutory rates. 5/27/15 Tr. 6231:3-23 (Pakman); Peterson WRT ¶ 36; 5/4/15 Tr. 1715:24-1716:15 (Blackburn). *Compare* Blackburn WDT at 66 n.117 (reporting that Pandora's 2013 nonsubscription sound recording royalty was .12 cents per performance) *with* 37 C.F.R. § 380.3(a)(1) (providing that 2013 commercial webcaster royalty is 0.21 cent per performance). The remaining $39 million was invested in only three companies – Songza, TuneIn, and DeliRadio – none of which paid CRB commercial statutory rates at the time of the investment. 5/27/15 Tr. 6231:23-6232:15 (Pakman) (Songza paying at the small pureplay rates, 5/4/15 Tr. 1716:24-1717:7 (Blackburn); TuneIn, an aggregator that pays no royalties at all, 5/27/15 Tr. 6231:25-6232:4 (Pakman); Peterson WRT ¶ 37; 5/4/15 Tr. 1717:11-17 (Blackburn); and DeliRadio which only plays royalty-free directly licensed recordings, 5/27/15 Tr. 6232:11-15 (Pakman); Peterson WRT ¶ 37; 5/4/15 Tr. 1717:18-1718:9 (Blackburn)).

157. Professor Lys purported to identify other investments, but none of them identified an outside investment in a company that paid CRB-set commercial statutory rates as of 2014. Lys WRT ¶ 136. Professor Lys was remarkably unfamiliar with the companies he cited. For example, he did not know whether any of them paid CRB-set statutory rates or not. 5/29/15 Tr. 6733:18-24 (Lys). He did not know whether any of them were on-demand services. 5/29/15 Tr. 6734:3-10 (Lys). And he did not know whether Goom Radio even still operated in the United States. 5/29/15 Tr. 6734:11-25

(Lys). In fact, many of the companies were not statutory webcasters at all but interactive services. 5/27/15 Tr. 6232:16-6233:8 (Pakman). [[ ]] *See* NAB Ex. 4141, 4199.[4] Some companies "were based in France that don't even operate in the United States." 5/27/15 Tr. 6232:16-6233:8 (Pakman).

A. NOT A SINGLE WEBCASTER PAYING RATES AT OR NEAR THOSE SET BY THE CRB IS PROFITABLE.

1. Even SoundExchange's Witnesses Concede that There Are No Profitable Webcasters.

158. Even SoundExchange's witnesses have failed to identify any profitable webcasters. Dr. Blackburn directly admitted that he "did not identify in [his] testimony a single profitable webcasting firm." 5/4/15 Tr. 1605:7-12 (Blackburn). He further admitted that he "did not identify in [his] written direct testimony a single webcasting service paying the statutory rate that has ever had a single profitable year in the history of the industry" and that he is "not aware of a single service paying the statutory rate that has ever had a single profitable year." *Id*. at 1606:24-1607:12.

159. While Professor Lys pointed to two webcasters that he suggested were profitable and that he claimed made Mr. Pakman's analysis "factually incorrect" – Pandora and Accuradio – neither example holds up. Lys WRT ¶ 125; 5/29/15 Tr. 6728:20-6729:3 (Lys). First, neither pays the CRB commercial rates. Rather, Pandora

[4] While Spotify paid CRB-set commercial statutory rates for a brief time during part of 2012 and 2013, it is primarily an on-demand service and no longer pays statutory royalties. NAB Ex. 4141 at 60, 86; NAB Ex. 4199 at 13. Pandora pays pureplay rates, and AccuRadio has paid small pureplay rates. NAB Ex. 4141 at 21, 24, 45, 47, 72, 97; NAB Ex. 4199 at 26, 30.

pays the pureplay rates, which have been approximately 40-50% lower than the commercial CRB-set webcaster rates during the 2011-2015 license term. NAB Ex. 4141 at 21, 45, 72, 97; NAB Ex. 4199 at 26; 5/27/15 Tr. 6218:4-8 (Pakman). *Compare* 74 Fed. Reg. 34796, 34799 (July 17, 2009) (nonsubscription pureplay rates) *with* 37 C.F.R. § 380.3(a)(1) (CRB-set commercial webcaster rates). Similarly, Accuradio has paid small pureplay webcaster rates, which have been 12-14% of Accuradio's revenues or 7% of its costs.[5] NAB Ex. 4141 at 24, 47; NAB Ex. 4199 at 30.

2. Pandora Has Never Been Profitable, Even at Rates 45% Lower than the Rest of the Industry.

160. The webcasting industry is dominated by a single webcaster – Pandora – which transmits by far the most performances and pays by far the most royalties. *See* Blackburn WDT ¶ 23 (characterizing the webcasting industry as "highly concentrated in terms of royalty payments" and showing that, in 2013, Pandora paid [[ ]] of statutory webcasting royalties). As Dr. Blackburn admitted, "Pandora is number one and is number one by far," and it pays, "by far, a substantial majority of statutory payments." 5/4/15 Tr. 1569:2-3, 13-17 (Blackburn). Pandora pays under the pureplay rates, which are about 45% lower than the commercial CRB statutory rates. *Compare* Blackburn WDT at 66 n.117 (reporting that Pandora's 2013 royalty was .12 cent per performance) *with* 37 C.F.R. § 380.3(a)(1) (providing that 2013 commercial webcaster royalty is .21

[5] As for Accuradio, which Professor Lys asserted was "reportedly profitable," Professor Lys relied only on a hearsay press release from September 2014 and not Accuradio's actual financial statements for full-year 2014. Lys WRT ¶125 & n. 126. Professor Lys relied on this hearsay release even though he admittedly had access to Accuradio's actual financial statements before he accessed the press release and about a week before his rebuttal testimony was filed. Lys WRT ¶125 n. 126. Moreover, Professor Lys did not bother to review Accuradio's financials produced in this case in the many months after they were produced and before he testified. 5/29/15 Tr. 6731:18-21 (Lys).

cent per performance). Therefore, according to SoundExchange witness Dr. Blackburn, Pandora represents "a big share of the dollars," and "[t]hey would be an even bigger share of the plays." 5/4/15 Tr. 1569:20-22 (Blackburn).

161. Even paying rates that are 40-50% lower than the CRB-set commercial rates, Pandora has never had a profitable year. Herring WDT ¶ 4.a ("Pandora … has yet to see its first profitable year."); SX Ex. 158-042 (Pandora 2014 10-K showing consistent full-year net losses, including $30.4 million net loss in 2014); Pakman WDT ¶ 27 (observing that although "Pandora Media is the largest internet radio company," "the company is unable to generate a profit and never has"); Pakman WDT ¶ 31 ("Yet even at its alternative rates, Pandora remains unprofitable.").

162. Mr. Pakman testified that of "the research reports [he] read by public market stock analysts, none of them, those analysts that [he] read, believe that Pandora will ever be profitable on an annual basis." 5/27/15 Tr. 6217:15-21 (Pakman). Indeed, Mr. Pakman quotes one of these reports by Generator Research as finding that:

> Our analysis is that *no current music subscription service – including marquee brands like Pandora, Spotify and Rhapsody – can ever be profitable*, even if they execute perfectly and the reason for this is that it is almost inconceivable that the music industry will agree to significantly reduced royalties.

Pakman WDT ¶ 27 n. 34 (quoting Generator Research, *Digital Music Subscription Services*, at 11 (Nov. 12, 2013)) (emphasis added by Mr. Pakman).

163. Mr. Herring confirmed the opinion of Mr. Pakman that the sound recording performance royalties are the chief culprit for Pandora's unprofitability. Herring WDT ¶ 4.a ("A significant contributing factor to [Pandora's] losses is Pandora's

staggering sound recording performance royalties, which have totaled more than $1 billion since the company launched in 2005."); Herring WDT ¶ 6 ("Pandora's single most significant cost is the royalties paid to SoundExchange to publicly perform sound recordings …."). Mr. Herring observes that had Pandora paid the CRB-set commercial webcaster royalties instead of the pureplay royalties, Pandora "would have sustained an estimated $800 million in additional losses … through the end of 2014 and almost certainly would have been forced out of business years ago." Herring WDT ¶ 4.a; 5/13/15 Tr. 3373:9-3374:15 (Herring) ("You can only operate at a large loss for a short period of time."). At those rates, Pandora would have paid royalties in both 2008 and 2012 that exceeded 100% of its revenues. Herring WDT ¶ 8. Mr. Herring emphasizes that it is "clear that Pandora would not be a 'willing buyer' at rate levels that would make it impossible … for us (or any other webcaster) to have the prospect of growing into a profitable business." Herring WDT ¶ 4.a. In his words, "[i]t defies logic to suggest that we would willingly negotiate royalty payments that would cause us to continue to sustain net losses for many additional years; it is equally implausible that record labels operating in a competitive marketplace would insist on royalties at a level that would jeopardize the continued flow of enormous royalties from by far the largest webcaster in operation." Herring WDT ¶ 10.

164. While Professor Lys pointed to Pandora's fourth quarter of 2014, where it reported a net income of $12 million, Pandora reported a net loss four times that large – $48 million – in the very next quarter (1Q 2015). Lys WRT ¶ 125; 5/27/15 Tr. 6216:21-6217:21 (Pakman); 5/29/15 Tr. 6730:22-24 (Lys). Moreover, Pandora's $48 million loss

in that quarter was greater than its loss in that same quarter for prior year 2014, where it experienced a lower loss of $28.9 million. 5/29/15 Tr. 6730:25-6731:8 (Lys).

B. IN CONTRAST TO THE FRAGMENTED AND UNPROFITABLE WEBCASTERS, THE RECORDING INDUSTRY IS HIGHLY CONCENTRATED, HIGHLY PROFITABLE, AND ORGANIZED TO MAXIMIZE INDUSTRY PROFIT.

165. SoundExchange goes to significant lengths to suggest that the recording industry is suffering, showing declines in sales to create an impression that the sky is falling. The labels also presented isolated tidbits regarding certain costs, principally in connection with SoundExchange's written direct case. *See, e.g.*, Kooker WDT at 3-5 (identifying certain Sony costs); Harleston WDT ¶¶ 11, 13, 30-32 (same for Universal). But neither the labels nor SoundExchange presented evidence that would support any analysis or rate setting based upon cost recovery or return on investment. *See* 4/28/15 Tr. 499:9-502:21 (Kooker) [[ ]]; *accord* 4/30/15 Tr. 1011:10-16 (Harrison) [[ ]].

166. Notwithstanding SoundExchange's tactical decision to avoid the subject of the labels' profitability, and to focus instead on purported difficulties arising from marketplace transitions, the record demonstrates unequivocally that the labels are highly profitable notwithstanding reduced revenues from physical and digital sales. [[

[redacted]]]. *See* IHM Ex. 3187 (medium range plan); 4/28/15 Tr. 517:4-6 (Kooker) ("[[[redacted]]]); *id*. at 517:23-518:5 (Kooker) ([[[redacted]]] 4/28/15 Tr. 521:15 – 522:2 (Kooker).

167. [[[redacted]]] 5/1/15 Tr. 1357:21-1358:2 (Harleston); IHM Ex. 3270. Moreover, Universal [[[redacted]]] IHM Ex. 3122.

168. Mr. Van Arman also testified that his labels are profitable. 4/28/15 Tr. 636:3-7 (Van Arman). He also testified that the digital revenue of the Secretly Group has more than tripled over the past five years. *Id.* at 637:1-5.

169. The evidence demonstrates that the recording industry is highly concentrated as well as being highly profitable. Sony's market share is 28.2% for CDs and 26.5% for digital albums. SX Ex. 12 at 3, Kooker WDT at 3; *accord* 4/28/15 Tr. 413:13-17 (Kooker).

170. Following the acquisition of EMI in 2012, Universal's market share is approximately 38%. Harrison CWDT ¶ 4; 4/30/15 Tr. 1094:17-23 (Harrison).

171. Warner's share of the recorded music market is approximately 20%. 4/30/15 Tr. 1095:14-16 (Harrison); *see also* 6/3/15 Tr. 7481:16-18 (Wilcox).

172. Among the three of them, Universal, Sony, and Warner control 85% of the US recorded music market. 4/30/15 Tr. 1094:17-1095:25 (Harrison).

173. Even SoundExchange's own economist has admitted that the record industry is highly concentrated. As early as 2002-2003, Dr. Blackburn noted that the recording industry was "extremely concentrated both horizontally and vertically," "[w]ith five companies owning virtually all significant record labels." 5/26/15 Tr. 5946:7-5947:8 (Blackburn). He further acknowledged "that those five companies had tremendous market power in the distribution of albums." *Id*. at 5947:9-13. He also agreed that, since the 2002-2003 timeframe, the record industry had become even more concentrated, with the five major labels "now consolidated to just three major labels." *Id*. at 5947:14-16.

174. Universal, Sony, and Warner representatives, representing a collective 85% of the increasingly concentrated industry, all sit on the SoundExchange Licensing Committee. 4/30/15 Tr. 1092:15-1094:15 (Harrison). This committee meets weekly to discuss CRB strategy and licensing strategy for statutory services. *Id*.

VI. THE JUDGES SHOULD ADOPT NAB'S PROPOSED RATES FOR SIMULCASTING UNDER THE APPLICABLE STATUTORY STRUCTURE.

A. THE STATUTORY STANDARD REQUIRES CONSIDERATION OF WHAT WILLING BUYERS WOULD PAY WILLING SELLERS IN A HYPOTHETICAL EFFECTIVELY COMPETITIVE MARKETPLACE WITHOUT THE STATUTORY LICENSE.

175. As discussed in NAB's Proposed Conclusions of Law, the governing statute requires the Judges to set license fees "that most clearly represent the rates and

terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." *See infra* PCL Part XI, 17 U.S.C. §114(f)(2)(B). Moreover, the rates must reflect the rates that would prevail in a hypothetical effectively competitive market without the statutory license in which individual record companies are the sellers of license rights and individual services are buyers. *See, e.g.*, *Web I*, Final Rule, 67 Fed. Reg. 45240, 45244-45 (July 8, 2002) (rates set in "competitive marketplace"); *Web III Remand*, Final Rule and Order, 79 Fed. Reg. 23102, 23114 n. 37 (statutory standard is one of "effective competition"); *Web II*, 72 Fed. Reg. at 24091 (observing that "[a]n effectively competitive market is one in which supercompetitive prices or below-market prices cannot be extracted by sellers or buyers . . . .").

176. All of the parties' economists agree that "[t]he hypothetical marketplace is one in which no statutory license exists." Katz WDT ¶ 5; Talley WRT at 5; 5/8/15 Tr. 2604:10-22 (Shapiro); *see* Fischel & Lichtman AWDT ¶ 10.

177. All of the parties' principal economists agree that the hypothetical market for which the Judges are setting rates must be competitive. *See* Katz WDT ¶¶ 5, 17, 18-34; Shapiro WDT at 3, 10-16; Fischel & Lichtman AWDT ¶ 10; Rubinfeld CWRT ¶ 112; 5/11/15 Tr. 2799:9-16; 2800:3-18; 2801:9-17 (Katz); 5/8/15 Tr. 2604:10-22 (Shapiro); 5/15/15 Tr. 4094:7-19 (Lichtman).

178. Professor Katz explained (i) the economic rationale for why the requirement of a competitive marketplace is the only sensible construction of the statutory scheme, and (ii) what economists mean by effective competition and competitive prices. 5/11/15 Tr. 2800:3-18; 2802:2-23 (Katz).

179. As Professor Katz explained, even monopolists are willing sellers that sell to willing buyers – at least buyers who are "willing" in the sense that they act voluntarily. Katz WDT ¶ 15. A standard that required only a voluntary transaction, however, would provide essentially no guidance for rate setting. *Id.* ¶ 16. Moreover, it would make no sense in the context of the statute. Congress would not have established the CRB and this enormously costly rate setting process "if Congress had intended that monopolistic license fees could meet the statutory standard. If Congress had intended monopoly rates to prevail, then it could simply have created the statutory license and given SoundExchange antitrust immunity unilaterally to set rates on behalf of the industry. Congress did not do so." *Id.*

180. Professor Katz opined that "[t]he creation of a rate-determination process and its willing-buyer/willing-seller standard can best be reconciled with economic principles and common sense by interpreting willing buyers as those who have meaningful choices among competing sellers, rather than facing a single, all-or-nothing offer from a monopolist." Katz WDT ¶ 17. He described buyer choice as the "essence of competition":

> Specifically, competition arises *only* when buyers have the ability to substitute the offerings of one seller for those of another. It is this possibility of substitution that drives sellers to offer higher quality and lower prices in order to attract buyers to themselves rather than their rivals. Conversely, when buyers lack the ability to substitute among the offerings of different sellers, there is no competition among sellers to attract customers.

Id. ¶ 32. Indeed, the concept of buyer choice among several substitute suppliers plays a critical and central role in all of the definitions of workable or reasonable competition in

the academic literature. *Id*. ¶ 33; 5/11/15 Tr. 2802:20-2803:8 (Katz); 5/26/15 Tr. 5649:4-8 (Katz).

181. It follows from the foregoing that (a) a monopolized market is not effectively competitive, and (b) suppliers of complementary products do not compete with each other. Katz WDT ¶¶ 34-43; 5/11/15 Tr. 2804:19-2805:7 (Katz); *accord* Shapiro WDT at 11-13 ("[A] market that is monopolized or controlled by a cartel is *not* workably competitive"); Fischel & Lichtman AWDT ¶ 10 (Under the statutory standard, "neither the buyers nor the sellers exercise such monopoly power as to establish them as price-makers and, thus, make negotiations between the parties superfluous."). Indeed, by logic first identified by Antoine Augustin Cournot in 1838, firms offering complementary products tend to set higher prices than would even a monopoly seller of the same products. Katz WDT ¶¶ 41-43. The fact that an oligopoly of suppliers of complementary products might charge higher prices than would a monopoly supplier is an illustration of the fact that suppliers of complements do not compete with one another. This fact in no way renders the monopolist's pricing effectively competitive. *Id*. ¶ 43.

182. Professor Katz explained that competition pushes prices towards the competing suppliers' marginal costs, including any opportunity costs or benefits. *Id*. ¶¶ 5, 14, 25. In effectively competitive markets, prices will not fall all the way to marginal cost, but they will strongly tend in that direction and will be near marginal cost. Katz WDT ¶¶ 5, 31.

183. Professor Katz also described the public benefits of a competitive market standard and the reasons why a competitive market standard is consistent with economic policy and the public interest. In Professor Katz's words, "[m]any U.S. public policies,

including antitrust and regulatory policies, seek to protect competition because of the benefits it delivers to consumers. These benefits typically arrive in the form of lower, cost-based prices, greater innovation and variety, and/or improved product and service quality." *Id.* ¶ 21.

184. According to Professor Katz: "[p]romoting efficiency through competition is widely recognized as the most effective means in most markets to promote overall consumer welfare. As the Federal Trade Commission has explained:

> Free and open markets are the foundation of a vibrant economy. Aggressive competition among *sellers* in an open marketplace gives consumers — both individuals and businesses — the benefits of *lower* prices, higher quality products and services, more choices, and greater innovation.

Id. ¶ 22 (quoting U.S. Federal Trade Commission, *Guide to Antitrust Laws*, http://www.ftc.gov/tipsadvice/competition-guidance/guide-antitrust-laws) (emphasis added by Professor Katz). The Supreme Court has repeatedly reached the same conclusion. For example, the Court stated:

> The Sherman Act reflects a legislative judgment that, ultimately, competition will produce not only lower prices but also better goods and services. "The heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co. v. FTC*, 340 U. S. 231, 340 U. S. 248. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost, are favorably affected *by the free opportunity to select among alternative offers*.

Katz WDT ¶ 22 (quoting *National Soc'y of Prof. Engineers v. United States*, 435 U.S. 679, 695 (1978)) (emphasis added by Professor Katz).

185. Similarly, economists have long recognized the benefits of competition:

> Economic efficiency means that, under competitive conditions, the net value of society's scare resources is maximized…a competitive market creates a maximum of net social value. This means that society's resources have been allocated in efficient fashion. The sum of consumers' surplus and factor or producers' surplus is maximized when net social value is maximized under competition.

Katz WDT ¶ 22 (quoting Robert B. Ekelund, Jr. and Robert D. Tollison (1997), *Microeconomics: Private Markets and Public Choice* (5th ed.), Boston: Pearson/Addison Wesley, at 97. As Professor Katz explains, "[o]ne of the great virtues of competitive prices is that they guide consumers and firms to the point at which society's benefits are maximized." Katz WDT ¶ 27.

186. In addition to maximizing society's overall benefits, competition also ensures that buyers face relatively low prices and, thus, buyers enjoy much of the benefit generated by the good or service. Protecting competition to promote consumer benefits is a fundamental objective of U.S. public policy. In summary, competition typically leads to a distribution of benefits that favors buyers; it does not necessarily split the gains from trade equally between buyers and sellers. *Id*. ¶ 28.

187. It is important to recognize that the mere presence of large, sophisticated buyers does not lead to a competitive outcome. Professor Katz identified the circumstances under which large, sophisticated buyers may be able partially to offset seller power by promoting increased rivalry among sellers and demonstrates why those circumstances do not exist in contexts relevant to this case. *Id*. ¶¶ 36-37. Those circumstances exist where large buyers can shift large purchases among competing sellers (not possible with "must haves" or sellers of complements) or where the buyers can promote entry. Neither is possible with a monopoly (or must have) seller and no

realistic chance that an entrant will offer a viable substitute for the monopolist's product *Id.* ¶ 36. Professor Katz further demonstrated the economic error of the view expressed in *Web II* that a large buyer could offset monopoly power and obtain a "competitive" price even in the absence of competition. *Id*. ¶¶ 37-39; 5/26/15 Tr. 5651:2-5657:14 (Katz) (discussing white crows).

188. Standard economic analysis demonstrates that the price set in markets with a single seller and a few large buyers will tend to give rise to prices much closer to the pure monopoly price than to a competitive price, even if the parties are equally skillful and sophisticated bargainers. In other words, the prices that result from bargaining between a buyer and seller with equal bargaining power do *not* satisfy a standard requiring prices at the levels that would obtain in an effectively competitive market. Moreover, when a licensor with market power faces two or more potential licensees, the resulting price will be even higher, and thus, further away from the competitive level. *See* Katz WDT ¶¶ 38-39 & Technical App. Part A.

189. Consistent with its desire for prices that reflect market power rather than competition, SoundExchange attempts to turn the concept of effective competition and its benefits for the public and for consumers on its head. In SoundExchange's view of the world, it is enough that buyers have some undefined amount of bargaining leverage to capture some undefined amount of the available surplus. *See*, *e.g.*, Rubinfeld CWRT ¶ 112 (essentially saying that any rates that do not "approximate[] monopoly rates" are effectively competitive); *id.* ¶¶ 123-26 (relying on evidence of negotiations to support claim of competition).

190. But that is not "competition" in the meaningful sense that promotes consumer or public benefits or fosters innovation and lower prices. Again, "competition typically leads to a distribution of benefits that favors buyers; it does not necessarily split the gains from trade equally between buyers and sellers." Katz WDT ¶ 28. And, in any event, Professor Rubinfeld himself concluded that [[ ]] NAB Ex. 4129, slide 42.

B. LICENSE RATES FOR SIMULCASTING SHOULD BE SET AT THE LOW END OF ANY RANGE OF REASONABLE RATES, NEAR THE RECORD COMPANIES' OPPORTUNITY COSTS OF LICENSING.

1. Under Current Rates, Simulcasting Is Not Profitable, and Simulcasting Is Stagnating.

191. The evidence at trial shows overwhelmingly that simulcasting is not currently a profitable business and that, at rates at or anywhere near the current rates, growth of simulcasting involving sound recordings will be severely limited if it occurs at all. *See supra* Part IV.

192. The testimony of every radio broadcaster was consistent that simulcast streaming is an unprofitable business because of sound recording fees and that, as a consequence, they are not aggressively seeking to develop streaming. Julie Koehn testified that her station, WLEN, is not streaming any music (only local community and sports programming) because of the SoundExchange fees. Koehn WDT ¶¶ 4, 20. Likewise, despite his philosophical commitment to streaming, Steve Newberry testified that Commonwealth is streaming only two of its ten music stations, both at a loss.

5/20/15 Tr. 5092:19-5093:11 (Newberry). Thus, a significant number of potential buyers are unwilling to participate at the current rates.

193. As set out in a chart in Mr. Dimick's testimony with respect to LFMC, [[ ]] Dimick WDT ¶ 27. As a consequence of these fees, it is not in the interest of LFMC to attempt to grow the audience for the stream or convert terrestrial listeners to the stream. *Id.* ¶ 29. If the rate were cut to $0.0005, the rate proposed by the NAB, "this would allow LFMC to more aggressively pursue streaming listeners." *Id.* ¶ 2.

194. Bryan Broadcasting's minimal revenues from streaming were also far outweighed by the fees paid to SoundExchange. For the period through August of 2014, Bryan Broadcasting had total streaming revenue (including streaming revenue for its talk stations) of [[ ]], of which only [[ ]] could be attributed to its music formatted stations. Downs WDT ¶ 20. In contrast the SoundExchange fees for the same period were [[ ]]. *Id.*; NAB Ex. 4119.

195. The examples of Lenawee, Commonwealth, LFMC, and Bryan are not outliers. Both Mr. Dimick and Ms. Koehn testified that they are not aware of broadcasters that are profiting from streaming. Dimick WDT ¶ 15 ("I do not believe that we are alone in this regard; I understand from colleagues in the industry that few broadcasters are able to boast a profitable streaming operation."); Koehn WDT ¶ 22 ("I am not aware of any small broadcasters who are streaming their broadcast programming and making a profit from it."). SoundExchange has also presented no evidence of a profitable simulcaster.

196. As discussed in Part IV, *supra*, the inability to generate profits from simulcasting has resulted in little or no growth of simulcast performances during the course of the most recent license term. As examples, Messrs. Dimick, Downs, and Newberry, and Ms. Koehn are either not streaming, limiting streaming, or not promoting streaming in order to avoid fees. In these circumstances, potential "willing buyers" are not willing to buy at the current rates.

2. The Marginal Cost to Record Companies from Licensing Simulcasting Is Near Zero or Negative.

197. As discussed in Professor Katz's Written Direct Testimony, a willing seller "will not agree to a price below its marginal or incremental cost of providing the good or service, including the opportunity cost of doing so." Katz WDT ¶ 14. Competition, however, will push pricing towards marginal cost, including opportunity cost. *Id*. ¶ 25 ("[r]ivalry among competitive suppliers drives them to set prices near their incremental or marginal costs of supplying the relevant good or service").

198. In the context of the licenses at issue, as with much intellectual property, the direct or out-of-pocket marginal cost is effectively zero. Katz WDT ¶ 29 ("In the case of intellectual property and software markets . . . marginal costs typically are near zero"); 5/26/16 Tr. 5658:3-5 (Katz) ("[w]hen you think about the marginal cost of the license, the out-of-pocket cost is probably going to be zero or near zero").

199. In addition to out-of-pocket costs, it is well established that a seller in an effectively competitive market would also consider its opportunity costs as part of its marginal costs:

> [a]n effectively competitive price will reflect the seller's opportunity cost. When licensing to a particular streaming service, a record company can face opportunity costs both in terms of forgone recording sales and foregone revenues from licensing to other streaming services. Conversely, when a streaming service has promotional benefits, those can be viewed as either a form of payment in kind or a negative opportunity cost.

Katz AWRT ¶ 77. As Professor Katz similarly noted at the hearing:

> as an economist, we're taking into account opportunity costs, and would say, okay, if the record company -- if there is one more play of its intellectual property, one more play of its recording, that may affect its sales of other products, and the record company is going to want to take that into account and that's what the notion of opportunity cost is getting at, is saying, if there is one more play of -- when you are recording, how does that affect your revenues and profits from other sources.

5/26/16 Tr. 5658:10-20 (Katz).

200. Critically, these "opportunity costs" can be either positive or negative.

Here, "opportunity costs" are essentially interchangeable with the concepts of promotion and substitution:

> JUDGE STRICKLER: Would you say that the concept of opportunity cost is essentially the same as the concept of substitution as is set forth in the statute that we are dealing with?
>
> THE WITNESS: I would say substitution and also promotion. If we take those as two sides of the same coin --
>
> JUDGE STRICKLER: Promotion being a negative opportunity.
>
> THE WITNESS: Exactly. Exactly.
>
> Again, I'm not offering a legal opinion but certainly as an economist, I think that is what it's getting at.

5/26/16 Tr. 5658:24-5659:11 (Katz) (emphasis added).

201. Consistent with Professor Katz's testimony, Aaron Harrison of Universal confirmed that varying degrees of substitutional effects would affect Universal's decisions as to appropriate rates for a license:

> Q. So, at your deposition, I asked you, question: "Does the perceived promotional or substitutionally affect the service, affect the rates that Universal is willing to offer for a particular service?"
>
> Your answer was: "Yes." Right?
>
> A. Right.
>
> * * *
>
> Q. So the way the rate is affected is that the higher the level of interactivity, the higher the rate, right?
>
> A. That's right.
>
> Q. And the lower the level of interactivity, the lower the rate, right?
>
> A. Right.
>
> Q. And the reason for that is you think on-demand or higher levels of interactivity are more substitutional than less on-demand, correct?
>
> A. Correct.
>
> Q. And, in fact, if you were to rank streaming services from least substitutional to most, the order would be simulcast, then custom, then on-demand, correct?
>
> A. Yes.
>
> Q. So simulcast is the least substitutional, right?
>
> A. Right.

4/30/15 Tr. 1100:16-1102:12 (Harrison).

202. In his trial testimony, Professor Katz further explained how both substitutional and promotional aspects would work in this context:

> Q. Could you provide an example of how opportunity costs would apply to a record company when licensing to an on-demand service?
>
> A. . . . If the record company licenses an additional play, the marginal play, through the interactive service, that could adversely affect its sales of downloads to own or its sales of CDs, and so that would be an opportunity cost of licensing to the interactive service, that there would be some forgone profits that the record company otherwise would have gotten from downloads or CD sales.
>
> Q. Could you provide an example of how opportunity costs would apply to a record company when licensing an Internet simulcast of the terrestrial broadcast?
>
> A. So in the simulcasting case, one that happened -- Judge Strickler and I just were talking about this and we've got to think about negative opportunity cost as a possibility as well, that an additional play on a simulcast, then it's going to have promotional effects that actually encourage the sale of downloads and CDs, then it would actually have a negative opportunity cost because the additional play would actually be simulating other sales for the record company that are profitable.

5/26/16 Tr. 5662:11-5663:16 (Katz).

203. The behavior of the record companies with respect to terrestrial radio illustrates these promotional benefits or "negative opportunity costs" in the real world. The record companies receive no royalties (and, thus, no direct incremental revenue) from additional spins on terrestrial radio. While Professor Katz recognized that countervailing promotional and substitutional effects might exist, *see* 5/26/16 Tr. 5670:1-23 (Katz), it is undisputed that the record companies aggressively seek additional unpaid spins. Professor Katz explained how this demonstrates that the net effect must be that performances are promotional or record companies would not seek them. In other words, there are overall net negative opportunity costs, which would push rates down for sellers:

> <u>If the record company thinks that every play hurts it, when we balance things out, it shouldn't be promoting incremental plays. That would be irrational for them to do that. So the fact that they want additional plays and they spend money to get additional plays, says the record company</u>

> has concluded that on balance, it's good for that record company to get more plays. If it is good for them to get more plays, that means they have a negative opportunity cost and that is something that is then going to push -- if they were bargaining over price, it's going to tend to push price downward, so I think it is telling us that they perceive there is a benefit of the margin.
>
> So that is the part I take away from it is given that the price they are getting is zero and given they want to push to have it happen, it is they perceive a negative opportunity cost, at the individual firm level. I am not saying at the industry level, but at the individual firm level, the record company perceived there to be a negative opportunity cost, and that I think is the part that Dr. Rubinfeld is ignoring.

5/26/16 Tr. 5675:14-5678:16 (Katz) (emphasis added).

204. Simulcast listening is taken primarily from terrestrial radio. 5/26/16 Tr. 5679:4-10 (Katz) (noting that "some of what [simulcast] can be doing is just bringing in completely new listening, but the listeners also can come from other sources of music, and in particular, I think the evidence indicates it is primarily coming from terrestrial radio"); Newberry WDT ¶ 14 ("We want to make it possible for our over-the-air listeners to hear our stations over the Internet, if that is what they want. Although the main way we reach our listeners is with our over-the-air broadcasts, streaming offers a secondary way to reach them.").

205. As a consequence of drawing listeners primarily from terrestrial radio, where there is no performance right (and, thus, no royalties due to the labels), the labels' opportunity cost of licensing simulcast is low:

> Q. What would that mean for the calculation of opportunity costs?
>
> A. Well as we have been talking about, terrestrial radio right now, there isn't a right that the record companies have to charge for it. When you are taking business away from terrestrial radio, that part doesn't have an opportunity cost and, in fact, that what it's going to tell you then is that if you are a record company, if you are licensed to a simulcaster and you are

> getting a royalty rate, that is going to be a benefit to you that you were not getting before, because you were not getting paid when it's on terrestrial and now you are getting paid, so another way of just saying it is that element of opportunity cost would be zero.

5/26/15 Tr. 5679:11-5680:1 (Katz) (emphasis added).

206. Because the marginal costs, including the opportunity costs, of licensing to simulcast are low, a willing seller would sell at a very low to near zero rate. As Professor Katz summarized:

> Q. Following it up to the end point, what would the implications be for a willing seller of having marginal costs including opportunity costs near zero?
>
> A. Again, that is going to affect their decision calculus and they're going to realize that their costs are low so that's going to tend to have lower prices all else equal. In fact, you could -- in specific cases and I think we see that essentially in terrestrial radio, it's the equivalent of having a negative price even.

5/26/15 Tr. 5680:10-20 (Katz) (emphasis added).

3. More Simulcasting Will Benefit, Not Harm, the Recording Industry

207. The recording industry would also benefit from more robust simulcasting, where broadcasters could add to and actively market their streams instead of turning them off, hiding them, or not actively promoting them.

208. Every time that a listener is moved from the broadcast to the stream, the recording industry benefits. 5/26/15 Tr. 5679:11-5680:1 (Katz).

209. As Professor Katz noted, the evidence shows that simulcast draws primarily from terrestrial radio. 5/26/16 Tr. 5679:4-10 (Katz). This makes sense, because the programming on simulcast is identical to the broadcast and includes the

personalities, news/talk/sports/weather, contests, and other attributes that are characteristic of local radio. *See supra* Part III.A**.** In contrast, if a listener is interested in hearing only music, there are numerous alternatives.

210. As a consequence of the current high rates, broadcasters are limiting their streaming operations, and thus the possibility of converting listeners from the broadcast to the stream, to the detriment of the recording industry. Julie Koehn testified that her station does not stream any music programming, even though it streams other programming. Koehn WDT ¶¶ 4, 20. Steve Newberry is streaming only two of Commonwealth's ten music stations. 5/20/15 Tr. 5092:19-5093:11 (Newberry). Ben Downs testified that, as a result of his review of streaming finances, streaming is no longer directly accessible on the website of Bryan's Top 40 station, although it is accessible elsewhere. 5/21/15 Tr. 5223:23-5224:5, 5246:12-5248:1 (Downs). And as John Dimick testified, LFMC has geofenced to limit listening of some stations and has seriously questioned whether to continue streaming at all; it certainly has not sought to push listeners from the broadcast to the stream. Dimick WDT ¶ 12; 5/21/15 Tr. 5838:8-24 (Dimick). All of these decisions, which are necessary in view of the current rates, result in the loss of potential revenues to the record labels.

211. As Mr. Dimick explained in response to questions from the Judges:

> JUDGE STRICKLER: So is it fair to say you've trying to invest in a presence in that market in the anticipation that it's a burgeoning market, so you'll be there when the market takes off?
>
> THE WITNESS: That's what we've been saying for eight years. Yes, sir.
>
> JUDGE STRICKLER: Okay.

> THE WITNESS: And that eventually there might be a there there, and it's incumbent upon us to try and figure out how to make that work.
>
> JUDGE STRICKLER: To keep that going, you need lower rates?
>
> THE WITNESS: Yes. I just -- I can't tell people, "Go listen to our stream," if I move them from over the air to the stream. Because it immediately begins to cost me money. The second I put one listener on a stream it immediately begins to cost me money. And advertiser[s] don't buy one listener. Advertisers buy a bunch.
>
> So I mean that's sort of the place that we're in right now, was I'd love to scream from the rooftops, "Listen to our stream. Listen to our stream." But I can't afford to do that because my costs go up long before my revenues go up.

5/26/15 Tr. 5837:20-5838:20 (Dimick).

212. Even Professor Lys concurred that "it is certainly a possibility" that it would make sense to establish a "much lower rate" for simulcasters than to have them go out of business, assuming "no substitution away from royalty bearing performances". 5/29/15 Tr. 6692:3-6693:8 (Lys).

C. THE JUDGES SHOULD ADOPT NAB'S PROPOSED RATES FOR SIMULCASTING.

1. NAB's Fee Proposal Reflects the Price that Would Prevail in the Relevant Hypothetical Effectively Competitive Market for Licenses to Engage in Simulcasting.

213. NAB proposes that the statutory rate for simulcasting (as defined in NAB's proposed rates and terms) be set at $0.0005 per "Performance" for the period January 1, 2016 through December 31, 2020. *See* NAB Proposed Rates and Terms (June 19, 2015). As this rate properly reflects, a substantial reduction from the current rates is warranted in light of uniformly unprofitable simulcasting and webcasting industries and other record evidence detailed herein and summarized below.

214. As Professor Katz testified, in an effectively competitive market, prices would be pushed towards the seller's marginal costs, including opportunity costs. *See supra* ¶¶ 182, 197. The marginal costs of the statutory license are near zero. *See supra* ¶ 197. The promotional benefits offered by simulcast should be viewed as a form of payment by the simulcasters (*i.e.*, a negative opportunity cost), which would lower the per performance fees that a record company seller would charge. *See supra* ¶¶ 200-03. NAB and iHeartMedia established, and SoundExchange and the record labels conceded, that terrestrial radio is the most promotional and the least substitutional service. *See supra* ¶ 115-16. This extends to the simulcast of those radio transmissions. *See supra* ¶¶ 204-05. Further, because simulcasting primarily draws listeners from terrestrial radio, which pays no royalties, it is in the interest of the record companies and artists to establish a rate for simulcasting that will encourage broadcasters to start and to promote their simulcast streams aggressively, in order to convert more of their over-the-air audience to their streaming audience. *See supra* ¶¶ 207-12

215. As Professor Katz further testified, a rate reflecting opportunity costs would be consistent with the efficient component pricing rule, which bases prices on the downstream buyer paying the upstream seller's opportunity costs. 5/26/15 Tr. 5680:21-5683:21 (Katz).

216. The logic of a lower rate for simulcasters is in accord with the lesser functionality offered by simulcasters. As demonstrated above, and acknowledged by label witnesses, simulcasting is the same as over-the-air radio and simply does not offer the functionality that custom radio or interactive services provide. *See supra* Part III.C.3. Indeed, Messrs. Kooker, Harrison and Hair all acknowledged that services that have a

greater functionality should pay a higher rate than services that have a lesser functionality. *See supra* Part III.D.

217. NAB's proposal is in line with many of the market agreements presented as benchmarks in this case, after appropriate adjustments are made, including Professor Fischel and Professor Lichtman's analysis of the October 2013 iHeartMedia and Warner agreement. Fischel & Lichtman AWDT ¶ 31. Professors Fischel and Lichtman determined that under that deal, iHeartMedia projected it would pay $0.0005 per performance for the rights to play additional Warner performances beyond those that it would have played absent an agreement. Fischel & Lichtman AWDT ¶¶ 44, 48-50. They determined that $0.0005 per performance was the most appropriate rate to consider for a benchmark, because it "is not directly influenced by the statutory rate, and therefore is a more appropriate reflection of what a willing buyer and willing seller would agree upon if unconstrained by government regulation." *Id.* ¶ 50; 5/22/15 Tr. 5488:2-15 (Fischel).

218. NAB's proposal also is broadly consistent with Professor Shapiro's analysis of the June 2014 agreement between the Music and Entertainment Rights Licensing Independent Network ("Merlin") and Pandora (the "Pandora/Merlin Agreement"). Under the Merlin Agreement, Professor Shapiro estimated the [[ ]]. Shapiro WDT at 31. Those rates, however, must be adjusted before they are appropriate for simulcasting. First, the Pandora/Merlin rates must be adjusted downward to account for the lesser functionality of simulcasting and the clear promotional value of simulcasting. *See, e.g.*, 4/30/15 Tr. 1101:18-25 (Harrison) (agreeing that, "if customization is limited, a lower rate can be justified"); *see also supra* ¶ 67. Second, the

rates must be adjusted downward in order fairly to account for the lesser importance of music for simulcasting, compared to custom services. *See supra* Part III.A. Further, it is very likely that the Pandora/Merlin rates were biased upward by the existence of the pure play rates under the statutory license, which would have discouraged Merlin from negotiating too far below those rates. *See* Shapiro WRT Figure 8 at 38-39 ("[Figure 8] demonstrates that the rates negotiated in the 'shadow' are pulled up from the competitive rate toward the applicable statutory rate, since the statutory rate would apply in the event of a bargaining impasse."). Indeed, it is very likely that the percentage of revenue prong of the Pandora/Merlin deal was a direct result of the pure play rates. *See* 5/18/15 Tr. 4205:20-4207:20 (Herring). [[ ]]. *See* 4/29/2015 Tr. 742:15-743:12 (Huppe); 5/18/15 Tr. 4208:16-4209:23 (Herring) ("[w]hen Merlin proposed the 25 percent floor as a percent of revenue, we were okay with that level. Even though we didn't think during the term of this agreement, at least in the first two years…we would achieve a moment where we would be paying on the percent of revenue basis").

219. The effective per performance rate paid by [[ ]] the rate Professor Rubinfeld derived. *See infra* Part VIII.E.4. That rate, however, must be adjusted downward to account for [[ ]]

[redacted]]]. *Id.* Other factors identified by Professor Katz, including the lack of an effectively competitive market, and the shadow of the statutory license, demonstrate that even this rate overstates an effectively competitive rate for simulcasting. *See infra* Part VIII.B; Katz AWRT ¶¶ [[redacted]]. Further, the same adjustment for the diminished importance of music to simulcasters should apply, resulting in a rate that is also consistent with, if not below, the rate proposed by NAB.

220. Properly analyzed, Professor Rubinfeld's interactive service benchmark also supports the NAB's rate proposal. As demonstrated below, when the readily quantifiable flaws in Professor Rubinfeld's analysis are corrected, the resulting rate is between $0.0005 and $0.0006. Those rates are, themselves, overstated relative to the statutory standard, as they do not correct for (i) the lack of effective competition in licensing the interactive services; (ii) the relative differences in promotion and substitution between simulcasting and on-demand services; and (iii) Dr. Rubinfeld's failure to account for the relative differences in the importance and value of sound recordings to simulcasting as compared to on-demand services. Katz AWRT ¶ 110.

221. A proper analysis of the iTunes Radio license agreements yields similar per-play results. Numerous flaws in Dr. Rubinfeld's discussion of these licenses drastically inflate the per play rate he derived from the iTunes Radio license agreements. *See infra* Part VIII.C. Indeed, these licenses do not corroborate SoundExchange's rate proposal, but rather, they support license fee rates for statutory custom webcasting

services [[ ]], and rates that properly account for the differences between simulcasting and custom radio, below that. *See infra* Part VIII.D.

2. NAB's Small Broadcaster Proposal Should Also Be Adopted.

222. NAB proposes that a Broadcaster shall pay only the minimum fee of $500 for each of its "Small Streaming Stations." A "Small Streaming Station" is defined as a terrestrial AM or FM radio station for which there were less than 876,000 Aggregate Tuning Hours ("ATH") of Eligible Transmissions during the prior calendar year, and Broadcaster reasonably expects that there will be less than 876,000 ATH during the applicable calendar year. 876,000 ATH is equivalent to 100 average concurrent listeners (24 hours/day x 365 days/year x 100 = 876,000). *See* NAB Proposed Rates and Terms (June 19, 2015) § 380.11.

223. Ms. Koehn of WLEN Radio reported that she is "not aware of any small broadcasters who are streaming their broadcast programming and making a profit from it." Koehn WDT ¶ 22. As shown above, small broadcasters generate very small revenues from streaming. *See supra* Part IV. The small number of listeners does not attract advertisers.

224. As Ben Downs testified, Bryan Broadcasting has been unable to interest advertisers in even our most listened-to streaming stations." Downs WDT ¶ 15. Bryan's most listened-to streaming station, WTAW AM, had [[ ]] average concurrent listeners (ACL) and [[ ]] aggregate tuning hours (ATH) during the 12-month period from October 1, 2013 to September 29, 2014. Bryan Broadcasting's most listened-to music formatted station, Candy 95, had only [[ ]] average concurrent listeners (ACL) and [[ ]] aggregate tuning hours (ATH) during that same 12-month period. *Id.* Mr.

Downs testified that: "To me, this demonstrates that, at least for markets and streaming audiences of our size, streaming ads have no intrinsic value to advertisers. Based on my experience, I am confident that even if we were able to grow our streaming audience to 100-200 average concurrent listeners, advertisers would still be unwilling to purchase streaming ads from us." *Id.* In other words, at the audience levels proposed by NAB for Small Streaming Stations, broadcasters are unlikely to be able to monetize their streams.

225. These small numbers of listeners simply cause no potential harm to the record labels. The small broadcasters, with their insignificant contributions to the overall SoundExchange pie, have little to no economic value to SoundExchange. However, the royalty costs small broadcasters pay dwarf the amount of revenue they are able to gain from streaming, making it increasingly likely that more broadcasters will exit the streaming business. The $500 minimum fee makes economic sense for all parties to allow broadcasters to serve their audiences through simulcasting.

D. IT IS UNDISPUTED THAT EPHEMERAL REPRODUCTIONS MADE PURSUANT TO THE SECTION 112(e) LICENSE SHOULD CONTINUE TO BE INCLUDED WITHIN, AND LICENSED AT, 5% OF THE OVERALL SECTION 114(e) ROYALTY RATES ADOPTED IN THIS PROCEEDING.

226. There is no dispute between SoundExchange and NAB regarding how the royalties for the ephemeral recording statutory license specified in 17 U.S.C. § 112(e) should be set. Both participants propose that those royalties for ephemeral reproductions used solely to facilitate transmissions made pursuant to the 17 U.S.C. § 114(f) statutory license be deemed to be "included within, and constitute 5% of," the section 114(f) statutory license payments made by a particular service. *See* NAB Proposed Rates and

Terms at 4 (Oct. 7, 2014); SoundExchange's Proposed Rates and Terms at 5 and attach. at 4 (Oct. 7, 2014) (proposed § 380.3(c)).

227. SoundExchange, however, has proposed language that may limit the scope of the ephemeral reproduction license to reproductions made "solely to facilitate transmissions for which it pays royalties." *Id*. (emphasis added). The statutory language, however, does not refer to payment of royalties but merely requires that the reproductions be:

> [u]sed solely for the transmitting organization's own transmissions originating in the United States under a statutory license in accordance with section 114(f) or the limitation on exclusive rights specified by section 114(d)(1)(C)(iv).

17 U.S.C. § 112(e)(1)(B) (emphasis added).

228. NAB, by contrast, has proposed to require that the reproductions be:

> [u]sed solely by the Broadcaster to facilitate transmissions made pursuant to 17 U.S.C. 114 as and when provided in this section [specifying royalty rates].

NAB Proposed Rates and Terms (June 19, 2015) § 380.12(b) (emphasis added).

229. Although SoundExchange's proposal tracks language in the current fee regulation found in 37 C.F.R. § 380.12(b), NAB believes that its proposed language more closely tracks the section 112(e) statutory provision itself. It therefore requests that the Judges adopt its proposed language.

E. SOUNDEXCHANGE'S ARGUMENT THAT THE JUDGES SHOULD SET A SINGLE RATE THAT DOES NOT DIFFERENTIATE SIMULCASTING IS CONTRARY TO LAW AND ECONOMICS

230. SoundExchange responds to NAB's showing that simulcasting is different and deserves a rate lower than SoundExchange seeks by arguing that the Judges should not concern themselves with simulcasting – the market will take care of itself and labels and services will negotiate a lower rate. *See, e.g.*, Rubinfeld CWRT ¶ 206; *see* 5/29/15 Tr. 6692:3-6693:18 (Lys). That approach is both (i) contrary to law and (ii) shockingly bad economics.

231. Section 114(f)(2)(B) obligates the Judges to set rates according to the applicable competitive market willing buyer/willing seller standard for all webcasters – not just for webcasters that SoundExchange claims should pay the highest rates. 17 U.S.C. §114(f)(2)(B). Indeed, the statute specifically mandates that the rates and terms set by the Judges "shall distinguish among the different types of eligible nonsubscription services then in operation." *Id.* Nothing in the statute supports the idea that the rates may be set only for webcasters that would pay the most in the relevant hypothetical market.

232. Contrary to SoundExchange's position, there is no reasonable prospect that simulcasters and record labels would negotiate an appropriate fee below the statutory license rate. First, it is unreasonable to expect SoundExchange to negotiate a competitive price. For all of the reasons discussed elsewhere, SoundExchange is a single seller that is not subject to competitive pressure; rather it functions as a monopoly seller or cartel in which all of the major record labels participate. *See infra* Part VII.A.

233. Nor would it be practicable for simulcasters to negotiate with the multitude of individual record labels. Even SoundExchange's witness Professor Lys recognized that if the statutory rate is set too high, it would fail to accomplish the statutory goal of eliminating (or at least minimizing) transaction costs – "[s]o you want to set it such that most people can live with it and leave very few to negotiations." 5/29/15 Tr. 6694:3-10 (Lys). Asked if that position was inconsistent with his previously asserted view that webcasters could strike direct deals if the rate were set too high, Professor Lys said "Yes. So what you want to do is really adhere to the willing buyer, willing seller, which is a reasonable standard. . . ." *Id*. 6694:15-6695:4.

234. Even apart from transaction costs, Professor Katz explained that there are numerous economic mechanisms through which the presence of the statutory license would prevent individual labels from reaching an effectively competitive negotiated rate with simulcasters—the effect of precedent, focal point effects, bargaining effects, private information, and market power. Katz AWRT ¶¶ 164-65, 172-79; 5/26/15 Tr. 5697:8-5705:9 (Katz).

235. Professor Katz explained that, as an economically rational decision maker, a record company will consider the precedential value when negotiating any private settlement that is eligible to serve as a benchmark for statutory rates. The record company has incentives to seek particularly high prices for an agreement that it knows can be precedential because the higher prices obtained for the initial agreement may result in higher statutory rates and, thus, higher payments from webcasters not party to the immediate negotiations. The possibility of influencing statutory rates upward thus

creates an incentive for record companies to bargain even harder for higher rates than they otherwise would. Katz AWRT ¶ 172.

236. The [[ ]].

- [[ ]].
- [[ ].
- [[ ].
- [[ ]].
- [[ ].
- [[ ]].
- [[

[redacted]]].

- 5/28/15 Tr. 6296:10-16 (Rubinfeld) (noting that an agreement "was affected by the shadow of the statutory license. There is just no way to avoid that.") (emphasis added).

237. Professor Katz further explained how, in the case of multiple sellers, the statutory rate could serve as a focal point facilitating tacit collusion. A focal point is an outcome that has some distinctive feature that allows two or more parties to coordinate on it without needing to communicate with one another. For oligopolists, the issue is how to coordinate on a price without explicitly communicating with one another and, thus violating the antitrust laws. In their leading industrial organization textbook, Scherer and Ross cite examples in which government-imposed price ceilings served as focal points that allowed suppliers to set higher prices than they might otherwise have done. Katz AWRT ¶ 174, citing *Frederick Scherer and David Ross, Industrial Market Structure and Economic Performance*, Third Edition, Boston, Houghton Mifflin Company, at 266-267. Intuitively, no record company will want to "break ranks" when a focal point would make such an action highly visible. Katz AWRT ¶ 175.

238. Moreover, as Professor Katz testified when discussing the NAB-SoundExchange WSA agreement, SoundExchange itself serves as a focus for tacit collusion that would further reduce the likelihood that simulcasters would be able to strike direct deals with the major record companies.

239. Professor Katz also explained how Professor Rubinfeld's view about the effect of the statutory rate on bargaining conducted in its shadow conflicts with the

leading economic theories of bargaining. Contrary to Professor Rubinfeld's view, bargaining theory indicates that the statutory option could actually weaken a buyer's position when negotiating with a seller and, thus, lead to higher negotiated rates. Katz AWRT ¶ 176. SoundExchange's own witness, Professor Talley, agreed and confirmed that the existence of the statutory rate could actually pull rates up and prevent deals from being struck below the statutory license rate. Talley WRT at 47-48 ("[T]he introduction of a statutory license rate that is less than the buyer's willingness to pay channels the parties exclusively towards non-consensual transactions even if they would have bargained for a lower price in the absence of the statutory rate."); 5/27/15 Tr. 6106:8-6112:20 (Talley) (describing example in which the statutory rate would pull rates up); 5/26/15 Tr. 5702:17-5703:16 (Katz).

240. In his oral testimony, Professor Katz also explained how the existence of private information could keep otherwise beneficial deals from being made, and showed how Professor Talley agreed. 5/26/15 Tr. 5698:4-22, 5703:17:-5705:9 (Katz); *accord* Talley WRT at 57 n.82 ("[P]rivate information tends to reduce the set of negotiated contracts even further, as privately-informed buyers and sellers attempt to extract information rents from the negotiation process.").

241. Finally, record label market power in licensing noninteractive services could prevent agreements that reflect effectively competitive rates from being struck. 5/26/15 Tr. 5702:5-14 (Katz).

242. For all of the foregoing reasons, "it is a mistake and it is not sound economics to say, oh, don't worry if the rate is too high, everything will be taken care of . . . ." 5/26/15 Tr. 5701:22-5702:4 (Katz).

VII. EXISTING STATUTORY RATES DO NOT PROVIDE A REASONABLE BASIS FOR SETTING RATES.

A. THE NAB WSA AND SIRIUS XM WSA AGREEMENTS ARE NOT APPROPRIATE BENCHMARKS, AND NO PARTICIPANT HAS PROPOSED THEM AS SUCH.

243. No party has advanced either the NAB-SoundExchange Webcaster Settlement Act ("WSA") agreement or the SiriusXM-SoundExchange WSA agreement as a benchmark in this case. Indeed, SoundExchange only mentioned the NAB agreement in its Written Direct Case once, noting its existence. *See* Wilcox WDT at 8. NAB and SiriusXM discussed the agreements only to demonstrate the unique circumstances that led to them and to show that they did not represent the rates and terms that would be agreed between a willing buyer and willing seller in an effectively competitive marketplace without the statutory license. *See* Newberry WDT ¶¶16-29; Katz WDT ¶¶ 64-78; Frear CWDT ¶¶ 33-51.

244. In SoundExchange's Rebuttal case, its lead economist admits that the "agreements were negotiated in a unique context that differs from the hypothetical market at issue here," and that they were negotiated "in the shadow of the statutory rates." Rubinfeld CWRT ¶ 217. He belatedly asserts that "[the] deals are nevertheless instructive." *Id*. At most, the agreements are instructive of the rates that a monopoly seller can extract in the shadow of the statutory license from two parties that were not prepared to litigate over the issue.

245. The NAB's lead negotiator, Steve Newberry, described in detail the circumstances leading up to the negotiations and the course of negotiations between SoundExchange and the NAB. Newberry WDT ¶¶ 16-29; 5/20/15 Tr. 5078:23-5091:8

(Newberry). As Mr. Newberry testified, the radio industry had been shocked by the adverse outcome of the Webcasting II proceeding:

> The Webcaster II rules for the broadcasting industry were pretty shocking. It was not just surprising. It was -- it was shocking. And as a result of that, our industry was kind of taken aback. We were -- we found that those rates were much higher than what we had expected the results to be.

5/20/15 Tr. 5079:15-21 (Newberry). The industry's shock was well founded. As discussed in Part VII.B., below, it is now clear that the *Web II* rates were based on SoundExchange's flawed analysis of the non-competitive interactive service benchmark.

246. The broadcasters entered the subsequent 2009 negotiations with almost no leverage. As Mr. Newberry testified:

> When we got in those discussions, the SoundExchange was dealing from a position of strength. They had the rates that had been established from Webcaster II, and they didn't have a great deal of motivation to come off of those -- off of those rates and we found that they weren't willing to do that in a significant manner.

5/20/15 Tr. 5081:13-20 (Newberry); *accord*, Newberry WDT ¶ 20 ("Unfortunately, we knew that we had no leverage, and SoundExchange knew that we had no leverage").

247. Professor Katz testified that from the perspective of economics, the NAB's lack of meaningful leverage was to be expected. SoundExchange was a monopolist. "In effect, the NAB was negotiating with the entire recording industry at once, so that the NAB could not credibly hold out the prospect that its members would increase the number of performances for a particular record label the way they might be able to do if they were in negotiations with individual labels." Katz WDT ¶ 68. Hence, there was no means of generating competitive pressure of any sort. *Id.* Mr. Frear of SiriusXM agreed. Frear CWDT ¶ 50 ("SoundExchange… exercised the market power of

a collective representing the entire industry (and therefore precluding any competition among rights owners)").

248. Professor Rubinfeld's assertion that Professor Katz had "not shown that SoundExchange was acting as would a classic monopolist" because "it was representing a multitude of interests," Rubinfeld CWRT ¶ 220, is not sound economics. As Professor Katz testified, SoundExchange was authorized to represent the recording industry as a single seller and did so. 5/26/15 Tr. 5710:5-5711:3 (Katz). Cartels often represent multiple interests, but that is not competition – it is still a single seller. *Id.*

249. Professor Rubinfeld argues that the NAB WSA agreement is reasonable because, in his view, it was characterized by "bilateral monopoly" and "countervailing market power." Rubinfeld CWRT ¶¶ 218, 224. These characterizations are both factually false, as discussed in this Part, and economically incorrect. As discussed above, an agreement between a monopoly seller facing a buyer with no meaningful alternative does not resemble a competitive market agreement. *See supra* ¶¶ 188-190. More specifically, as Professor Katz found, the NAB did not have the ability to offset SoundExchange's market power. Katz WDT ¶ 36 ("[S]trategies for offsetting SoundExchange's market power were not available to either the NAB or Sirius XM."); *id.* ¶ 69 ("[E]ven if there were two large buyers, each accounting for 50 percent of the royalty payments, the resulting outcome would not be an effectively competitive one when there is a monopoly seller. . . the NAB would not have had the ability to offset SoundExchange's market power.").

250. SoundExchange made clear from the outset of the negotiations that, while there might be some flexibility as to the rates in any particular year, anything that was

taken away from one year would have to be added to another year. As Mr. Newberry testified, "if we wanted to reduce by a percent in the first or the second year of the rates, we had to raise it at the end." 5/20/15 Tr. 5089:1-3 (Newberry); *accord* Newberry WDT ¶ 24. Mr. Frear similarly testified that, after it negotiated the NAB agreement, SoundExchange insisted on a continuous escalation in rates with SiriusXM. 5/22/15 Tr. 5447:13-5447:15 (Frear) ("Q. And why was there an escalation in the WSA settlement rates? A. Huppe insisted on it.").

251. SoundExchange refused to reduce the average below what it had won at the CRB. *Id.; see also* 5/20/15 Tr. 5090:14-5091:8 (Newberry). Consistent with SoundExchange's demands, the final agreement had slightly lower rates in the early years, and even higher rates than the CRB had ordered in later years. SX. Ex. 0121 at 008 (NAB WSA Agreement). Mr. Newberry's testimony is corroborated by the similar course of SoundExchange's negotiation with SiriusXM, which led to an agreement that Mr. Huppe of SoundExchange described as having "the symmetry of you paying above NAB for three years, and below NAB for the final three years." NAB Ex. 4235 (at SNDEX0494369).

252. Participation in Webcasting III was not a viable option for the broadcasters, for multiple reasons. The industry was suffering the effects of the great recession, in which industry revenues had declined by nearly 30%, and broadcasters "were fighting to save our core business, the terrestrial business." 5/20/15 Tr. 5082:5-7 (Newberry); *see also id*. 5115:8-14. Having just litigated Webcasting II to a disastrous result, and given the other immense financial pressures, "[t]here wasn't an appetite to spend the large amount of monies for litigation." *Id.* at 5082:7-8.

253. There was also no reason for the NAB to expect a better outcome relitigating the same issues before the same Judges on a record that had not changed substantially. Newberry WDT ¶ 21; 5/20/15 Tr. 5020:25-5081:26, 5082:16-5083:3, 5115:17-5118:12 (Newberry). The NAB negotiators were concerned that the outcome in *Web III* might be even worse for broadcasters than *Web II* had been. Newberry WDT ¶ 22; 5/20/15 Tr. 5082:11-15 (Newberry).

254. Professor Katz put these facts into the context of economics. "The NAB team's pessimism meant that the legal fees it might expend by participating in the proceeding were large relative to the expected benefits of litigation. In economic terms, future litigation was not an attractive option for the NAB, which weakened its bargaining position. In contrast, SoundExchange was going to be involved in the litigation in any event and, based on the *Web II* outcome, had greater cause for optimism with respect to the likely *Web III* outcome. Moreover, SoundExchange benefits from greater economies of scale: it amortizes the costs of participating in statutory rate-setting proceedings over all of the licenses. In contrast, any one licensee or group of licensees amortizes the costs of participation over only its own set of licenses." Katz WDT ¶ 73.

255. Contrary to Mr. Huppe's assertion, the NAB had not taken any steps to prepare to litigate *Web III*. Huppe WRT ¶ 14 ("NAB had in fact retained legal counsel and filed a petition *to participate.*"). That petition was actually filed by in-house counsel, not outside litigation counsel. 5/20/15 Tr. 5083:4-5084:2 (Newberry). This was done in order to preserve the appearance that the NAB might participate during the WSA negotiations. *Id.*

256. SiriusXM faced similar considerations in the negotiation of its WSA agreement. As Mr. Frear testified, SiriusXM faced being stuck with the *Web II* rates and was ill prepared to litigate in *Web III*, as the company was on the well-publicized brink of bankruptcy. Frear CWDT ¶¶ 46-48, 50; 5/22/15 Tr. 5429:17-5431:5 (Frear). Moreover, the NAB agreement had already been published in the Federal Register; SiriusXM recognized that the NAB agreement would be used as precedent by SoundExchange against any effort by SiriusXM to seek lower rates. Frear CWDT ¶ 50; 5/22/15 Tr. 5431:6-5434:5 (Frear).

257. Although the NAB negotiators were unable to achieve any real progress on rates, they were able to obtain certain adjustments to the statutory license conditions that were beneficial to the industry. In particular, after the main economic terms of the WSA agreement were negotiated with SoundExchange, the NAB negotiators were able to obtain certain waivers of the performance complement and other statutory license conditions from the major labels and A2IM. NAB Ex. 4101; Newberry WDT ¶¶ 26-29; 5/20/15 Tr. 5084:3-5086:3 (Newberry); SX Ex. 1574 (term sheet including commitment of SoundExchange to work with the major record companies to arrange the waiver negotiations).

258. Contrary to SoundExchange's assertions that the NAB could have negotiated direct deals on rates with the record labels, SoundExchange representatives made clear that rates should be negotiated through it. 5/20/15 Tr. 5086:4-16 (Newberry). Indeed, in the WSA, Congress had provided for "the receiving agent" – SoundExchange – to negotiate on behalf of the industry, not the individual labels. 17 U.S.C. § 114(f)(5)(A), as amended by Pub. L. 110-435, 122 Stat. 4976 (2008); 6/3/15 Tr. 7603:9-

7604:3 (Huppe). Mr. Newberry testified that the NAB did not view direct negotiations over rates as a realistic alternative. 5/20/15 5086:4-16 (Newberry).

259. Moreover, Mr. Huppe's and Professor Rubinfeld's assertions that NAB could have negotiated direct deals with record labels, Rubinfeld CWRT ¶ 226; Huppe WRT ¶¶ 17, 27, were belied by the facts. Neither Mr. Huppe nor Professor Rubinfeld could identify a single direct license agreement for the statutory license that had been negotiated as of the date of the NAB WSA agreement. 6/3/15 Tr. 7604:4-7605:9 (Huppe); 5/28/15 Tr. 6493:10-6494:3 (Rubinfeld).

260. Further, there was no realistic prospect that the major record companies would negotiate direct deals with either the NAB or SiriusXM that undercut SoundExchange's collective strategy. Each of the major record companies held (and still holds) seats on SoundExchange's Board of Directors and Licensing Committee. 4/29/15 Tr. 730:18-734:24, 750:13-20 (Huppe) (6 of 9 copyright owner seats on the SoundExchange Board of Directors are major label representatives, including at least one from each of the majors); *id.* 737:10-738:6 (all of the major label representatives on the Board of Directors sit on the Licensing Committee). SoundExchange's Licensing Committee has the ultimate authority to authorize license fee settlements. *Id.* 736:20-737:9. The Licensing Committee is scheduled to meet every week via telephone. 4/30/15 Tr. 1093:11-14 (Harrison).

261. As Professor Katz testified, "there was a structure set up that I think made it an unrealistic alternative to think you would go and then bargain separately with the majors." 5/26/15 Tr. 5711:21-5712:1 (Katz). "[T]he majors were all on SoundExchange['s] board and I understand that they were on the bargaining committee,

so they were able to put forth a single position, and it would be pretty obvious if you cut a side deal, as another firm – if you broke off from that, so I think there [are] a lot of reasons here, good economics, you'd expect full tacit collusion." *Id.* 5711:9-20.

262. Mr. Huppe now claims that "the option to negotiate direct licenses with any and all copyright owners is *always* an alternative." Huppe WRT ¶ 27 (emphasis in original). Yet, when SiriusXM tried to do just that for its primary SDARS service in mid-2011, a little over two years after the NAB and SiriusXM WSA agreements were entered into, it faced a concerted effort by the recording industry to defeat that effort.

263. On August 11, 2011, after SoundExchange learned of SiriusXM's direct licensing plans, it issued a statement describing its plans to seek a substantial increase in SiriusXM's statutory license fees, and advised the industry that privately negotiated licenses could play a very significant role in the upcoming proceeding. 6/3/15 Tr. 7608:1-7609:14 (Huppe); NAB Ex. 4239. Then, on October 27, 2011, SoundExchange issued another statement contrasting SiriusXM's licensing agent ("a company that represents the services who *use* music rather than the people and companies that *make* music" and that "strives to license music from music creators 'at the lowest possible cost'") with SoundExchange (which "fights for artists and copyright owners") and reiterated its plans to seek a significant rate increase for SiriusXM. 6/3/15 Tr. 7613:5-7614:20 (Huppe); NAB Ex. 4240 (emphasis in original).

264. Mr. Huppe repeatedly denied that SoundExchange's intent was to discourage record labels from signing direct deals, asserting instead that it only intended to "provide information." 6/3/15 Tr. 7606:14-7607:25, 7610:8-7611:15 ,7614:21-7615:8 (Huppe). But the message of SoundExchange's statements was clear – you will be better

served if you stick with SoundExchange and do not do a direct deal that could undermine SoundExchange's strategy.

265. Moreover, SoundExchange's October 27, 2011 statement was released on the exact same day as statements issued by the two artist unions (AF of M and AFTRA) and by the National Academy of Recording Arts and Sciences (NARAS). 6/3/15 Tr. 7611:16-7612:22, 7615:9-11, 7617:10-15 (Huppe). Those statements expressly called on artists to discourage their labels from entering into direct deals. The NARAS statement expressly told labels that it was in their interest to refrain from direct licensing. The union statement described the initiative as "anti-artist." *Id.* 7615:9-7619:25. Mr. Huppe acknowledged that one purpose of the NARAS statement was to discourage record companies from entering into direct licenses with SiriusXM. *Id.* 7619:21-25.

266. Mr. Huppe denied that the three statements issued on the precise same day "were coordinated," but admitted that "we were roughly aware that [the other two organizations] may be issuing statements." *Id.* 7612:8-7613:4. He further admitted that "the whole industry was worked up about" the SiriusXM initiative, and that SoundExchange's board members were among those who were concerned. *Id.* 7620:1-13, 7621:22-24. And, as evidence supporting Professor Katz's expectations that the structure of SoundExchange facilitates tacit collusion, SiriusXM was never able to negotiate a single direct license with a major label. 5/22/15 Tr. 5442:25-5443:3 (Frear).

267. The shadow of the statutory license weighted heavily on the NAB and SiriusXM WSA agreements. Mr. Huppe admitted that both the existing *Web II* rates and the upcoming *Web III* proceeding influenced the NAB-SoundExchange agreement. 6/3/15 Tr. 7587:17-7588:1 (Huppe).

268. The *Web II* rates formed the backdrop for the negotiations and infected the outcome. Newberry WDT ¶ 20; Frear CWDT ¶ 49. As discussed in Part VII.B, below, these rates were unreasonably high because they were based on a flawed analysis of the non-competitive interactive service benchmark presented by SoundExchange. The *Web III* proceeding skewed the parties' incentives and increased SoundExchange's incentive to establish high precedential rates. Frear CWDT ¶¶ 37, 50; *see* Newberry WDT ¶ 24. As Professor Katz testified, "the ability to use certain contracts as precedents tends to raise the prices in those contracts above effectively competitive levels." Katz WDT ¶¶ 75, 77.

269. At the last minute in the negotiations, when the broadcasters had no real options, SoundExchange insisted on a precedential agreement. Newberry WDT ¶ 30; 5/20/15 Tr. 5094:8-5097:12 (Newberry); *see* SX Ex. 1574 ¶ 8 (February 3 time sheet describing parties intent to submit the WSA agreement to the CRB as a settlement in "Webcaster 3," but nowhere saying that the agreement would be precedential beyond that); 6/3/15 Tr. 7588:2-8 (Huppe) (It was SoundExchange's request that the agreement be precedential). SoundExchange later used a similar negotiating tactic with SiriusXM to make that agreement precedential. 5/22/15 Tr. 5442:25-5443:11 (Frear) ("I think that was a last minute throw-in from Mike [Huppe]. I think everything else was done and it came in at the last minute and quite honestly, we just wanted things to go away."); NAB Ex. 4235 (SiriusXM negotiation emails revealing that SoundExchange raised the issue of whether that agreement would be precedential near the end of the process).

270. SoundExchange used the precedential status of the NAB agreement as leverage in its WSA negotiations with SiriusXM. Frear CWDT ¶50; NAB Ex. 4235

([[ ]]). This selection bias can be seen from the fact that SoundExchange allowed only the highest-priced agreements to be precedential, and all of the "precedential" agreements had essentially the same high per-performance fees. *See* SX Ex. 121 (publication of 3 WSA agreements, one of which was precedential – Appendix B); SX Ex. 124 (publication of 4 WSA agreements, two of which were precedential – Appendices A and B); 74 Fed. Reg. 34796 (July 17, 2009) (publication of non-precedential pure play WSA agreement).

271. Professor Katz also testified that the ability of SoundExchange to negotiate over whether a given agreement is precedential provided SoundExchange with the incentive and ability to create selection bias in the agreements that could be used as a precedent. This selection bias renders the available agreements inappropriate to serve as benchmarks. Katz WDT ¶ 75. Professor Katz explained the asymmetrical incentives operating on SoundExchange and the services negotiating the agreements and concluded that economic logic indicates that the precedential royalty rates are unrepresentative of what a willing buyer and willing seller would agree to absent the distortions induced by the statutory regime. *Id*. ¶ 76.

272. SoundExchange also sought language in the NAB WSA that prohibited broadcasters who signed the agreement from participating "at any time. . . as a party, intervenor, amicus curiae, or otherwise, or giv[ing] evidence or otherwise support[ing] or assist[ing]" in several proceedings, including *Web III*. SX Ex. 0121-009 (NAB-SX WSA § 6.2); 6/3/15 Tr. 7588:9-7590:2 (Huppe) ("it wouldn't surprise me if we requested that"); *see* SX Ex. 0124-003 (same term in SiriusXM WSA agreement). SoundExchange

thus sought to prevent the Judges from obtaining information concerning the WSA agreements from services operating under the agreements. *See* 6/3/15 Tr. 7590:3-8 (Huppe) ("So no broadcaster that signed the agreement . . . could have come forward to give evidence to the [J]udges in Web III without breaching the terms of the agreement").

273. Pursuant to the agreement between the parties, SoundExchange and the NAB presented their WSA agreement to the CRB as a settlement of the broadcasters' interest in the *Web III* proceeding. *See* SX Ex. 124. SoundExchange further argued that the NAB WSA agreement constituted an appropriate benchmark agreement.

274. The *Web III* Remand Decision found that: "In the absence of any such evidence, the Judges cannot simply assume a multi-party conspiracy among SoundExchange, the NAB, and Sirius XM to increase the rates charged to the NAB and Sirius XM, in the hope that the Judges would utilize those WSA rates to establish the statutory rates." *Web III Remand*, 79 Fed. Reg. at 23112. However, as Professor Katz testified,

> [t]his statement fails to recognize that the logic indicating WSA agreements will lead to overly high rates does not rely on the existence of an explicit conspiracy. For the reasons described above, while (a) SoundExchange has incentives to allow only WSA agreements with particularly high rates to be precedential, and it has incentives to seek especially high rates in any agreement that is precedential, (b) licensees negotiating WSA agreements do not have countervailing incentives. Thus, economic analysis clearly indicates that precedential WSA agreements present a biased sample with unrepresentatively high rates. The experience of the NAB/SoundExchange WSA negotiations is fully consistent with this analysis.

Katz WDT ¶ 78.

275. SoundExchange points to the fact that 380 broadcasters signed the NAB WSA agreement before it was presented to the CRB as evidence that it offered reasonable rates. Huppe WRT ¶¶ 10. But these numbers simply reflects the circumstances at the time, as Steve Newberry explained:

> Q. Finally, Mr. Newberry, Mr. Huppe claims that the number of broadcasters who have signed up for the Webcaster Settlement Act agreement rates show that they are reasonable. I think he says, for example [that] 380 have signed up.
>
> Do you agree with his position?
>
> A. I do not. The 380 is a number that was triggered because after the results of the negotiations were reached and after it was published, it was a 30-day window that broadcasters either had to opt in or opt out. So if they did not make the election by early -- the first week in April of 2009, they would not be eligible for the benefits from this, and that included the performance complement. The number of songs you could play back to back, all of those issues. So while broadcasters looked at it and said the rates are somewhat better in the early years, we have answered a lot of the uncertainties about the complement -- performance complement. We think that the risk may be much worse if we go into Web III. The choice was do you want to take this agreement, or do you want to run the risk of not having those clarifications and moving ahead to Web III? So the broadcasters did it. I'm one of the companies that -- I'm one of the 380, but I'm still only able to stream two of my ten radio stations. So I did this as a business decision because it was the lesser of the two evils. But it was not that there was an overwhelming support for the agreement and that the industry thought it was a great deal.

5/20/15 Tr. 5091:11-5092:18 (Newberry).

276. Mr. Huppe also claimed that the number of broadcasters who have since signed up to stream under the WSA rates is evidence of the rates' reasonableness. Huppe WRT ¶ 11. As Professor Katz testified, however, this adoption merely demonstrates that these broadcasters lacked more attractive options, not that the WSA agreement was effectively competitive. More generally, the fact that a monopoly seller makes positive sales to some buyers at the monopoly price does not render the monopoly

price competitive. Katz WDT ¶ 74. Mr. Huppe admitted that the choice for broadcasters signing up was "binary" once the rates were set. "[I]f they wanted to stream under the statutory license, the rates were the rates." 6/3/15 Tr. 7574:2-13 (Huppe).

B. THE WEB II RATES WERE FATALLY INFECTED BY SOUNDEXCHANGE'S FLAWED ANALYSIS OF THE NON-COMPETITIVE INTERACTIVE SERVICE BENCHMARKS.

277. As discussed above, the NAB and SiriusXM WSA agreements were the direct result of the rates set in *Web II*. Those rates, in turn, were based on what Professor Katz called "a severely flawed benchmark analysis conducted by Dr. Pelcovits that led to rates well in excess of those that would have been negotiated by a willing buyer and willing seller in an appropriate market." These excessive rates, in turn, begat the WSA agreements, further propagating rates far above rates that would be seen in a competitive market. Katz WDT ¶ 3. As Professor Katz explained, by "strongly influencing the private parties' expectations regarding future statutory rates, the rates set in *Web II* created significant upward pressure on rates in the WSA agreements subsequently negotiated and, thus, rendered those agreements inappropriate benchmarks for what a willing buyer would have paid a willing seller in the absence of the statute." *Id.* ¶¶ 3, 44, 94.

278. In *Web II*, as here, SoundExchange relied very heavily on its expert's analysis of the major labels' licenses to on-demand interactive services. As discussed in this Part, Dr. Pelcovits' analysis in that case was flawed in many of the same ways as Professor Rubinfeld's analysis in this case.

279. The *Web II* record did not contain sufficient evidence to allow the Judges to assess the lack of competition in the interactive services licensing market. As a result,

they relied heavily upon the benchmark. *Web II*, 72 Fed. Reg. at 24093. Unlike in *Web II*, the Judges now have compelling evidence demonstrating that the market is far from competitive. *See supra* Part VIII.A.1.

280. Dr. Pelcovits, like Professor Rubinfeld, relied on an unfounded assumption that interactive services and noninteractive services should pay the same percentage of revenue as royalties. As discussed below, this assumption is contrary to economics. *See supra* Part VIII.A. Moreover, Professor Rubinfeld could adduce no basis for this assumption, expressed disagreement with Dr. Pelcovits' reasoning, and disclaimed any reliance on Dr. Pelcovits. *See id.* Like Professor Rubinfeld, Dr. Pelcovits also failed to consider the services' non-license-fee costs in his analysis. *See, e.g.*, Katz WDT ¶¶ 53-55; *Web II*, 72 Fed. Reg. at 24094.

281. Dr. Pelcovits, like Professor Rubinfeld, relied entirely on a comparison of subscription prices for his adjustment, despite the overwhelming differences in business models between noninteractive and interactive services. *See Web II*, 72 Fed. Reg. at 24094. That approach was as flawed then as it is now. The Judges, however, downplayed the issue, observing that "ad-supported revenues may not yet have equalized subscription revenues on a per-listener hour basis but are expected to grow over the term of this applicable license." *Web II*, 72 Fed. Reg. at 24094. With hindsight, that confidence proved to have been misplaced. Ten years later, the expected equalization has not occurred and may never occur. *See* Kooker WDT at 14-15 ("We have found that streaming services cannot generate revenues sufficient to compensate us for the value of our music unless those services increase the revenues—specifically, the ARPU—they generate from the consumption of our music. Streaming services are generally unable to

significantly increase their ARPU through advertising alone."); Harrison CWDT ¶ 13 ("In particular, we have found that streaming services cannot generate sufficient ARPU through advertising alone."). Professor Katz testified to the enormous impact this single error had on Dr. Pelcovits' analysis. Katz WDT ¶ 63 (using Pandora data to show recommended rate would have been [[ ]] instead of $0.00234).

282. Moreover, as Professor Katz testified, the interactive service industry was not in equilibrium, raising doubts about the reliability of the benchmark. Katz WDT ¶¶ 56-58. Dr. Pelcovits based his benchmark analysis on seven interactive services. Of the seven, only one continues to be offered. In addition, a number of the noninteractive services on which Dr. Pelcovits based his interactivity adjustment also went out of business. *Id*. ¶¶ 57-58.

283. In short, the evidence now available to the Judges makes clear that the *Web II* rates were not rates that would have been set in an effectively competitive market.

C. THE WEB III RATES WERE FATALLY INFECTED BY THE WSA AGREEMENTS AND A REPRISE OF THE FLAWED INTERACTIVE SERVICE BENCHMARK.

284. The outcome in *Web III*, in which only one relatively small commercial service participated, was based on the NAB and SiriusXM WSA agreements and a reprise of Dr. Pelcovits' interactive service benchmark.

285. For the reasons discussed above, evidence not previously available to the Judges shows that the WSA agreements were not an appropriate basis for rate-setting.

286. For the reasons discussed in Part VII.B, evidence now available to the Judges demonstrates that Dr. Pelcovits' reprise of his interactive service benchmark was not an appropriate basis for rate-setting.

287. Indeed, in the *Web III Remand*, the Judges correctly recognized many of the flaws in the interactive benchmark and found its probative value to be compromised. *Web III Remand*, 79 Fed. Reg. at 23118-119. Among other things, the Judges questioned Dr. Pelcovits' failure to consider ad-supported services, finding that this "implicitly constituted an a priori rejection" of the primary noninteractive webcaster business model. *Id*. at 23118 n.47.

288. The evidence now demonstrates unequivocally that Dr. Pelcovits' interactive service benchmark, and his analysis of that benchmark, were erroneous and did not provide a valid basis for rate-setting.

VIII. SOUNDEXCHANGE'S THEORIES OF THE CASE ARE INVALID AND, WHEN PROPERLY ADJUSTED, SUPPORT NAB'S PROPOSED RATES MORE THAN SOUNDEXCHANGE'S.

A. PROFESSOR RUBINFELD'S INTERACTIVE SERVICES BENCHMARK AND ANALYSIS ARE COMPREHENSIVELY FLAWED.

289. Just as it did in *Web II*, *Web III*, *SDARS I*, and *SDARS II*, SoundExchange again relies on license agreements between the major record companies and interactive, on-demand services as a primary benchmark and theory of the case. In Web III, the Judges expressed concerns about several aspects of SoundExchange's analysis of the benchmark. *See Web III Remand*, 79 Fed. Reg. at 23118-119 (citing, among other concerns, SoundExchange's failure to properly account for advertising revenue and the failure to adjust for the downward trend in interactive rates). In *SDARS II*, the Judges

voiced further concerns, noting that "the interactive subscription service market upon which Dr. Ordover relied is in a constant state of flux." *SDARS II*, 78 Fed. Reg. 23054.

290. In this proceeding, evidence has, for the first time, become available that demonstrates conclusively that the Judges were right to be concerned about SoundExchange's continued reliance upon the interactive service benchmark. In fact, the evidence demonstrates that the benchmark, and SoundExchange's analysis of the benchmark, are both fatally flawed and should be rejected.

1. The Admissions of SoundExchange and its Witnesses and Counsel Now Confirm the Lack of Effective Competition in the Interactive Services Market.

291. The interactive service licenses relied upon by Professor Rubinfeld do not provide a valid benchmark, because they were negotiated in a market in which the major record companies do not compete. As such, the market is not effectively competitive, and it cannot serve as a benchmark for an effectively competitive hypothetical market, without an adjustment that Professor Rubinfeld does not propose and the record does not permit.

292. The record is replete with evidence that the record labels do not compete in licensing on-demand streaming services. This evidence includes (i) the direct testimony of the record label executives themselves attesting to the lack of competition; (ii) testimony from SoundExchange's own lead economic expert in this case confirming that the major labels are "must-haves" and "complements" for on-demand services – characteristics that eliminate competition; and (iii) a wealth of evidence presented to the Federal Trade Commission by UMG and EMI in support of their 2012 merger that succeeded in convincing the FTC that the major labels already did not compete when

they licensed on-demand services, so the merger would not harm competition. This evidence is discussed in Professor Katz's Amended Written Rebuttal Testimony at Paragraphs 15 to 41. This evidence was not available to the Judges in prior cases; it compels the conclusion that SoundExchange's primary benchmark should be rejected.

293. As discussed above, the ability of buyers to choose (or substitute) among sellers is the "essence of competition." *See supra* ¶ 180. Buyers cannot choose among sellers of complements, or between "must have" sellers. And, there can be no dispute that the majors are must-haves and sellers of complementary products for interactive services. Indeed, Professor Rubinfeld expressly stated to the Federal Trade Commission that there was [[ ]]. 5/5/15 Tr. 1958:8-17 (Rubinfeld). It follows that the market for sound recording licenses sold to interactive services is not effectively competitive. Professor Rubinfeld's late-presented arguments to the contrary lack merit and are inconsistent with his presentations to the Federal Trade Commission.

a. SoundExchange Admissions that Majors Are Must Haves and Complements and Do Not Compete

294. [[5/11/2015 Tr. 2808:10-14 (Katz) ("[T]he repertoires of the major labels are must-haves from the perspective of an

interactive streaming service and that, as a result of being must-have, which itself means there's not competition.").

295. Professor Rubinfeld also confirmed that the catalogs of the three major labels are complements. Katz AWRT ¶ 24, citing Rubinfeld Dep. Tr. at 49.

296. As Professor Katz testified, a market structure with complements actually gives rise to higher prices than would exist in a monopolized market. "In other words, oligopolists selling complementary products set prices that are even more far removed from competitive prices than are the prices set by a monopolist or a perfect cartel. Therefore, the prices that emerge in such a market manifestly are not those that would arise in an effectively competitive market." Katz AWRT ¶ 23; 5/11/2015 Tr. 2808:14-22 (Katz). As discussed below, UMG and EMI agreed with this economic proposition in their presentation to submissions to the FTC. *See infra* Part VIII.A.1.c; [[ ]].

b. Record Company Witnesses Admitted that Their Companies Do Not Compete on the Basis of Price with Other Labels.

297. Record company executives testified that their companies never compete with one another on the basis of price or to obtain more plays in licensing on-demand services. As Dennis Kooker of Sony testified:

> Q. And over all that time, you, Sony, have never lowered your proposed rate in response to a proposed -- a proposal by another major label, correct?
>
> A. No.
>
> Q. You're saying you have never lowered it, or that's incorrect?

> A. Sorry. Never lowered it. We're not negotiating with our competitors.
>
> Q. Okay. So you have never lowered your proposed rate to another service in response to a proposal by another major label, correct?
>
> A. I don't know proposals from the other major labels.
>
> Q. Well, do the -- when you're negotiating [with] these prospective licensees, do they ever tell you we've got a proposal from another label that's better than yours? Does that ever happen?
>
> A. It always happens.
>
> Q. Okay. And have you ever -- have you ever lowered your rate in response to such a statement by a proposed licensee?
>
> A. Absolutely not.
>
> Q. And you have also never lowered your proposed rate in order to get more plays from another service, correct?
>
> A. No.
>
> Q. So you've never cut the price that you're offering, either, to respond to a competitor label's price or to get more plays for Sony, correct?
>
> A. I have never cut -- we've never cut our price responding to a competitor's proposal or for more plays.

4/28/15 Tr. 414:25-416:9 (Kooker).

298. Aaron Harrison similarly confirmed that Universal never negotiates on price in response to competition from other labels, nor does it cut prices in order to obtain more plays than its alleged competitors:

> Q. . . . on occasion you have given some relief to services in negotiations based on suggestions that they were not being profitable; is that fair, without getting into any details?
>
> A. That's fair.

Q. Okay. But you have never lowered any of the rates that you are proposing as a consequence to finding out some other major was offering a lower rate, correct?

A. I don't recall that happening.

* * *

Q. So you're at Page 218 of your deposition?

A. Yes.

Q. And did I ask, at that time, and did you answer, question: "Are there any actions you can think of that Universal takes to compete with Sony and Warner or Warner with respect to services?"

Answer: "No."

A. Yes.

Q. Now, you have had services -- without getting into any specifics -- come in and say, you know, if you cut your rates I'll play more of your music, right? Services have made that pitch to you?

A. I think it's mainly been in the inverse, meaning that if the rates are too high we won't play your content as much or won't merchandise the content as much.

Q. Okay.

A. But it's a reasonable inference from that.

Q. Okay. But that doesn't sway your decision as to what you're going to offer, correct, that argument?

A. Correct.

Q. And that's because you always want to get the highest rate possible, correct?

A. Correct

4/30/15 Tr. 1096:22-1099:17 (Harrison); *accord* 4/30/15 Tr. 1074:4-8 (Harrison)

([[ ]]).

299. [[ ]]

300. The majors were not alone in their disdain for competition. As Mr. Van Arman testified: "I am opposed in principle to a system in which the decision of what recordings are played is not based on the quality of or consumer interest in the recordings, but rather on the deal terms of a direct license." Van Arman WDT at 14. He further testified that "[m]y concern is that the use of play-share incentives will devolve into a race to the bottom in which you de-value your music just to have your songs heard." Van Arman WDT at 14.

301. The "play-share incentives" and "race to the bottom" described by Mr. Van Arman are, in fact, nothing more than competition. 4/28/15 Tr. 606:9-608:11, 610:5-611:8 (Van Arman). Mr. Van Arman agreed that entering into a play-share incentive agreement was a good competitive move on the part of his labels and in their self-interest. 4/28/15 Tr. 611:5-9 (Van Arman). He also testified that "[b]y us being part of an agreement with a play share incentive as a first mover, it makes it harder for bigger companies that normally are first movers to enter into play share incentive deals with that same digital service." 4/28/15 Tr. 610:24-611:4 (Van Arman).

302. Mr. Van Arman later confirmed that his concern about the race to the bottom "is that record labels will compete with each [other] on price to get more plays." 4/28/15 Tr. 650:3-7 (Van Arman). Mr. Van Arman, like the majors, may not like competition, but he is not entitled to be insulated from its force.

303. Mr. Van Arman also testified that market concentration within the music industry is a primary threat to the musical creative enterprise. 4/28/15 Tr. 643:4-9 (Van Arman); SX Ex. 469 at 3. He also testified that the three major recording companies have used their clout to extract a disproportionate share of copyright-related revenue from the marketplace. 4/28/15 Tr. 643:15-21 (Van Arman); SX Ex. 469 at 4.

304. Professor Rubinfeld also confirmed that he was not aware of any evidence that the major labels compete with each other to secure increased plays on interactive services. 5/5/15 Tr. 1940:24-1941:6 (Rubinfeld).

c. Universal and EMI's Presentation to the Federal Trade Commission in Support of their 2012 Merger, as Presented by SoundExchange's Lead Economist and Lead Counsel, Confirms that the Record Companies Do Not Compete in Licensing Interactive Services.

305. Professor Rubinfeld served as expert economist to both UMG and EMI in connection with their 2012 merger. 5/5/15 Tr. 1835:22-25, 1942:16-1943:1 (Rubinfeld).

[[ ]]

306. [[ ]] As Professor Rubinfeld described it:

> [[ ]]

Katz AWRT ¶ 28, quoting 12/11/14 Rubinfeld Dep. Tr. at 103:6-11.

307. Professor Rubinfeld, UMG, and EMI, accomplished their goal by demonstrating to the FTC that, with respect to licensing interactive streaming services, there was no competition to lessen. As Professor Katz described it [[redacted]]] Katz AWRT ¶ 15.

308. After reviewing the relevant evidence, Professor Katz concluded: [[redacted]]]

309. [[redacted]]].

310. Indeed, Professor Rubinfeld and UMG were successful in their arguments. The FTC decided not to challenge the merger. Its reasoning was set forth in a statement issued by the Director of the Bureau of Competition. The statement explained:

> Commission staff also assessed the impact of the acquisition on the development of interactive music streaming services. . . . Commission staff found considerable evidence that each leading interactive streaming service must carry the music of each Major to be competitive. Because each Major currently controls recorded music necessary for these streaming services, the music is more complementary than substitutable in this context, leading to limited direct competition between Universal and EMI. In the end, insufficient evidence existed showing that Universal and EMI offer products that could be viewed by streaming services as direct substitutes.

NAB Ex. 4134 at 1-2.

311. The submissions to the FTC included Professor Rubinfeld's economic analysis, analysis by other economists, and arguments on behalf of UMG and EMI supported by extensive evidence marshaled by the labels' counsel.

312. [[ ]]

313. [[ ]]. As Professor Katz explained, "[a] situation in which a seller holds almost all of the bargaining power and the buyer holds little or none clearly is not one of effective competition." Katz AWRT ¶ 16.

314. The UMG/EMI submissions to the FTC, including Professor Rubinfeld's presentation, repeatedly stressed that the labels were must-haves for on-demand

streaming services and [[ ]]. For example:

- According to Professor Rubinfeld, [[ ]] NAB Ex. 4129 at Slide 40
- Acting as counsel for UMG and EMI in the acquisition, SoundExchange's lead counsel Glenn Pomerantz presented evidence to the FTC showing: [[ ].
- According to Mr. Pomerantz: [[ ]] *Id*. at 18.
- [[ ] *Id*.
- Mr. Pomerantz goes on to say: [ ]] *Id*. at 20.
- [[

315. These views, conclusions, and accompanying evidence were also set forth in UMG's July 23, 2012 White Paper. PAN Ex. 5349.

[[ ]].

Id. at 1-2.

316. UMG's assessment of its market power and position in dealing with on demand services was particularly clear, and stark:

[[ ]]

Id. at 17. The White Paper was supported by UMG's ordinary course of business documents. PAN Ex. 5349 at 17-18; Katz AWRT ¶ 21 n.33 (quoting PAN Ex. 5349 at 17-18)

317. The submissions similarly argued (and demonstrated) that the majors catalogs were complements for on demand services:

- Professor Rubinfeld himself recognized that the major label's catalogs were complements. NAB Ex. 4129 at Slide 44 [ ]; *see also* Katz AWRT ¶ 24 n.37 [[ ]])
- Other economic experts retained by Universal and EMI [[ ]
- According to [[

[redacted] PAN Ex. 5349 at 19.

- **[**[redacted]**]**. PAN Ex. 5349 at 19 n.57 (second emphasis added) (internal citations omitted).

318. The UMG submissions also recognized the Cournot complements principle—that complements actually charge more than a single monopoly seller. As UMG explained in its [[redacted]

[redacted]]]

PAN Ex. 5349 at 19.

319. The same point was expressed in Mr. Pomerantz's June 22 letter. [[redacted]]] PAN Ex. 5025 at 22.

d. Professor Rubinfeld's Late-Presented Theories of Why the Market Is Competitive Are Wrong.

320. Professor Rubinfeld's belated attempts to argue that the major labels' interactive service licenses stem from an effectively competitive market ring hollow. In his written direct testimony, where he described his view of the statutory willing buyer/willing seller standard and developed and presented his interactive service benchmark, Professor Rubinfeld did not even mention the need for the benchmark market to be competitive. *See* Rubinfeld CWDT ¶¶ 80-92 (describing the statutory standard without any mention of competition); 5/5/15 Tr. 1931:8-16 (Rubinfeld) ("In that report, I did not explicitly talk about the nature of the competition."); *id*. 1921:16-23 (Ask to find any discussion of competition, he responded: "Give me more time and I'll keep looking."); Katz AWRT ¶ 12. Professor Rubinfeld described other necessary attributes of the market, including [the importance of removing the effect of the statutory license] but the need for competition was wholly and notably absent. Rubinfeld CWDT ¶¶ 80-92.

321. Then, in his written rebuttal testimony, where he finally acknowledged the need for the hypothetical market to be competitive, and quoted the relevant passage from the *Web III* remand at length, Professor Rubinfeld inexplicably excluded the statement emphasized by the Judges that the market needed to be "effectively competitive." *See* Rubinfeld CWRT ¶ 112, quoting *Web III Remand*, 79 Fed. Reg. at 23114 n. 37. Asked why he did not include the emphasized language in his testimony, Professor Rubinfeld could only must the assertion "no particular reason, except that I was trying to write a shorter paragraph and I didn't want to cite the entire footnote." 5/5/15 Tr. 1927:6-1928:13 (Rubinfeld).

322. Instead, Professor Rubinfeld adopted a cramped view of competition that would encompass any market in which the buyer possessed some bargaining leverage and asserted his view that a market would be competitive even where the seller would [[redacted]]. Indeed, Professor Rubinfeld testified that, in his view, a market in which a seller possessed monopoly power could still include what he considered competition. 5/5/15 Tr. 1912:18-1913:5 (Rubinfeld). This view flies in the face of economic theory and the underlying statutory demand for a competitive market price. *See supra* ¶¶ 188-190.

(1) Professor Rubinfeld's Claim that Complements Compete

323. In the face of his extensive presentation to the FTC in connection with the UMG/EMI merger, Professor Rubinfeld now tries to argue that, although they are complements, the major labels compete in licensing interactive services. Rubinfeld CWRT ¶¶ 114-117. Notably, this new-found theory of competition is wholly inconsistent with his representations to the FTC. First, if the major labels in fact competed, it would have been relevant to the merger analysis to explain why the merger would not lessen that competition. The documents are devoid of any such argument by Professor Rubinfeld. Second, Professor Rubinfeld admitted that [[redacted]]. *See supra* ¶ 306. This syllogism would not follow if the majors in fact competed.

324. More fundamentally, Professor Rubinfeld had concluded that [[ ]] Without substitution, there is no competition. *See supra* ¶ 692; *see also* Shapiro WRT at 13-15.

325. Faced with this inconsistency, Professor Rubinfeld could only try to explain: [[ ]] Apparently, Professor Rubinfeld's view is that insignificant (or not "meaningful") substitution did not affect his conclusion in connection with the merger that the labels did not compete, but should be enough for the Judges to find that they do. That position does not pass the red-face test.

326. As Professor Katz explained,

> [w]here he and I disagree is that I believe the economics -- economic principles demonstrate that when you have products that are complements, they don't engage in, sort of, price competition that is what we seek -- generally seek in public policy. They don't engage in price competition, as I've said repeatedly, where what we would see with substitutes is one supplier would offer a low price to try to take business away from the other. That's the essence of competition.

5/11/15 Tr. 2817:1-14 (Katz); *accord* Shapiro WDT at 10 ("In markets for recorded music, competition among record companies would take the form of price reductions

(discounted royalty rates) in exchange for greater market share (more plays by music services)."). Indeed, in Professor Katz's opinion, Professor Rubinfeld's argument "is really flipping competition on its head," arguing that if the record company gets a higher price, it makes it harder for others to charge higher prices.

> But that is very, very different than what we think of as competition, which is, I charge a low price, which then makes it hard for my rival to get sales. . . . I believe that, quite clearly, the economics show that if you have complementary products, the suppliers are not involved in price competition of the sort that benefits consumers.

Id. 2817:15-2818:6; Shapiro WRT at 17-18 ("My conclusion that the market for licensing recorded music to interactive services is not workably competitive is further bolstered by additional evidence now available to me regarding the lack of price competition in that market."); [[ ]].

(2) Professor Rubinfeld's Claim that Competition Among Services in the Downstream Market Constrains Upstream License Fees

327. Professor Rubinfeld claims that downstream competition among on-demand services constrains the license fees that the record labels can charge. Rubinfeld CWRT ¶¶ 130-133. As Professor Katz explained, Professor Rubinfeld actually has it backwards – "the more intense the competition downstream, the greater the incentive [of the record companies] to charge a high price upstream." 5/11/15 Tr. 2818:15-2819:23 (Katz). That is "because the high royalty would get passed through to the ultimate consumer . . . it's basically almost like there's a direct channel for the upstream monopoly to get the surplus or the payments from the ultimate consumer." *Id*. 2820:13-2822:13.

328. Moreover, the existence of many competing services increases the record companies' bargaining power in dealing with any service, "[s]o, again it leads to higher prices, not lower prices." *Id.* 2819:24-2820:12.

329. Professor Rubinfeld himself recognized this reality in his presentation to the FTC in connection with the UMG/EMI merger. [[ ]] NAB Ex. 4129 at Slide 42; *see* Katz AWRT ¶¶ 37-41.

(3) Professor Rubinfeld's Claim that Piracy Constrains License Fees

330. In the face of clear evidence that the major record labels do not compete to license interactive services, Professor Rubinfeld now assert that piracy constrains prices in that market. Rubinfeld CWRT ¶¶ 135-36. Professor Rubinfeld, however, cites to no analysis or evidence to support any claim that any constraints imposed by piracy push license fees down to anything near the competitive level. He simply asserts, with no analysis or proof, that the effect is "strong." Rubinfeld CWRT ¶ 135. In fact, there is no such evidence. 5/27/15 Tr. 5996:12-5997:22 (Blackburn) (stating that he did not perform a "quantitative exercise" to quantify the effect of piracy on the rates negotiated between the licensed services and the labels).

331. Notably, before Professor Rubinfeld's work on the UMG-EMI merger came to light in discovery, Professor Rubinfeld was wholly silent about the effect of

piracy on interactive license fees. Indeed, in his Written Direct Testimony, in an effort to bolster his theory of "convergence," Professor Rubinfeld specifically attributed declines in interactive license rates to a different cause: "[i]n other words, the decline in interactive rates can be attributed to the increasing competition posed by non-interactive services." Rubinfeld CWDT ¶ 140; [[ ]]

332. Professor Rubinfeld admitted that at the time of the UMG-EMI merger, [[ ]].

333. Professors Katz and Shapiro addressed the effect of piracy on license fees. Both testified that downstream piracy would not and does not result in an effectively competitive licensing market. 5/8/15 Tr. 2648:10-2649:15 (Shapiro); 5/11/15 Tr. 2822:25-2823:22 (Katz). As Professor Katz testified, even if piracy imposes some constraint, "that doesn't render the market effectively competitive . . . it may be pressure on the monopoly price, but, nonetheless, it's a monopoly price." 5/11/15 Tr. 2823:8-22 (Katz).

334. Professor Katz further demonstrated that the merger submissions made by UMG and EMI (and Professor Rubinfeld) provide strong evidence that piracy has not reduced interactive license fees to near the competitive level. 5/11/15 Tr. 2823:23-2825:19 (Katz) (citing PAN Ex. 5025 at 22). As Professor Katz explained, the merger submissions made by UMG argued that the merger would lead to lower prices because it would remove the Cournot complements pricing effect between UMG and EMI. That

would not have been true if prices had been squeezed by piracy to near the competitive level:

> [T]he parties were saying, if we're allowed to merge, we would find that it would increase our profits to lower our price. So clearly, piracy had not pushed them down to such a low price that going lower would reduce their profit. They actually say, going lower would raise our profits. And what that's telling you is, along with the fact that the other majors are must-have[s] as well, is [that] they were actually concerned they were pricing above the monopoly level.

5/11/15 Tr. 2825:6-16 (citing PAN Ex. 5025 at 22). In short, the fact that the labels believed that the merger would lead to lower prices (i.e., to monopoly prices instead of Cournot complement prices) is strong evidence that piracy was not lowering prices to near the competitive level.

335. Professor Katz further observed that Professor Rubinfeld's presentation to the FTC showed that UMG's variable margins were robust and were inconsistent with the claim that piracy had squeezed UMG's margins to competitive levels – "there's room for prices to go down." 5/11/15 Tr. 2825:17-2827:8 (Katz) (referring to NAB Ex. 4129 at Slide 22).

336. In short, the assertion that downstream piracy has forced the major labels to license at effectively competitive prices despite their upstream market power is wholly without proof and is belied by the labels' own statements to the FTC.

(4) The Claim that the Labels Negotiate with Interactive Services

337. In an effort to save the interactive service benchmark from the proof presented by its own witnesses that the market was not effectively competitive, SoundExchange attempts to make much of the fact that the labels actually negotiate with

interactive services. Professor Rubinfeld asserted that such negotiations were "consistent with competition." Rubinfeld CWRT ¶¶ 123-26. Unfortunately, the existence of negotiations proves nothing, as the record in this case merely confirms the basic economic reality that even monopolists negotiate.

338. Professor Rubinfeld testified that "there were prolonged negotiations and that the interactive streaming services demanded and in some cases obtained preferred terms." Rubinfeld CWRT ¶ 123. Similarly, the record company executives – Dennis Kooker of Sony, Aaron Harrison of Universal, and Ron Wilcox of Warner – highlighted the fact that they negotiate with interactive services and that those negotiations involve give-and-take on the license terms. Kooker WRT at 19-20; Harrison WRT ¶ 21; Wilcox WRT ¶ 32.

339. As Professor Shapiro testified, however, "this is just an argument that does not work":

> In input markets -- business-to-business transactions between large companies, there's almost always negotiation. There's a lot of things to work out. What are the terms of credit. What if we give you a special deal for this -- you know, can you sell more if we give you a deal for this. There's just so much to talk about. And of course there's give-and-take. <u>And to say the mere fact that a company engaged in those negotiations means they don't have a monopoly, it's invalid. It's just wrong</u>.

5/8/15 Tr. 2650:22-2652:17 (Shapiro) (emphasis added).

340. Professor Katz agreed, explaining that bargaining by a monopolist was consistent with trying to obtain private information in order to price appropriately. 5/26/15 Tr. 5716:4-20 (Katz). He pointed out that negotiations can facilitate price discrimination used by a seller with market power to extract additional monopoly profits:

> Bargaining with your customers and having some of the give and take can even be a form of price discrimination in a way to get additional monopoly profits, so the mere fact that your customer asks for something and you say, okay, I will give that to you, particularly if that is going to help you get more money, the fact that you do that doesn't show you lack monopoly power. It shows you are economically rational.

5/26/15 Tr. 5715:20-5716:3 (Katz).

341. [[ ]]; 5/28/15 Tr. 6487:21-6488:3 (Rubinfeld) ("Do firms with monopoly power ever bargain with their customers? A. Yes. Q. Do firms with monopoly power ever make concessions or change their bargaining position in response to positions taken by buyers with which they are dealing? A. Yes."). [[ ]]

342. As discussed above, the direct evidence of monopoly power and the lack of effective competition presented in this case was overwhelming. *See supra* Part VIII.A.1. The fact that negotiations are equally consistent with competition and with monopoly proves nothing.

(5) The Claim that the Labels Are Must Haves for Non-Interactive Services As Well As Interactive Services

343. Two of SoundExchange's economists, Professors Rubinfeld and Talley, expressed the view that the major labels are all must-haves for noninteractive services.

Rubinfeld CWRT ¶¶ 140-42, 153-54; [[ ]]; *accord* Talley WRT at 31; 5/27/15 Tr. 6068:17-21 (Talley) ("[T]o the extent that the labels, the majors, are must-haves in the interactive market, I don't see much of a reason to believe that they're any less must-haves in the noninteractive market.").

344. Professor Katz made clear that this claim is irrelevant to considering the validity of the interactive service licenses as a benchmark for noninteractive license agreements that would exist in a hypothetical effectively competitive market. "[T]hat means that when we look at any market for a benchmark. . . it's going to be important in that market, the market the benchmark rates are actually coming from, that's the market where we care is it effectively competitive or not. And so once one reaches the conclusion that the market for licenses to interactive services is not effectively competitive, that's the end of the story for that issue. It means there's a problem with that benchmark, and that's true regardless of what's going on in the actual noninteractive services licensing market." 5/11/15 Tr. 2829:3-2830:3 (Katz).

345. In making this claim, SoundExchange's experts are once again arguing to the Judges that they should ignore the statutory standard and adopt supra-competitive license fees. The relevant question is not whether an interactive market that lacks effective competition may be used as a benchmark for a noninteractive licensing market that also lacks effective competition; it is whether an interactive market that lacks effective competition may properly be used as a benchmark for a hypothetical noninteractive licensing market that is effectively competitive. Professor Rubinfeld's reliance on this argument again makes clear that he is asking the wrong question.

346. In other words, Professor Rubinfeld's argument is irrelevant to consideration of the interactive service benchmark. His argument does, however, indicate the strong possibility that direct licenses struck by statutory services, themselves, are the result of supra-competitive record company market power. They should be viewed in that light and adjusted downward to ascertain a competitive market license fee.

(6) Professor Rubinfeld's Claim that the Labels Do Not Collude in Licensing Interactive Services

347. Professor Rubinfeld asserts that "[n]either Professor Shapiro nor Professor Katz has offered any evidence that the labels or services in the interactive market have engaged and/or are engaging in 'collusion' with one another. I see no basis for concluding that the major recording companies have negotiated together as a monopoly." Rubinfeld CWRT ¶ 119.

348. This is a straw man. The Services' argument that the labels do not compete in licensing interactive services does not depend on actual collusion. Rather, it is based on the economic fact that complements do not compete on price. In fact, collusion between firms selling complementary products could actually leads to lower prices if it allowed the firms to price like a monopoly instead of like sellers of complements. *See* [[

[redacted]

[redacted]

[redacted]]].

(7) Professor Rubinfeld's Claim that His Interactivity Adjustment Resolves any Competitive Concern

349. Professor Rubinfeld asserts that even if the rates charged by the labels to interactive services were "supra-competitive," his interactivity adjustment "would tend to remove the effects of any non-competitive forces which are unique to that space." Rubinfeld CWRT ¶ 157. He offers no explanation for how this might be so – he simply asserts it, but acknowledges it is at most a "tend[ency]." *Id.*

350. Professor Katz explained that Professor Rubinfeld's unsupported assertion "is incorrect, that what he is doing is making very strong assumptions about the exact nature of how a change in the license fee would translate into downstream pricing. And I don't think he's done anything to justify that – he hasn't even explained what those assumptions are. I don't think there is any reason to believe that they hold." 5/11/15 Tr. 2828:5-2829:2 (Katz).

351. Moreover, to the extent that supra-competitive license fees paid by subscription noninteractive services are passed through in higher subscription prices for those services, Professor Rubinfeld's interactivity adjustment would tend to preserve those supra-competitive fees. Professor Rubinfeld admits that his claim that his adjustment "would tend" to remove the effect of supra-competitive interactive license fees because only non-competitive forces are "unique" to the interactive space. To the extent the supra-competitive prices charged to interactive services have resulted in supra-

competitive noninteractive license fees (*e.g.*, through the decisions in *Web II* and *Web III*, which relied on the interactive service benchmark), there would be no such tendency.

2. Professor Rubinfeld's Assumption that License Fees Will Be the Same Percentage of Revenue Is Wholly Unsupported and Lacks Economic Validity.

352. Professor Rubinfeld's interactive service benchmark analysis hinges on the critical assumption that "the ratio of the average retail subscription price to the per-subscriber royalty paid by the licensee to the record label is approximately the same" for both interactive and noninteractive services. Rubinfeld CWDT ¶ 169. Professor Rubinfeld acknowledged that the "assumption is actually foundational to [his] entire analysis." 5/6/15 Tr. 2026:8-11 (Rubinfeld).

353. Despite its central importance, Professor Rubinfeld provides no basis for this assumption in his Written Direct Testimony, stating only that he was "follow[ing] past practices." *See* Rubinfeld CWDT ¶ 207 n. 124; 5/6/15 Tr. 2025:21-2026:7 (Rubinfeld); *id.* 2026:24-2027:4. Professor Rubinfeld further identified the "past practices" as those of Dr. Pelcovits in *Web II* and *Web III*. Rubinfeld CWDT ¶ 207 n. 124; 5/6/15 Tr. 2026:19-2027:4 (Rubinfeld). Nevertheless, Professor Rubinfeld admitted that he did not agree with parts of Dr. Pelcovits' analysis and that he would be "somewhat critical" of what he did. 5/6/15 Tr. 2027:8-2028:3 (Rubinfeld). Indeed, Professor Rubinfeld admitted that he was "not relying on Dr. Pelcovits at all." *Id.* 2027:4-23.

354. Professor Rubinfeld similarly provided no basis for his core assumption in his Corrected Written Rebuttal Testimony. While he presented a table that he claimed showed interactive services paying the same percentage of revenue regardless of

subscription price, Rubinfeld CWRT ¶ 172; SX Ex. 143, that table on its face said nothing about the percentage of revenue paid by noninteractive services or the relative percentage of revenue paid by the two types of services. 5/11/15 Tr. 2843:5-25, 2852:12-25 (Katz) (the table does not deal with any possible differences between interactive and noninteractive services). Moreover, with one exception (a limited classical genre service) none of the lower-price subscriptions represented an independent data point – each was negotiated and offered in conjunction with a broader service that also included a baseline $9.99 subscription price. *Id*. 2844:1-2847:10 ("[G]iven that these things would be negotiated as a bundle, I don't think it's informative about what would happen if you really had a stand-alone service. . . ."). Professor Katz also testified that the high percentage of revenue charged to on-demand services is consistent with an expression of record company market power. *Id.* at 2847:11-2848:3.

355. As Professor Katz testified, Professor Rubinfeld's central assumption is "contrary to fundamental economic principles." Katz AWRT Part II.C. Professor Katz explained that in a competitive market that was less than perfectly competitive, a buyer's valuation "could come into play to a limited degree," but if it played too large a role, that would be indicative that sellers have substantial market power, or even monopoly power. Katz AWRT ¶ 49. Moreover, "[f]undamental economic principles – as well as common sense' indicate that the buyer's valuation is not based on its revenues, but the "profits it can earn from the use of the input gross of the costs of obtaining the input." *Id*. ¶ 50; 5/11/15 Tr. 2860:3-2861:13 (Katz). Those profits require consideration of all of the costs of a service, including non-license fee costs. Katz AWRT ¶¶ 70-71; 5/11/15 Tr. 2861:6-9 (Katz).

356. Professor Katz further observed that Professor Rubinfeld had, in his deposition, admitted that [[ ]] and demonstrated that the Nash Bargaining Model, [[ ]] required consideration of services' profits, not their revenues. Katz AWRT ¶ 70 (citing 12/11/14 Rubinfeld Dep. Tr. at 196:1-197:11 and NAB Ex. 4129 at Slide 39); 5/11/15 Tr. 2863:6-2866:18 (Katz) (discussing NAB Ex. 4129 at Slide 39). In other words, there is no economic justification for Professor Rubinfeld's central assumption that the ratio of sound recording license fees to revenues would be the same in for interactive and on-demand services.

357. Moreover, as Professor Katz explained, AWRT ¶ 47, it is understandable that Professor Rubinfeld disclaimed any reliance on the analysis by Dr. Pelcovits, despite the fact that Dr. Pelcovits' analysis formed the "past practices" that Professor Rubinfeld claimed to be following. Dr. Pelcovits' analysis was based on the assumption that the elasticities of demand for interactive and noninteractive services were similar. Katz AWRT ¶ 47. Professor Rubinfeld, however, testified that those [[ ]] *Id.* ¶ 47 n.64 (quoting 12/11/14 Rubinfeld Dep. Tr. at 164:23-165:7); see Rubinfeld CWDT ¶ 110 (expressing view that services' demand elasticities would reflect differences in technical features and business model); 5/28/15 Tr. 6490:13-6491:12 (Rubinfeld) (confirming that technical features would include differences between interactive and noninteractive services, and business models referred to differences between subscription advertising supported services).

358. Indeed, unable to offer any basis for his central assumption, at his April 13 deposition, Professor Rubinfeld asserted that he wasn't relying on the assumption in

response to a clear question asking for his basis. After his deposition, when he was no longer subject to questioning, he rewrote his response as an "errata" to again assert the assumption. 5/6/15 Tr. 2029:20-2034:19 (Rubinfeld); NAB Ex. 4233. Ironically, Professor Rubinfeld's original answer (that he was not relying on the assumption) was at least responsive to the question that was asked at the deposition. His rewritten response was wholly unresponsive. Moreover, he never explained how he was confused by the clear question.

359. In his final appearance before the Judges, Professor Rubinfeld attempted to back-fill a rationale for his unsupported assumption. He espoused a theory based on the assumptions that the elasticities of demand for interactive and noninteractive services were "quite similar" and the non-license fee costs were small. 5/28/15 Tr. 6308:7-6311:7 (Rubinfeld). On cross examination, however, he admitted that he had not calculated any elasticity of demand or performed any quantitative analysis to determine any elasticity of demand, and that he had not performed any analysis to quantify the variable costs of any of the inputs to interactive or noninteractive services. *Id.* at 6488:4-6492:6. He further admitted that in his Written Direct Testimony he said that he expected differences in price elasticities of demand to reflect differences in technical features, such as on-demand versus noninteractive, and business models, such as ad-supported versus subscription. *Id.* at 6490:4-6491:12 (discussing Rubinfeld CWDT ¶ 110). Thus, his late espoused theory contradicted his earlier written testimony.

360. As Professor Katz testified, Professor Rubinfeld's central assumption is "contrary to fundamental economic principles." Katz AWRT Part II.C. As Professor Katz demonstrated, if there is any validity to Professor Rubinfeld's attempt to relate

interactive and noninteractive license fees, it must be based on the services' profits, taking into account revenues as well as costs: "any economically rational basis for that adjustment is going to have to take into account cost." 5/11/15 Tr. 2862:4-7 (Katz). This issue is discussed in greater detail below, in Part VIII.A.5.

3. Professor Rubinfeld's Failure Properly to Account for Advertising Supported Services in His Interactivity Adjustment

361. The evidence revealed a fundamental difference between on-demand and statutory streaming services that Professor Rubinfeld failed properly to account for in his benchmark analysis. Professor Rubinfeld admitted that [[ ]]. Katz AWRT ¶ 53 (citing 12/11/14 Rubinfeld Dep. Tr. at 167:14-19). Indeed, the subscription business model is largely unsuccessful for noninteractive services. *Id.* (citing Rubinfeld CWDT ¶¶ 70, 73); Kooker WDT at 14 ("Pandora's subscription revenues do not yield market rate returns to artists and content owners."); Fischel & Lichtman AWDT ¶ 114 ("Non-interactive services are usually provided to consumers with no subscription fee, but with display and audio advertisements bundled together with the music. For instance, Pandora, which is by far the largest non-interactive webcasting service, has reported that less than five percent of its active users, and less than two percent of its registered users, subscribe."). Conversely, on-demand services depend to a much higher degree on the subscription model. *See, e.g.*, Katz AWRT ¶ 53 & n. 69 (91% of the revenue of the interactive services analyzed by Professor Rubinfeld appeared to be subscription); *id.* n.71 (comparing ad-supported listeners on Pandora and Spotify); Fischel & Lichtman

AWDT ¶ 114 ("[A]pproximately 25 percent of its reported active users are subscribers, as compared with . . . five percent of Pandora's active users.").

362. Despite this overwhelming dominance of the ad-supported business model for noninteractive services and the fundamental difference between noninteractive and on-demand services in their respective reliance on the subscription model, Professor Rubinfeld's benchmark analysis contained in his Written Direct Testimony relied on subscription prices for his interactivity adjustment and ignored the ad-supported business. *See* Rubinfeld CWDT ¶ 169 (basing analysis on assumption that ratio of subscription prices to royalties will be the same for both types of services); *id*. ¶ 170 ("[M]y analysis does not explicitly account for 'free' ad-supported services."); *id*. ¶ 207 & Ex. 5 (SX Ex. 45) (comparing subscription prices for adjustment); *accord* Katz AWRT ¶ 53 (quoting Rubinfeld CWDT ¶ 170 saying that his "analysis does not explicitly account for 'free' ad-supported services.").

363. As Professor Katz explained, "Dr. Rubinfeld's omission of the dominant business model for non-interactive services is troubling because there are important differences between advertising-supported and subscription business models in terms of their implications for a service's derived demand for licensed music. In addition to having very different levels of revenues per play, the advertising-supported and subscription models attract different consumers. Specifically, consumers who choose to pay for subscription services are an unrepresentative minority of all consumers who stream music. Subscribers to noninteractive services apparently are less price sensitive than the majority of consumers. Non-interactive, ad-supported appears to be a high-volume, low-margin business, appealing to consumers with a lower willingness to pay for

access to music." Katz AWRT ¶ 55; *accord* IHM Ex. 3118 at 11 [[ ]]

364. In *Web III*, the Judges criticized Dr. Pelcovits' similar failure to address the dominant ad-supported noninteractive business model in his analysis of the interactive service benchmark. 79 Fed. Reg. at 23118 ("The Judges conclude that the interactive benchmark model as developed by Dr. Pelcovits is compromised, and its usefulness reduced, by its failure to take into account the advertising revenue received in both the interactive benchmark market and the statutory noninteractive market.").

365. Professor Rubinfeld did purport to address ad-supported services in his Rebuttal Testimony, but he did so in an economically invalid way that camouflaged the important differences between on-demand and noninteractive services. Rubinfeld CWRT ¶¶ 164-169. Rather than analyzing the overall revenue per play earned by interactive and noninteractive services, Professor Rubinfeld sought to compare only the revenues of the ad-supported tiers of interactive and noninteractive services, concluding that they were about the same. Ergo, according to Professor Rubinfeld, the 1:1 ratio of ad-supported revenues, confirmed the reasonableness of his 2:1 ratio of subscription revenues. *Id.* ¶ 169.

366. Professor Katz presented a hypothetical example that demonstrated the fallacy in Professor Rubinfeld's reasoning. He demonstrated how two different services, one primarily subscription and one primarily ad-supported, could have very different overall average revenues per play (a factor of more than 5:1), but the ratio between the subscription revenues on the two services and the ratio between the advertising-supported revenues on the two services could both be 1:1. Specifically, Professor Katz showed the following:

Service	Subscription Model		Advertising-Supported Model		Average Revenue Per Play
	Number of Plays	Revenue Per Play	Number of Plays	Revenue Per Play	
A	90 million	$0.0100	10 million	$0.0010	$0.0091
B	10 million	$0.0100	90 million	$0.0010	$0.0019

5/11/15 Tr. 2854:10-2857:6 (Katz) (discussing above demonstrative).

367. As Professor Katz explained, "[i]n terms of its effects on a service's demand for a music license, it makes no difference whether the service derives its revenues from advertising or from subscriptions. The relevant measure of revenues for these services thus should include both subscription and advertising revenues." Katz AWRT ¶ 57. "Because the relevant measure of revenues includes both advertising and subscription revenues, Professor Rubinfeld's interactivity adjustment should have used the ratio of total revenues per play for interactive and non-interactive services rather than the ratio of their subscription prices or the ratio of consumer's estimated willingness to pay." *Id.* ¶ 58. In other words, as Professor Katz explained, "what Dr. Rubinfeld's

argument leaves out is you have to take into account the mix" of subscription and non-subscription revenue per performance, in order to develop a proper adjustment based on per-performance revenue. 5/11/15 Tr. 2856:17-24, 2859:2-2860:1 (Katz).

368. Professor Katz computed the interactivity adjustment based on the correct mix of ad-supported and subscription per-play revenues that Professor Rubinfeld elected not to compute. Katz AWRT ¶¶ 58-59. Professor Katz used Professor Rubinfeld's interactive service data, as well as the noninteractive products offered by the interactive services and Pandora, the largest noninteractive service, to compute a revised interactivity adjustment, approximately twice Professor Rubinfeld's.

Table 2: Comparison of Rubinfeld's Interactivity Adjustment to an Interactivity Adjustment based on Revenue per Play

			Unweighted Average Monthly Price	"Interactivity Adjustment" (Interactive / Non-interactive)
Dr. Rubinfeld's interactivity adjustment using unweighted average monthly subscription prices				
Interactive services			$9.86	
Non-interactive services			$4.84 - $5.27	**2.04 - 1.87**
	Service Revenue (incl. advertising and subscription)	**Plays**	**Revenue per Play**	**"Interactivity Adjustment" (Interactive / Non-interactive)**
Interactivity adjustment using revenue per play				
Interactive services	$403,358,313	36,389,232,297	$0.01108	
Non-interactive services	$783,809,583	280,202,898,569	$0.00280	**3.96**

Notes: Service revenue and label plays for Non-interactive services and for non-Pandora Interactive services are from the data collected by Dr. Rubinfeld from various royalty reports for June 2013 - May 2014. (*See* , 'All Data' tab in *14 11 05 Rubinfeld Drafts of Exhibits and Appendices in Native Format SNDEX0051684_RESTRICTED.xlsx* .)

The classification of products as interactive or non-interactive follows Dr. Rubinfeld's classification in his reported data.

Rubinfeld interactivity adjustment using unweighted average monthly prices is given in *Rubinfeld WDT* , Ex.5.

Pandora data are from Pandora Annual Report for the year ended 12/31/2014, and *Shapiro WDT* , Appendix D.

Pandora data for 2013 and 2014 are used to estimate data for the same time peiod as Dr. Rubinfeld's data, June 2013 - May 2014.

Katz AWRT ¶ 58, Table 2.

369. As Professor Katz testified, "[a]n interactivity adjustment more properly based on both advertising and subscription revenues would set the benchmark royalty rate equal to 25.2 percent of the interactive royalty rate. Hence, this correction alone reduces the recommended noninteractive per-play royalty by half, to $0.001347 per play. Of course, even this partially corrected rate calculation yields a benchmark that is too high because it makes no correction for record company market power and the other factors" identified by Professor Katz. Katz AWRT ¶ 59. The following Table reflects this result:

Table 3: Correcting Dr. Rubinfeld's Interactivity Adjustment Using All Revenues

	Average Minimum Per-Play Rate	
	Adjustment based on Subscription Prices	**Adjustment based on All Revenues**
Dr. Rubinfeld's Average Minimum Per-Play Royalty Rate	$0.005337	$0.005337
Interactivity Adjustment Factor	2.00	3.96
Adjusted Average Minimum Per-Play Royalty Rate	$0.002668	$0.001347

Katz AWRT ¶ 59, Table 3.

370. Professor Rubinfeld's analysis of his interactivity adjustment is invalid for another reason. His adjustments based on subscription revenues and his analysis of ad-supported ARPU ("average revenue per user") failed to account for the likelihood that the number of performances per user differs between interactive and noninteractive services. Indeed, in *Web III*, Dr. Pelcovits acknowledged the need to account for the greater number of plays by subscribers of noninteractive services than by subscribers of interactive services. *Web III Remand*, 79 Fed. Reg. at 23116. The Judges found that the lack of data to make such an adjustment "diminished" the probative value of his analysis. *Id.* at 23118. Professor Rubinfeld did not even attempt to make this adjustment, and his failure to account for any differences in the number of plays makes it impossible to

determine a per-play rate based on his revenue comparisons. Professor Katz's analysis properly accounts for revenues on a per-performance basis and, therefore, addresses this deficiency.

4. Even on its Own Terms, Professor Rubinfeld Did Not Properly Implement His Subscription-Based Interactivity Adjustment

371. Professor Rubinfeld's attempt to develop an interactivity adjustment based on a comparison of interactive and noninteractive subscription prices was flawed even on its own terms. Professor Rubinfeld intended to compare the subscription prices of on demand services with the subscription prices of statutory services. 5/6/15 Tr. 2036:16-2041:22 (Rubinfeld). Indeed, no other comparison would have been meaningful to assess the relative differences between the subscription prices of his benchmark market and the target market of services operating under the statutory license. *See, e.g.*, Rubinfeld CWDT ¶ 167 ("Before the interactive agreements can be used as appropriate benchmarks, adjustments must be made to reflect differences between the rights in the agreements and the statutory license.") Yet, as Professor Rubinfeld admitted, a number of the services that he counted as statutory for purposes of his comparison, in fact offered significant extra-statutory functionality. 5/16/15 Tr. 2042:4-2047:15 (Rubinfeld) (Rhapsody unRadio, offering on-demand plays, caching for off-line playback, and unlimited skips); IHM Ex. 3476 (Rhapsody/UMG Term sheet for unRadio); 5/6/15 Tr. 2047:25-2049:22 (Rubinfeld) (Slacker Radio Plus, offering unlimited skips and caching for off-line playback); *id.* at 2050:18-22 (MixRadio Plus, offering caching for off-line playback and unlimited skips).

372. Professor Rubinfeld admitted that the subscription prices for these services would include payment for the extra-statutory functionality. 5/6/15 Tr. 2047:16-24 (Rubinfeld) (Rhapsody unRadio); *id.* 2049:23-2050:17 (Slacker Radio Plus); but *cf.* McFadden WDT ¶ 9 (valuing unlimited skips at $1.41 per month and caching for off-line playback at $1.18 per month). Professor Rubinfeld admitted that "if [he] were to view [the subscription prices] as a primary source of developing a numerical benchmark, [he] would want to adjust the subscription price to account for the functionality that went beyond the statutory license." 5/6/15 Tr. 2047:20-24 (Rubinfeld). In making that admission, Professor Rubinfeld ignored the fact that his subscription price ratio was, indeed, a "primary source of developing" his primary interactive service benchmark.

5. Improper and Biased Weighting by Professor Rubinfeld in Developing his Average Per Performance Rate

373. To compute his average minimum per performance royalty paid by interactive services, Professor Rubinfeld used biased weighting that systematically and significantly inflated his benchmark license fee.

374. Professor Rubinfeld's revenue weighting approach put more weight on the services that earn more revenue. Rubinfeld CWDT ¶ 203; [[ ]]

375. Professor Katz demonstrated, using both hypothetical examples and actual data, the significant upward bias caused by Professor Rubinfeld's weighting scheme. Katz AWRT ¶¶ 42-44, 162; 5/11/15 Tr. 2830:16-2834:4, 2837:24-2840:4 (Katz). The hypothetical showed a simplified example of how revenue weighting would overstate the actual per-performance fees earned by the record companies, causing per-performance fees of $0.0030 to be presented as $0.0036:

Service	Number of Plays	Revenue Per Play	Total Revenues	Royalty Per Play	Total Royalties Paid
A	1 million	$0.0080	$8,000	$0.0040	$4,000
B	1 million	$0.0020	$2,000	$0.0020	$2,000

Average royalty per play:
$6,000 / 2 million = **$0.0030**

Average royalty per play as calculated by Dr. Rubinfeld's methodology:
(8,000 / 10,000) × $0.0040 + (2,000 / 10,000) × $0.0020 = **$0.0036**

5/11/15 Tr. 2831:2-2834:4 (Katz) (discussing above demonstrative).

376. Professor Katz also showed, using actual data, how Professor Rubinfeld's biased weighting scheme would falsely imply that the record labels earned more than $112.2 million more than they actually did from on-demand services during the period examined by Professor Rubinfeld, an overstatement of more than 42%. Katz AWRT ¶ 162 (Professor Rubinfeld's weighted effective per-play rate implying license fees of

$375.9 million, compared to actual license fees of $263.7 million); 5/11/15 Tr. 2837:24-2840:4 (Katz).

377. Professor Katz then used Professor Rubinfeld's data, weighted properly on a performance weighted basis, to show how Professor Rubinfeld's choice of revenue weighting actually overstated his "average minimum per play rate" by 14% due to that factor alone:

Table 1: Correcting Dr. Rubinfeld's Weighting Scheme

	Average Minimum Per-Play Rate	
	Using Dr. Rubinfeld's Weights	**Using Corrected, Play Weights**
Average Minimum Per-Play Royalty Rate	$0.005337	$0.004697

Notes: Dr. Rubinfeld's weighted average minimum per-play royalty rate is given in *Rubinfeld WDT*, Exhibit 16a.
Corrected, play-weighted average calculated using Dr. Rubinfeld's data for his Category A services. The play-weighted average uses only on-demand products that have a minimum per-play rate.

Katz AWRT ¶ 44 (Table 1); 5/11/15 Tr. 2840:6-20 (Katz).

378. A similar analysis of Professor Rubinfeld's "average effective per play rate," showed that Professor Rubinfeld's biased approach to weighting inflated that number by 42.6%. *See* Katz AWRT ¶ 163.

6. Professor Rubinfeld's Failure To Account for Services' Non-License Fee Costs

379. Another major flaw in Professor Rubinfeld's analysis of the interactive service agreements was his failure to consider the non-license fee costs of the services. This is a corollary of Professor Rubinfeld's invalid assumption, discussed above, that license fees would be the same percentage of a service's revenues, regardless of the level

of those revenues. *See* s*upra* Part VII.A.3; 5/11/15 Tr. 2860:4-2873:14 (Katz) (Professor Rubinfeld was "not really looking at what would be a key driver of the demand for licenses.").

380. Professor Katz demonstrated the flaws in Professor Rubinfeld's approach. As Professor Katz testified, consider an interactive service with revenues per performance of $0.0052, and a noninteractive service with revenues per play of $0.0026. Assume further that the non-license fee costs per performance for each service was the same = $0.0020. This would leave a margin before license fees of $0.0032 for the interactive service and $0.0006 for the noninteractive service. If license fees were set at 31% of revenue the fee for the interactive service would be ($0.0016), leaving a profit margin of $0.0016. Taxing the noninteractive service's revenue at that same rate would cost it $0.0008 (half of the amount charged to the interactive service), which would leave the noninteractive service with a loss of $0.0002. The noninteractive service would not long remain in business. 5/11/15 Tr. 2867:15-2870:6 (Katz); Katz AWRT ¶ 73 (providing a similar example).

381. The effect would be even more pronounced with a license fee equal to 50% of revenue. In that case, the interactive service in the foregoing example would pay a fee of $0.0026, leaving a profit margin of $0.0006 ($0.0052-$0.0020-$0.0026). By contrast, the noninteractive service would be required to pay a fee of $0.0013, leaving it with a loss of $0.0007 ($0.0026-$0.0020-$0.0013). That is not a recipe for a healthy webcasting industry. It is also not reflective of what a willing buyer would pay a willing seller in an effectively competitive market.

382. Professor Rubinfeld admitted that [[ ]] Katz AWRT ¶ 71 (citing 12/11/14 Rubinfeld Dep. Tr. at 196:1-197:11). Indeed, the Nash Bargaining Model, [[ ]], specifically considers a buyer's profits, not its revenues. Katz AWRT ¶ 70; 5/11/15 Tr. 2865:3-2866:18 (Katz) (discussing NAB Ex. 4129, Slide 39).

383. As Professor Katz testified, consideration of non-license fee costs would have a dramatic effect on Professor Rubinfeld's interactivity adjustment. 5/11/15 Tr. 2867:15-20 (Katz). In Table 6 of his Amended Written Rebuttal Testimony, Professor Katz demonstrated, using actual per-performance revenue data for interactive and noninteractive services, how if the non-license fee costs per-performance of interactive and noninteractive services were assumed to equal Pandora's non-license fee costs per performance, Professor Rubinfeld's interactivity adjustment would jump from his constructed 2.0 (or 3.96, accounting for real advertising and subscription revenues per performance) to 7.9. Katz AWRT ¶¶ 74-76 & Tables 6 and 7; 5/11/15 Tr. 2870:7-2873:5 (Katz); [[ ]]

Table 7: Correcting Dr. Rubinfeld's Interactivity Adjustment Using Estimated Profits

	Average Minimum Per-Play Rate	
	Adjustment based on Subscription Prices	**Adjustment based on Profits**
Dr. Rubinfeld's Average Minimum Per-Play Royalty Rate	$0.005337	$0.005337
Interactivity Adjustment Factor	2.0	7.9
Adjusted Average Minimum Per-Play Royalty Rate	$0.002668	$0.000673

384. [[

]]

385. [[

[redacted]

386. Professor Katz's intuition was correct. Even if one assumes, for example, that interactive non-license fee costs are twice Pandora's, his point still holds. The corrected adjustment would be 6.57, still far more than either 2.0 or 3.9. The following table starts with the revenue and cost per play data from Professor Katz's Table 6 and doubles the interactive service's non-license fee costs per play:

	Rev. Per Play	**Non-License cost per play**	**Profit per play**	**Interactivity Adjustment**
Interactive Service	$[[redacted]]	$[[redacted]]	$[[redacted]]	
Non-Interactive Service	$[[redacted]]	$[[redacted]]	$[[redacted]]	6.57

387. The bottom line is that Professor Katz's analysis [[redacted]].

[6] [[redacted].

7. Professor Rubinfeld's Failure Properly To Account for Differences in Promotion and Substitution

388. It is beyond dispute that an effectively competitive price will reflect the seller's opportunity cost. Katz AWRT ¶ 77; Shapiro WDT at 5-7; Shapiro WRT at 26-27. "When licensing to a particular streaming service, a record company can face opportunity costs both in terms of forgone recording sales and foregone revenues from licensing to other streaming services. Conversely, when a streaming service has promotional benefits, those can be viewed as either a form of payment in kind or a negative opportunity cost." Katz AWRT ¶ 77; Shapiro WDT at 5-7 ("For performances that substitute for other sales by the record company, the economic cost includes the lost price/cost margins on those other sales, and hence is positive. By precisely the same logic, for performances that promote other sales by the record company, the extra price/cost margins on those other sales are an economic benefit, causing the economic cost to be negative."); 5/8/15 Tr. 2637:20-2639:7 (Shapiro) (stating that Judges "absolutely want to consider net promotion and substitution, the effect on other revenue streams"); Fischel & Lichtman WRT ¶ 22 ("For example, to the extent that non-interactive services have a larger net promotion effect on music sales than do interactive services, this would translate into lower market royalty rates for non-interactive services, relative to interactive services.").

389. "Economic principles clearly indicate that the differences between services in terms of substitution and promotion would be reflected in their license fees under conditions of effective competition." *Id.* ¶ 78; Shapiro WDT at 6-7; Shapiro WRT at 26-27 ("The impact that a music service has on other revenue streams of the record company will affect the prices that would be negotiated in the hypothetical statutory

market. The more promotional of other revenue streams the music service is, on net, the lower the rate that the music service will pay, all else equal.").

390. The principle is so clearly established that the Copyright Act specifically obligates the Judges to account for differences in the promotion and substitution effects of licensed services (i.e., opportunity costs) in applying the willing buyer/willing seller standard:

391. "In determining such rates and terms, the Copyright Royalty Judges shall base their decision on economic, competitive, and programming information presented by the parties, including – (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or enhance the sound recording copyright owner's other streams of revenue from its sound recordings…." 17 U.S.C. § 114(f)(2)(B).

392. The requirement to consider promotion and substitution is express. The focus on "other streams of revenue" makes clear that this provision is directed towards the opportunity cost of licensing a particular service. *See infra* Part XI.B.7.

393. Professor Rubinfeld admitted that the Judges would need to take account of any differences in promotion or substitution between his benchmark interactive services and statutory services. 5/6/15 Tr. 2151:18-23 (Rubinfeld) ("If there were a different effect between interactive and noninteractive, then you would have to consider how to adjust it – adjust for that."). But despite these clear principles, and his own acknowledgement, Professor Rubinfeld admitted that he did not undertake any empirical analysis to quantify whether there were differences in the promotional or substitutional

effect of interactive versus noninteractive services on other record company revenue streams. 5/6/15 Tr. 2035:3-20, 2152:7-9 (Rubinfeld); Katz AWRT ¶ 100. Rather, he claimed to be "agnostic" about, and admitted he had not studied, the relative substitution impact of the two types of services. 5/6/15 Tr. 2035:21-2036:10 (Rubinfeld); *accord id.* 2153:10-12 ("From my point of view, it is an open question.").

394. In fact, as common sense would indicate, the record reflects significant differences between noninteractive and interactive services in their effect on downloads and other sales of sound recordings.

- [[ ]]. *Id.*
- A Sony "Strategy" presentation reports that, [[ ]].
- A Bain & Company document, produced for Universal, states that the [[ ]].

395. As discussed above, *supra* Part III.C, the differences in promotion and substitution between simulcasting and on-demand services are particularly acute.

396. In his rebuttal testimony, SoundExchange's expert David Blackburn posited a distinction between what he termed "expansionary" promotion (activity generating sales that would not have otherwise occurred) and so-called "diversionary"

promotion (activity shifting sales from one competitive product to another. See Blackburn WRT ¶¶ 6-7. He then asserted that only "expansionary" promotion was pertinent to the question before the Judges. *Id*. ¶ 7; *accord* 5/26/15 Tr. 5895:3-12 (Blackburn) ("there is no such thing as diversionary promotion when we are looking at a license for the whole industry, right, because at that point, it's the whole industry. The only type of promotion that can exist is expansionary. Anything that makes one guy better off while making somebody else worse off is just shifting the -- giving me a slightly bigger slice of pie and giving you a slightly smaller slice").

397. On cross-examination, Dr. Blackburn admitted that the concept he articulated does not appear in any published economics literature or textbook. 5/26/15 Tr. 5926:20-5927:4 (Blackburn). More fundamentally, however, and as Dr. Blackburn also admitted, the limitation to so called expansionary promotion would apply only in a market with a monopoly seller; in a market with competition, sellers would be concerned with both expansionary and diversionary promotion:

> Q. And if that market has a single monopolist seller, the seller would care -- would only care about what you have labeled expansionary promotion and would not care about diversionary promotion, correct?
>
> A. I mean I think that's right. . . .
>
> Q. And if that same market, instead of having a single monopolist seller, is instead a competitive market with multiple sellers, you would expect those sellers to care about both expansionary promotion and diversionary promotion, correct?
>
> A. Well, right. I mean firms conduct diversionary promotional tactics all the time, right? I mean Coke spends lots of money going around convincing people to buy Coke instead of Pepsi.
>
> Q. And assume with me that there is a music service that is neither promotional nor substitutional to recording industry revenues as a whole,

> but air play on that music service affects the split of industry-wide revenues earned by each record label.
>
> Are you with me?
>
> A. I think so.
>
> Q. In that situation, as an economist, you would expect that record labels would compete to increase their share of air play on that service, right?
>
> A. Right.

5/26/15 Tr. 5927:12-5928:25 (Blackburn).

398. Professor Katz further explained the flaws in Dr. Blackburn's contentions. As he noted, Dr. Blackburn's view is premised on consideration of a monopoly seller, not a seller in an effectively competitive market. 5/26/15 Tr. 5665:9-5666:4 (Katz) ("I think he is asking the [J]udges to put effective competition aside in this section. He is asking them to adopt a monopoly standard which is not my understanding of what the standard is").

399. In short, Professor Rubinfeld's failure to account for differences between his benchmark on-demand services and noninteractive services further undermines the validity of his benchmark analysis. This failure is particularly acute with respect to simulcasting.

8. Professor Rubinfeld's Failure Properly To Account for Differences in the Relative Importance of Sound Recordings on Simulcasting

400. It is important to ensure that the licensed fee charged relates unambiguously to the value of the sound recording performance rights that are licensed. SDARS II, 78 Fed. Reg. 23054 (citing SDARS I, 73 Fed. Reg. at 4087); Katz AWRT

¶ 60 ("the relevant measure of revenue for determining a per-play license fee is the revenue per play attributable to the licensed content.").

401. There are important differences in the role that licensed sound recordings play in the success of the on-demand services relied upon by Professor Rubinfeld's benchmark analysis compared to the role that they play in the success of statutory noninteractive services. Katz AWRT ¶ 61. The role of programming other than licensed sound recordings is particular significant for simulcasting. *See supra* Part III.A.

402. In light of these differences, it is necessary to make an adjustment to any interactive service benchmark in order to account for the fact that licensed music content plays a lesser role in generating value for simulcasters than for on-demand music services. Katz AWRT ¶¶ 62-63.

403. Professor Rubinfeld acknowledges that, at least for his percentage of revenue fee proposal, that fee should only be charged against revenue attributable to the music programming. 5/6/15 Tr. 2056:16-2057:7 (Rubinfeld). [[ ]]

404. As Professor Katz points out, however, the need for an adjustment arises even when the royalty is levied on a per-performance basis for two reasons. First, to the extent the number of plays does not vary in strict proportion with the relative value contributed by the licensed sound recordings, the price per play will need to be adjusted to account for the differences in value. Second, if the per play royalty is based, in part,

on a measure of revenue per play (*e.g.*, through a revenue-based interactivity adjustment such as that used by Professor Rubinfeld), then the estimated revenue per play and resulting royalty will be too high when all of the revenue is attributed to the licensed content. Katz AWRT ¶ 62 & n.83.

405. Thus, as Professor Katz concludes, correcting Professor Rubinfeld's failure "to account for differences in the relative contributions of music to non-interactive and on-demand services could lead to a large downward adjustment in his recommended per-play royalty rate. His failure to take this factor into account further reduces the reliability of his recommended statutory royalties." Katz AWRT ¶ 69.

9. Underestimating the Number of Plays that Would Not Be Compensable Under Professor Rubinfeld's Benchmark Interactivity Agreements

406. The interactive service license agreements that Professor Rubinfeld relies upon as his benchmark typically do not require the service to pay a royalty for performances under a certain length (*e.g.*, skips). For example, [[ ]] of the agreements between the major labels and the two largest interactive services, Spotify and Rhapsody, [[ ]] Katz AWRT ¶ 101 & n.157.[7] By contrast, SoundExchange proposes that the statutory license

[7] [[ ]].

should charge for all plays, no matter how short. *See* SoundExchange Proposed Rates and Terms, Attach. A at 2-3.

407. [[ ]]

408. [[ ]]; Katz AWRT ¶ 102. Based on those estimates and assumption, Professor Rubinfeld concluded that his interactive benchmark rate should be divided by a factor of 1.1. Rubinfeld CWDT ¶¶ 216-17.

409. In fact, however, [[ ]]. Katz AWRT ¶¶ 103-04 & Table 8.

10. Professor McFadden's Survey Does Not Corroborate the Interactivity Adjustment.

410. Professor Rubinfeld claimed that his subscription-price based interactivity adjustment was corroborated by a conjoint study performed by Professor Daniel McFadden. Rubinfeld CWDT ¶¶ 209-10. As was evident at the hearing, and as described below, Professor McFadden's survey suffered from numerous flaws. These flaws render his willingness to pay results unusable. Hauser WRT ¶¶ 9-13, 152-53;

5/22/15 Tr. 5591:8-13 (Hauser); Peterson WRT ¶¶ 80-110. Moreover, Professor Rubinfeld used the results of the survey in a way that did not and could not support his interactivity adjustment.

a. Professor McFadden's Survey Methodology Was Fatally Flawed

411. Professor McFadden purported to test the willingness to pay of consumers for specific features through a conjoint survey. He submitted the results of his survey as part of his Written Direct Testimony. SX Ex. 15.

412. iHeartMedia and NAB engaged Professor John R. Hauser, Sc.D., a recognized authority on the design, implementation and evaluation of conjoint surveys. *See* Hauser WRT ¶¶ 1-4. Professor Hauser was asked to review and comment on Professor McFadden's Written Direct Testimony and to assess the scientific validity of Professor McFadden's survey methodology and design, and to evaluate whether or not the survey provided reliable results. *Id.* ¶ 6; 5/22/15 Tr. 5560:16-19 (Hauser).

413. Based on his initial review of Professor McFadden's survey and written materials, which indicated the potential for confusion, Professor Hauser conducted his own independent qualitative study to test the whether Professor McFadden's conjoint survey was understandable by survey respondents. Hauser WRT ¶¶ 60-68; 5/22/15 Tr. 5561:1-5562:7 (Hauser). In his study, Professor Hauser tested fifty-three respondents to determine whether they understood the feature definitions and incentive alignment of Professor McFadden's survey. Hauser WRT ¶ 60. Professor Hauser duplicated Professor McFadden's methodology, using the same screening criteria and the same survey design and questions. Hauser WRT ¶ 60; 5/22/15 Tr. 5561:10-17 (Hauser). As

part of the qualitative study, interviewers (blind to the purpose of the study) asked the participants (also blind to the purpose) questions regarding their comprehension of Professor McFadden's survey questions. Hauser WRT ¶ 60; 5/22/15 Tr. 5561:18-5562:7 (Hauser). Professor Hauser video-taped the responses of his participants, and had coders (also blind to the purpose of the study) evaluate and categorize the responses. Hauser WRT ¶ 66; 5/22/15 Tr. 5561:18-5562:7 (Hauser).

414. Based upon his professional experience, review of the available testimony, documentation and data, and the results of his own qualitative study, Professor Hauser formulated several opinions regarding Professor McFadden's finding. Hauser WRT ¶¶ 60-68. Most importantly, he concluded that Professor McFadden's "survey data are not reliable." Hauser WRT ¶ 9; Hauser Tr. 5591:8-13. Because Professor Hauser's respondents had "varied and meaningfully distinct interpretations of Professor McFadden's feature levels," one cannot map Professor McFadden's results to actual services in the manner used by Professor Rubinfeld. Hauser WRT ¶ 13(c). "The overall confusion rate found in [Professor Hauser's] study of Professor McFadden's survey instrument demonstrates that the data cannot be used in a scientific or reliable manner and that interpretations based on the data cannot be relied upon in this matter." Hauser WRT ¶ 13; 5/22/15 Tr. 5591:8-13 (Hauser).

415. The first major flaw was Professor McFadden's selection and description of his conjoint features. As was revealed at the hearing, Professor McFadden did not select these features himself, but rather staff from the Brattle Group, a survey firm, did the research and made the selections. 4/29/15 Tr. 909:5-910:10 (McFadden). Professor McFadden admitted to having little to no experience in the webcasting industry and no

direct knowledge of the relevant webcasting features. 4/29/15 Tr. 910:11-911:8 (McFadden); *id*. at 913:7-15 ("Well, I'm not an expert myself in what these features are, and my understanding was that what we did was we went and looked at the features that seemed to be commonly listed in comparisons of streaming services and on websites. There may be additional specifications which are included, but I've not gone—myself, I have no direct personal information on that"). Indeed, Professor McFadden repeatedly disclaimed his ability to knowledgably select features for testing. *See, e.g.*, 4/29/15 Tr. 938:9-14 (McFadden) ("Q: And, in fact, social networking, the various abilities on different services, is something that differentiates services, correct? A: I'm not an expert. It's possible, but I simply don't know."); *id*. at 933:14-18 ("Q: Do you know whether on-demand services provide a social networking feature as one of their attributes? A: I would say, no, I'm not – I'm not aware of what those attributes are."). Professor McFadden also admitted that members of the Brattle Group's staff are not experts in the field of webcasting. 4/29/15 Tr. 934:23-935:7 (McFadden).

416. Professor McFadden's survey failed to test for certain very important webcasting features, including "high quality audio streaming" and "social networking" (sharing music with friends). These features are cited prominently in some of the very materials that were identified as having been "relied upon" by Professor McFadden in developing his report. In truth, Professor McFadden had not even seen the materials he allegedly "relied upon" in developing his list of features and was not familiar with the relative importance of these important features he did not include in his survey. 4/29/15 Tr. 923:13-932:13 (establishing the importance of high quality sound as a feature); *id*. at 933:6-940:1 (establishing the importance of social media capabilities as a feature for

services and Professor McFadden's lack of knowledge of same). Professor McFadden clearly was absent from the decision making process regarding feature inclusion, and by his own admission, neither he nor his staff are experts in webcasting features. Despite intending to include in his survey those features that the consumers of music are likely to value, features cited as important by the very documentation Professor McFadden relied upon were absent from his survey.

417. Compounding the problem, the features Professor McFadden did test were presented to his survey respondents in a confusing manner. Professor Hauser testified that Professor McFadden's survey relied upon "complicated feature descriptions that were long, overlapping, and jargon–heavy." Hauser WRT ¶ 10; *see also id*. ¶¶ 90-136. In making this determination, Professor Hauser used the results of his qualitative survey, finding that his respondents only fully understood two of the seven features contained in Professor McFadden's conjoint selections and that "the vast majority" of respondents were "confused by one or more of Professor McFadden's feature descriptions." Hauser WRT ¶ 13 (for example, 60 percent of Professor Hauser's study respondents were unable to accurately characterize the meaning of a "playlist generated by a tastemaker."); *id*. at Exhibit 12.

418. Professor McFadden's survey was also poorly implemented with respect to the feature descriptions. After an initial pre-test, Professor McFadden made substantial changes to certain feature descriptions and titles. 5/22/15 Tr. 5568:9-5570:20 (Hauser); Hauser WRT ¶¶ 46-52. There is no evidence in the record that these substantially revised definitions were pretested again; however, Professor Hauser testified that this should be standard procedure upon making significant changes to feature definitions. Hauser WRT

¶¶ 35, 46-48; 5/22/15 Tr. 5567:5-5568:7 (Hauser) ("it is absolutely standard procedure to continue pretesting until you are satisfied with the survey. . . . The goal is to keep pretesting until you get to the point where you are very confident that the consumers understand your survey."); Hauser WDT ¶ 32 ("Pretests are useful in accurately designing surveys in both academia and litigation cases, particularly when the survey instrument is complex, as in the case of Professor McFadden's study. Pretests can be particularly important when the survey relies on industry specific terms or jargon which may not be understood by target respondents.").

419. Professor McFadden changed the feature definition titles in his definitions section, but left the original feature titles (from the pilot survey) in the conjoint selection tables. 5/22/15 Tr. 5568:9-5569:5 (testifying that Professor McFadden made "substantial changes" to the description of "Features available for streaming to a computer" but left the feature title "On-demand track selection" in the conjoint exercise); Hauser WRT ¶ 39; *compare* SX Ex. 15, at App. B-viii (definitions page reflecting the feature title "features available for streaming to a computer") with *id.* at App. B-ix (choice tasks reflecting the same feature as "on-demand track selection"); 5/22/15 Tr. 5569:20-22 (Hauser") ("Q: So does that mean the change was made in one place in his survey but not in another? A: That's absolutely correct?"). This sloppiness in implementation could have easily confused a respondent who could not readily correlate a conjoint feature title with its appropriate definition. Hauser WRT ¶ 39 (noting that "[t]his name is so different from the name in the definitions that it may be very difficult for respondents to relate the two concepts."). Indeed, Professor McFadden changed all of the names of the features from

his pilot survey, except for advertising, without changing the names in the accompanying choice tasks, and without further pre-testing the changes. Hauser WRT ¶¶ 35, 50, 52.

420. Without a consistent understanding of the meaning of the survey features, the willingness to pay results will not be meaningful. 5/22/15 Tr. 5586:11-5587:15 (Hauser) (testifying that "[i]f different people understand the features in different ways, the [Professor McFadden] is really comparing apples and oranges" when he is trying to report an average willingness to pay).

421. Professor McFadden's incentive alignment was also flawed. Professor McFadden's own report noted that "[i]n conjoint surveys, it is important to align the respondent's incentives with incentives they would face in the actual market to ensure they accurately reveal their preferences." SX Ex. 15 at 14. But Professor Hauser's qualitative study revealed that an "unacceptable three-quarters of these qualitative study participants found Professor McFadden's incentive alignment language confusing." Hauser WRT ¶ 12. "The confusing incentive-alignment language means that Professor McFadden cannot interpret respondents' reactions to the survey to be consistent with choices respondents would make with respect to real music services." Hauser WRT ¶ 13.

422. A simple read of Professor McFadden's incentive alignment demonstrates how easily a lay respondent could be confused:

> We offer you an incentive to participate in this survey. Here's how it works. You will be shown 15 sets of choices of streaming music plans and you will be asked to choose your preferred plan within each set. One of the choices in each set will be a free plan.
>
> We will use a computer algorithm to understand your preferences for streaming music services. We will give you a gift that has a dollar value of $30 in total. Based on your streaming music preferences in this survey, we

> will select a music streaming service among the ones currently available and give that to you, deducting its actual cost from the $30. Then we will give you the remaining amount as a VISA gift card.
>
> For example, suppose that your preferred service costs $10 a month. Then, we will give you this service plus the remaining amount of $20 ($30 minus $10) as a VISA gift card. If this service is actually worth more to you than $10 a month, then you are better off with the service and the $20 VISA gift card than you would be with a $30 gift card. Of course, if the service is actually worth less to you than $10 a month, then you are worse off with the service and a $20 gift card than with a $30 gift card. Everyone will get at least $15 in VISA gift cards.
>
> To guarantee that you get a streaming service that is worth more to you than its cost, try to weigh service features and costs carefully and accurately so that the choices you indicate tell us whether various features of streaming service plans are truly worth their cost.

SX Ex. 15 at App. B-vii; Hauser WRT ¶ 18. Professor McFadden characterized this incentive alignment language as "simplified" from his pilot study, despite the fact that it is much longer than the pre-test language. SX Ex. 15 ¶ 16; Hauser WRT ¶ 49 (the original pre-test language was a random selection of "one of two gifts: (1) a $30 VISA gift card or (2) a $30 gift card to one of several possible popular music streaming services."). But Professor McFadden's final language "contains essentially terms of art and it is fairly complex." 5/22/15 Tr. 5572:11-19 (Hauser). Similar to the changes to his feature definitions, there is no evidence in the record that Professor McFadden pre-tested his revised incentive alignment language to ensure that respondents would understand this new version. Hauser WRT ¶ 49. Professor Hauser determined that "74 percent of the respondents had some problem with the incentive alignment . . . it was a difficult concept for them to read in the survey." 5/22/15 Tr. 5572:20-5573:9 (Hauser); *see also* Hauser WRT ¶ 82, Exhibit 2. The confusion generated by the incentive alignment

language in Professor McFadden's survey independently renders Professor McFadden's conjoint analysis results unreliable. Hauser WRT ¶ 82.

423. Professor McFadden's pretesting process was also insufficient. First, from the pool of 53 pilot survey participants, Professor McFadden's team received feedback from only 9 participants. SX Ex. 15 ¶ 41; 5/22/15 Tr. 5566:13-21 (Hauser). Professor Hauser characterized Professor McFadden's consideration of only 9 of the 53 pilot survey participants' feedback as a "limited pretest," as Professor McFadden had no information on comments that could have been made by over 80 percent of his pilot survey respondents. Hauser WDT ¶ 34. Because of the significant and material changes made by Professor McFadden to his survey questions after the pilot test, the revised survey instrument should have been carefully pre-tested, but there is no evidence that this occurred. Hauser ¶ 52 ("Professor McFadden made substantial changes to his feature definitions and incentive alignment process and language, all of which are crucial aspects of his survey. In cases with complex instructions and language, with such extensive changes following a pretest, it is best practice to re-test the survey to assess whether the new language is understandable to respondents. I have seen no evidence that Professor McFadden has done such retesting."). Although Professor McFadden characterized the changes to his pilot survey as "minor," they clearly were not, and his failure to pretest such changes is highly problematic. 5/22/15 Tr. 5570:2-8 (Hauser) ("In your opinion, were the changes that we see in these slides minor as Professor McFadden suggested? A: No. If this were my survey, I certainly would pretest this level of change. If there is one or two words change, maybe not, but this is a substantial change. I would retest this.").

424. Further reflecting the fact that his survey was confusing, Professor McFadden experienced a very high drop-out for survey participants. Hauser WRT ¶¶ 11, 56-59; Hauser Tr. 5570:24-5571:14. From Professor McFadden's data, Professor Hauser calculated that 59 percent of people who completed Part A of Professor McFadden's survey also completed Part B, which means that 41 percent of respondents did not complete Part B of the survey. For teens, the dropout rate was 68 percent. Hauser WRT ¶ 58. In Professor Hauser's experience, "these rates are unusually high for an online conjoint analysis survey." *Id.* Indeed, Professor McFadden characterized his drop-out rate of teenage respondents "alarming." 4/29/15 Tr. 898:6-10 (McFadden) ("In fact, the high attrition rate among teens is alarming to me as well as Professor Hauser"); *see also id*. at 899:16-900:6 (characterizing the adult drop-out rate of one-third as being "at the upper end – towards the upper end of attrition rates I've seen for surveys like this, but it's not out of range. It's not the worst I've ever seen.").

b. Professor McFadden's Survey Results Were Improperly Used by Professor Rubinfeld.

425. Steven R. Peterson, Ph.D., was engaged by NAB and Pandora to analyze certain aspects of the testimony of Professor McFadden and Professor Rubinfeld's use of Professor McFadden's survey. Peterson WRT ¶¶ 1, 4. This included evaluating whether Professor McFadden's results corroborated Professor Rubinfeld's calculation of the "interactivity adjustment." *Id.* ¶ 4.

426. Dr. Peterson determined that Professor McFadden's results did not corroborate Professor Rubinfeld's interactivity adjustment. 5/14/15 Tr. 3887:7-25 (Peterson); Peterson WRT ¶¶ 80-110.

427. Notably, Professor McFadden did not coordinate his findings with Professor Rubinfeld, nor did Professor McFadden endorse Professor Rubinfeld's analysis or Professor Rubinfeld's use of Professor McFadden's findings. *See, e.g.*, 4/29/15 Tr. 877:10-15 (McFadden) (confirming that Professor McFadden did not have any involvement with Professor Rubinfeld's use of Professor McFadden's results); SX Ex. 15 ¶ 6 (Professor McFadden noting in his report that "I understand that the results of my conjoint survey may be relied upon by Dr. Daniel L. Rubinfeld.").

428. Professor Rubinfeld's "interactivity adjustment" was developed through a ratio of prices—that is, a ratio of the average subscription price for an on-demand service to the average subscription price for a statutory service. 5/14/15 Tr. 3887:7-25 (Peterson); Peterson WRT ¶ 94. Professor Rubinfeld found this ratio to be "2." WRT ¶ 94. Professor Rubinfeld attempted to corroborate his ratio of prices by comparing it to a ratio of the average willingness to pay for the features of an interactive service versus the average willingness to pay for the features of a statutory service, the data for which Professor Rubinfeld obtained from Professor McFadden's survey results.

429. Dr. Peterson found that Professor Rubinfeld's approach is wrong for two reasons. First, it is improper to attempt to draw a comparison between subscription prices in the market (Professor Rubinfeld's interactivity adjustment) and average willingness to pay for certain features of music services (Professor McFadden's numbers). 5/14/15 Tr. 3887:7-25 (Peterson); *see also* Peterson WRT ¶¶ 96, 98-103. "[T]here is no relationship between the average willingness to pay for the features included in a service and the market price of that service." Peterson WRT ¶ 103. As Dr. Peterson explained:

> [t]he average willingness to pay for an interactive service (derived from Dr. McFadden's survey) is $8.57 according to Dr. Rubinfeld. This is lower than the average price of an interactive service, which he calculates to be $9.86 per month. An individual with the average willingness to pay for an interactive subscription service that Dr. Rubinfeld calculates would not buy the service at the average price. In fact, no one would buy the vast majority of interactive subscription services, most of which have a subscription price of $9.99 per month or higher.

Id. ¶ 102*; see id*. ¶ 96. ("In fact, Dr. McFadden's estimates of willingness to pay need not have any relationship to market prices, which means that they cannot be used in a calculation designed to preserve the relationship between retail subscription prices and license fees as Dr. Rubinfeld assumes should be done."). It is "pure happenstance" that the two numbers produce roughly the same results; "[o]ne calculation cannot support the other." Peterson WRT ¶ 14; 5/14/15 Tr. 3887:23-25, 3889:14-3890:21 (Peterson).

430. Second, Professor Rubinfeld's two calculations were based on different sets of features. Peterson WRT ¶ 97. For his adjustment based on willingness to pay, Professor Rubinfeld included all of the features of interactive and noninteractive services. *Id.* But many of these features are available for free in the marketplace. *See id.* ¶ 104. Consumers will make choices in the marketplace based on whether the features included in the subscription service that he or she cannot get for free are worth the subscription fee. *Id.* The estimates of the average willingness to pay that Professor Rubinfeld calculated based on the survey and used to "corroborate" his interactivity adjustment "include the value of features that consumers will not be willing to pay for in the marketplace." Peterson WRT ¶ 105. Therefore, the "features that Professor Rubinfeld used to estimate the ratio of the average willingness to pay for an interactive subscription service and a statutory non-interactive service are not the same features that consumers

evaluate when deciding to buy a subscription service or to use a free-to-the-user service." *Id.*; *see also* ¶¶ 106-109 (graphically illustrating this issue).

431. There are other reasons to doubt the validity of Professor Rubinfeld's use of Professor McFadden's data. Professor McFadden presented only the average willingness to pay for each feature addressed in his survey, but the data were available for Dr. Peterson—and, of course, Professor Rubinfeld—to analyze each survey respondent's willingness to pay for all of the tested features. Peterson WRT ¶ 82. As performed by Dr. Peterson, the results of that analysis undermine the reliability of Professor McFadden's data as a whole, including any "average" willingness to pay numbers. For example, 35.3% of respondents had a "negative" (less than zero dollars) average willingness to pay for a premium on-demand subscription service over a free ad-supported service. Peterson WRT at 36, Figure 9; 5/14/15 Tr. 3884:13-3886:2 (Peterson). Also, the overall average willingness to pay of Professor McFadden's respondents was $2.53 for that same on-demand subscription service, which is substantially below the typical marketplace cost of a premium service of $10. Peterson WRT ¶¶ 89-92; 5/14/15 Tr. 3883:17-3884:12 (Peterson).

432. Furthermore, the data reflect that Professor McFadden's respondents showed that in some instances, respondents were willing to pay less for a more beneficial feature. For example, Dr. Peterson examined the willingness to pay data for a 20 million song library versus a 1 million song library, and found that 23% of future users had a negative willingness to pay for the increased song library, while the mean willingness to pay was $1.55. *Id.* ¶¶ 84, Figure 7. This extreme variation in willingness to pay reveals that the average willingness to pay for that feature provides "no indication of consumers'

divergent preferences." Peterson WRT ¶ 84; *see also id.* ¶ 87 ("Where estimates of the individual willingness to pay are both positive and negative and when the distributions of willingness to pay are bimodal (sometimes with peaks on either side of zero), the average willingness to pay does a particularly poor job of describing the range and even the direction of preferences"); *id*. ¶¶ 88-93.

B. PROPERLY VIEWED, PROFESSOR RUBINFELD'S INTERACTIVE BENCHMARK SUPPORTS THE NAB'S PROPOSED RATES.

433. Professor Katz demonstrated that it was possible to correct some fo the analytical flaws in Professor Rubinfeld's interactive service benchmark. Such a corrected benchmark "can serve as a ceiling on a reasonable statutory rate." Katz AWRT ¶ 108.

434. As discussed above, a number of Professor Rubinfeld's errors readily lend themselves to being quantified – specifically, his use of improper revenue weighting, his failure properly to account for advertising supported services, and his under-correction for non-compensable performances. In addition, although it requires assumptions regarding the non-license fee costs of interactive services, the effect of Professor Rubinfeld's failure to consider non-license fee costs can also be quantified.

435. These corrections can be applied singly or together. Taking them all together results in a partially corrected per-performance fee of $0.0005, assuming that the non-license fee costs of interactive and noninteractive services are the same.

Partial Corrections

	Rubinfeld Methodology		Corrected Methodology	
Weighted Average Per-Play Min	Revenue-Weighted	$0.005337	Play-Weighted	$0.004697
Interactivity Adjustment				
Revenue Component	Subscription Revenues: 2.0	$0.002668	All Revenues: 3.96	$0.001186
Cost Component	No Adjustment	$0.002668	Data-Based: 7.90	$0.000592
Compensable-Play Adjustment	Assumed: 1.1	$0.002426	Data-Based: 1.2.	$0.000495
ROUNDED AMOUNT BEFORE ADDITIONAL CORRECTIONS		**$0.0024**		**$0.0005**

See Katz AWRT ¶¶ 44 & Table 1, 58 & Table 2, 59 & Table 3, 74 & Table 6, 76 & Table 7, 104 & Table 8, 109 & Table 9; 5/11/15 Tr. 2875:24-2877:11 (Katz) (Discussing demonstrative slide 20, combining partial corrections to Professor Rubinfeld's benchmark analysis).

436. It is possible to perform the same adjustments using the more conservative assumption that the non-license fee costs of interactive services are double those of noninteractive services (which seems unlikely given the need for noninteractive services to curate the music that is performed). This results in a partially corrected per-performance fee of $0.0006.

Partial Corrections

	Rubinfeld Methodology		Corrected Methodology	
Weighted Average Per-Play Min	Revenue-Weighted	$0.005337	Play-Weighted	$0.004697
Interactivity Adjustment				
Revenue Component	Subscription Revenues: 2.0	$0.002668	All Revenues: 3.96	$0.001186
Cost Component	No Adjustment	$0.002668	Data-Based: 6.57	$0.000715
Compensable-Play Adjustment	Assumed: 1.1	$0.002426	Data-Based: 1.2.	$0.000596
ROUNDED AMOUNT BEFORE ADDITIONAL CORRECTIONS		**$0.0024**		**$0.0006**

437. It should be emphasized that these numbers only partially correct for the many flaws of Professor Rubinfeld's analysis. They do not include any correction for:

- The lack of effective competition in the benchmark market (which Professor Katz projects could double the rates above what they should be, Katz AWRT ¶ 110);

- Differences in promotion and substitution (opportunity costs) between interactive and noninteractive services, most notably simulcasting; or
- Differences in the relative contribution of music to interactive services and simulcasting.

Each of these likely has a significant additional effect, meaning that the partially corrected rates are likely above the outer boundary of a range of reasonable rates for simulcasting.

438. Professor Katz opined that one way to partially adjust for the lack of effective competition would be to use the partially corrected minimum per-performance fee set forth above without imposing a percentage of revenue fee. As explained by Professor Katz, "[u]se of the per-play minimum can be taken as a market power adjustment: the per-play minimum amounts have been revealed through market behavior as royalty rates at which the record companies are willing to sell licenses. There is no reason to believe that these rates are below effectively competitive levels," while there are many reasons to believe that the percentage of revenue fees are far above the effectively competitive level. Katz AWRT ¶ 160.

439. Professor Katz concluded that the adjusted per-play minimum "is a useful upper bound on the zone of reasonableness (it is an upper bound because this figure has not been adjusted downward to reflect factors such as greater net promotional value of non-interactive services in comparison with on-demand services)." Katz AWRT ¶ 160.

C. PROFESSOR RUBINFELD'S APPLE BENCHMARK ANALYSIS WAS FATALLY FLAWED.

440. In his Corrected Written Rebuttal Testimony, Professor Rubinfeld includes an "appendix" in which he purports to analyze agreements between Apple and

Warner and Sony relating to Apple's iTunes Radio product. Professor Rubinfeld claims that these agreements "confirm" his interactive service benchmark, and he offers them benchmarks. Rubinfeld CWRT App. 2, SX Ex. 128.

441. In fact, Professor Rubinfeld's analysis of the Apple agreements is deeply flawed. The agreements do not confirm Professor Rubinfeld's interactive service benchmark or serve as a useful alternative benchmark for numerous reasons:

- Professor Rubinfeld engages in an *ex post* analysis of the agreements, which ignores the expectations of the parties when they made the deal, and results in his computation of a [[ ];
- Professor Rubinfeld fails to account for the shadow of the statutory license, which demonstrably raised the license fees Apple agreed to pay;
- Professor Rubinfeld fails to account for the unique value available to Apple from its iTunes Radio service;
- Professor Rubinfeld fails to account for the fact that the iTunes Radio agreements [ ]];
- Professor Rubinfeld included the full amount of [[ ]; and
- Professor Rubinfeld included an [[ ]].

442. Based on his review of Professor Rubinfeld's work, Professor Katz concluded "Dr. Rubinfeld's analysis is deeply flawed. . . . A correct analysis reveals that, far from confirming the reasonableness of his interactive-service benchmark, the iTunes Radio licensing agreements demonstrate that Dr. Rubinfeld's interactive-services

benchmark is unreasonably high by a very significant amount." Katz AWRT ¶¶ 182-83; *accord* Shapiro SWRT at 1-2 ("Professor Rubinfeld's use of the Apple agreements is fundamentally flawed for a number of reasons."); Fischel & Lichtman SWRT ¶ 4.

1. Professor Rubinfeld's *Ex Post* Analysis Results in a Facially Absurd Effective Per-Pay Rate.

443. Professor Rubinfeld's analysis of the Apple-Sony and Apple-Warner agreements as benchmarks impeaches itself. Professor Rubinfeld acknowledged that the statutory license could "very easily" have been available to Apple, with certain changes to its service. Katz AWRT ¶ 224, citing 4/15/15 Rubinfeld Dep. Tr. 713:4-17. Nevertheless, as Professor Katz described:

> "[b]y Dr. Rubinfeld's calculation, the adjusted effective per-play rates to which Apple agreed for its iTunes Radio service—[[ ]]. Dr. Rubinfeld attempts to resolve this tension by saying that [[ ]]].

Katz AWRT ¶ 224 (footnotes omitted); *accord* Shapiro SWRT at 7-8. In other words, no sane licensee would have agreed in advance to the rates Professor Rubinfeld attributes to the Apple agreements as per-play rates.

444. Professor Shapiro expressed the contradiction clearly and bluntly:

> I can find nothing in the Rubinfeld Rebuttal Testimony indicating that he is even aware of the stunning contradiction between the rates he calculates and the undisputed fact that the statutory rates serve as a ceiling on the rates that any statutory service would pay. . . . In my opinion, this contradiction alone implies that the benchmark rates calculated by

> Professor Rubinfeld based on the Apple agreements with Warner and with Sony are unreliable and should be dismissed out of hand.

Shapiro SWRT at 7-8.

445. Similarly, Professors Fischel and Lichtman explained, according to Rubinfeld, Apple is [[ ]] Fischel & Lichtman SWRT ¶ 5.

446. The extraordinarily high rates computed by Professor Rubinfeld result from his [[ ]] SX Ex. 128 at 018 ([[ ]]); SX Ex. 128 at 021 ([[ ]]); 5/11/15 Tr. 2916:10-2919:3 (Katz) (Professor Rubinfeld's use of [[ ]])

447. All of the parties' economic experts (except for Professor Rubinfeld) agree that the appropriate basis for ascertaining what a willing buyer and willing seller agreed to is to look at the expectations of the parties "at the time they reached the agreement." Katz AWRT ¶¶ 220, 222, 226; Fischel & Lichtman WRT ¶ 103 ("[F]rom an economic

standpoint, what is relevant in determining the rates 'that would have been negotiated in the marketplace between a willing buyer and a willing seller' is the parties' expectations at the time of the agreement, not the *ex post* outcomes of the agreement."); Fischel & Lichtman SWRT ¶¶ 40-42; Shapiro SWRT at 2, 8-11. As Professor Katz explains, the expectations of the parties "will thus be a critical part of determining whether the party is or is not 'willing.'" Katz AWRT ¶ 222; 5/11/15 Tr. 2918:16-25 (Katz) ([[ ]]).

448. The evidence demonstrates that Apple and all three of the major record companies had very different expectations from the ones Professor Rubinfeld implicitly imputes to them. The effect of this divergence is that, when he amortizes the [[ ]] using actual realized performances, Professor Rubinfeld calculates much higher effective per-play royalty rates than the parties anticipated. Katz AWRT ¶ 227; Shapiro SWRT at 9; Fischel & Lichtman SWRT ¶ 41. His result is not what a willing buyer would agree to pay a willing seller.

449. Professor Katz's testimony demonstrates the magnitude of this error. Katz AWRT ¶¶ 225-26. Based on actual results, Professor Rubinfeld estimated the effective per-play allocations [[ ]] Katz AWRT ¶225; SX Ex. 128 at 18, 21; *accord* Shapiro SWRT at 10-11. By contrast, [[

[redacted] Katz AWRT ¶ 226. [redacted] Katz AWRT ¶ 226.

450. Professor Rubinfeld further biased his estimate upward by using data on actual plays for the first 14 months following the launch of iTunes Radio. By allocating the [redacted] equally across all months and using actual plays only for the earlier part of what was expected to be a period of growth, Professor Rubinfeld biases the number total plays over which he [redacted] downward and, thus, biases his calculated effective per-play rates upward. For example, [redacted] *See* Katz AWRT ¶ 226. Because he focused primarily on the first year, Professor Rubinfeld attributed fewer average plays than would a more complete examination of the entire period. Katz AWRT ¶ 228-29.

2. Professor Rubinfeld Fails To Account for the Shadow of the Statutory License

451. The evidence shows that the statutory license and the potential precedential effect of the iTunes Radio agreements strongly biased the result upward. As Professor Katz opined: "[c]onsistent with economic logic, [redacted] the royalty rates negotiated between Apple and the major record companies were

influenced by both: (a) the current CRB statutory webcasting rates and Pure Play rates, and (b) [[ ]] Katz AWRT ¶ 189.

452. Apple could not reasonably take advantage of the pure play WSA agreement, which include a revenue prong that taxes at the rate of 25% "all revenue of any kind earned by the Commercial Webcaster or its Affiliates [entities under common ownership or control] from all its operations," including operations unrelated to webcasting. 74 Fed. Reg. 34796, 34797, 34799 (July 17, 2009). [[ ]]), it would be crippling to Apple, which by the terms of the agreement would be required to pay SoundExchange 25% of its enterprise-wide revenue (meaning revenues from iPhones, iPads, iPods, iMacs, MacBooks, iTunes downloads, etc.).

453. As a result, any agreement that resulted in rates less than the CRB-set statutory rates would have been preferable to Apple. And, as discussed above, the statutory license rates would have pulled up the privately negotiated rates. *Accord* Katz AWRT ¶ 191; Shapiro SWRT at 6-7.

454. At the same time, the evidence indicates that the pure play rates also exercised some influence on the resulting Apple rates, [[ ]] *See* Katz AWRT ¶¶ 190-191 [[ ]]; *accord* Shapiro SWRT at 3-4.

455. The rates reflected in the iTunes Radio agreements also were biased [[ ]].

456. [[ ]]

457. [[ ]] IHM Ex. 3435 at 5.

458. In summary, the rates negotiated between Apple and the majors were biased upward by the existing CRB webcasting rates [[ ]]. These influences significantly reduce the reliability

of the rates negotiated between Apple and the majors as benchmarks for setting statutory rates. Katz AWRT ¶¶ 192, 196; *accord* Shapiro SWRT at 6-7; Fischel & Lichtman SWRT ¶¶ 20-23; 5/6/15 Tr. 2220:17-21 (Rubinfeld) [[ ]].

3. Professor Rubinfeld's Failure To Account for the Unique Value to Apple from iTunes Radio

459. At the time the license agreements were negotiated, iTunes Radio was intended to play a valuable role in the overall Apple ecosystem. As a result of these additional considerations, Apple could be expected to find a license more valuable than would other Internet radio service providers and, thus, to be willing to pay higher license fees than other service providers. Katz AWRT ¶ 184; *accord* Shapiro SWRT at 5 ("Apple's own business interests in the iTunes Radio are unique as a result of the far greater revenues that Apple earns from related products and services associated with iTunes, … and very likely increased Apple's willingness to pay for the rights to stream recorded music on the iTunes Radio service.").

460. [[ ]].

461. Moreover, [[

[redacted] IHM Ex. 3435 at 4.

462. Apple's unique position increased its willingness to pay and likely resulted in license fees that were higher than those that would prevail between most webcasters and most record companies.

4. Professor Rubinfeld's Failure To Account for [[redacted]]

463. Contemporaneously with negotiating licensing agreements with the major record companies for iTunes Radio, [[redacted]] Katz AWRT ¶ 187; Shapiro SWRT at 4-5; Fischel & Lichtman SWRT ¶¶ 29-30.

464. For example, [[redacted]]

[redacted]

]]

465. [[[redacted]]] And, as discussed in ¶¶ 475-476, below, [[[redacted]]]

466. [[[redacted]]] *Id*. 2065:22-25.

467. [[[redacted]]] SX Ex. 128 at 1-3, 11-13 (Professor Rubinfeld's discussion of iTunes Radio and his analysis of Apple-Sony rates); *see* 5/6/15 Tr. 2064:2-20 (Rubinfeld) [[[redacted]]]. This failure undermines

the validity of his analysis. *See* Katz AWRT ¶ 188; *accord* Shapiro SWRT at 4-5; Fischel & Lichtman SWRT ¶¶ 29, 39.

5. Professor Rubinfeld's Improper Treatment of the [[ ]].

468. The close relationship among the Apple services and [[ ]] should have been attributed by Professor Rubinfeld to iTunes Radio at all.

469. In the case of the Sony-Apple agreement, Professor Rubinfeld's allocation of the [[ ]

Katz AWRT ¶ 199; *accord* Shapiro SWRT at 4.

470. [[

[redacted]

471. [[redacted]]] Katz AWRT ¶ 202.

472. [[redacted]]] *Id*.

473. [[redacted]]] Katz AWRT ¶ 206. [[redacted]

[redacted]]]

5/6/15 Tr. 2063:19-2064:1, 2064:23-2065:21 (Rubinfeld).

474. [[redacted]]] Katz AWRT ¶ 207.

475. [[redacted]]] [[redacted]]]

476. As Professor Katz testified: [[redacted]]] As discussed further in Part VIII.D, below, [[redacted]

[redacted]

477. It is also noteworthy that, to the extent that [[redacted]] above effectively competitive rates. *See* Katz AWRT ¶ 213. Professor Rubinfeld repeatedly asserted that the major label catalogs were "must-haves" for noninteractive webcasters. *See, e.g.*, Rubinfeld CWRT ¶¶ 141-142. As Professor Katz testified:

> [w]hen the overall catalog is must have, it is impossible for the radio service successfully to engage in sufficient substitution to [[redacted]]. Therefore, if Apple considered [[redacted]] catalogs to be must haves in order to launch its high-quality service, which was part of its differentiation strategy as a new entrant, then [[redacted]] could charge a supra-competitive [[redacted]] while setting a more-competitive per-play minimum rate.

Katz AWRT ¶ 213. Professor Katz explained that "[a] price structure containing both a lump-sum payment and usage-sensitive payments is known in the economics literature as a two-part tariff. A two-part tariff can allow a firm with market power to extract a greater proportion of its customers' benefits." Katz AWRT n. 274, *citing* Robert S. Pindyck and Daniel L. Rubinfeld, *Microeconomics*, Eighth Edition, Boston: Pearson (2013) at 399 and § 11.4.

478. This effect may offer an explanation of why [[redacted]]. To the extent that it does and [[redacted]] should not be included in the calculation of benchmarks if the statutory standard is one of effective competitive as that term is

understood by economists. Katz AWRT ¶ 214. In other words, the payments received by [[ ]] for iTunes Radio more likely reflects the forces of effective competition.

6. Professor Rubinfeld's Flawed Adjustment for Non-Compensable Plays

479. Professor Rubinfeld failed properly to account for differences between the Apple agreements and the existing statutory license in terms of compensable plays. As a result, [[ ]], his methodology resulted in an inappropriately high per-performance rate. *See* Katz AWRT ¶¶ 219, 230-233; Shapiro SWRT at 11-12; Fischel & Lichtman SWRT ¶¶ 43-48.

480. Professor Rubinfeld's analysis of the effective per-performance fees paid by Apple only included performances [[ ]]. 5/6/15 Tr. 2068:1-24 (Rubinfeld).

481. However, under Apple's agreements with Sony and Warner, [[ ]], while under current rules, services pay for such performances under the statutory license. 5/6/15 Tr. 2070:6-16 (Rubinfeld); SX Ex. 128 at 27 (Apple-Warner definition of "Performance"); *id*. at 51 (Apple-Sony definition of "Performance"). Moreover, under Apple's iTunes Radio agreements, [

[redacted]]]. SX Ex. 128 at 24, 26, 27 (provisions of Apple-Warner agreement); *id*. at 48, 50, 51, 53 (provisions of Apple-Sony agreement).

482. [[redacted]]]

483. As discussed in Part VIII.C.1, above, Professor Rubinfeld should have used the total number of plays expected by the parties over the life of the agreement. He did not. Instead, he used an *ex post* count of actual plays for part of the license term. This error dramatically overstated the effective per-performance rat under the agreements. Fischel & Lichtman SWRT ¶¶ 43-44.

484. But even if one accepts the use of ex post actual performances, Professor Rubinfeld used the wrong number to account for differences between [redacted]]] To quote Professor Katz, "this [was] a serious error." Katz AWRT ¶ 232; *accord* Shapiro SWRT at 12.

485. [[ ]] 5/6/15 Tr. 2076:2-2081:24. (Rubinfeld); *see* Shapiro SWRT at 12 (describing Professor Rubinfeld's decision to not use actual data in his possession as "inexplicabl[e]"). [[ ]] Shapiro SWRT at 11-12; *accord* Katz AWRT ¶¶ 233 ([[ ]]). The following table shows the data used Professor Katz to calculate his adjustment:

486. As Professor Katz testified, even this one correction dramatically reduces the calculated effective royalty rate. Katz AWRT ¶ 233; *accord* Shapiro SWRT at 12.

D. PROPERLY VIEWED, THE ITUNES RADIO LICENSE FEES ACTUALLY SUPPORT PER-PLAY LICENSE FEE RATES [[ ]].

487. As discussed above, numerous flaws in Professor Rubinfeld's discussion of the iTunes Radio license agreements result in a dramatic overstatement of the actual effective per-play rates represented by those licenses. Properly viewed, the licenses do not corroborate SoundExchange's fee proposal; instead, they support license fee rates for

statutory custom webcasting services [[ ]], and fees for simulcasting below that.

488. Because of the issues associated with [[ ]], Apple's agreements with independent labels and Universal provide better measures of the effective per-play rates to which the record companies and Apple agreed for its iTunes Radio service. Katz AWRT ¶ 215.

489. First, Professor Rubinfeld calculated that Apple's iTunes Radio agreements with independents resulted in effective per-performance royalties for compensable performances [[ ]] Katz AWRT ¶ 216 (citing SX Ex. 128 at 18, 21).

490. [[ ]] *Id.* at 215-218.

491. It is important to remember that the [[ ]] computed by Professor Rubinfeld is for compensable plays under the iTunes Radio license, and that [[ ]]. As Professor Rubinfeld agreed, it is necessary to adjust the rate for compensable plays to account for the [[ ]] of free plays.

492. The record does not contain complete information concerning the parties' expectations for the number of non-compensable plays that would be made on iTunes radio. As discussed above, using the ratio of the actual number of plays to the compensable plays, results in an adjustment factor of [[ ]]. *Supra* ¶ 485. Because Professor Rubinfeld's [[ ]] rate is a rate based on the actual performance of the service, it would be reasonable to divide it by [[ ]], which would result in an effective per-performance rate for statutory plays of [[ ]]. Notably, this is an effective per-performance rate, taking into account all prongs of the iTunes Radio royalty formula.

493. [[ ]]. This led Professor Shapiro to estimate Apple's ex ante per-performance rate for all plays, [[ ]]

[redacted]]]. *Cf. id.* at 5068:3-5069:20 (calculating slightly different effective per-play rate due to rounding of the adjustment factor).

494. Under either approach, the rate for simulcasting would need to be further adjusted downward significantly to account for the many differences between iTunes Radio's custom radio service and simulcasting.

E. PROFESSOR RUBINFELD'S "III.E." SERVICES DO NOT CORROBORATE HIS FEE PROPOSAL.

495. Professor Rubinfeld presents summary discussions of royalty rates in license agreements reached by four music streaming services that he asserts are "for non-interactive and/or ad-supported services:" a free service by Beats that provided access to the feature known as "The Sentence;" Nokia's MixRadio; Rhapsody's UnRadio; and Spotify's Free service. Rubinfeld CWRT §§ III.E.1, III.E.2(2), III.E.2(3) , and III.E.2(4). Professor Rubinfeld concludes that these agreements "corroborate the rates proposed by SoundExchange" and "further confirm [his] proposed interactivity adjustments." Rubinfeld CWRT ¶ 178. Notably, Professor Rubinfeld testified that he was not presenting these licensing agreements as benchmarks. 5/6/15 Tr. 2083:6-21 (Rubinfeld). Therefore, despite the fact that each of these "III.E" services had significant extra-statutory functionality, Professor Rubinfeld did not make any adjustments in the rates he cited for the services. 5/6/15 Tr. 2084:3-2086:6 (Rubinfeld); *see generally* Katz AWRT ¶ 235 (Professor Rubinfeld did not make any adjustments to account for factors such as the

treatment of skips or short-duration plays, the fact that some of the allegedly corroborative services included on-demand functionality, or the extent to which these four services offer interactive or other non-statutory functionality, such as on-demand plays or caching for offline listening).

496. The four "III.E" agreements do not support Professor Rubinfeld's proposed rates or his interactivity adjustment. In addition to the services' extra-statutory functionality, for which Professor Rubinfeld did not adjust, his analysis of the agreements suffers from numerous other flaws, including failure to account for the fact that these services were licensed as part of much larger on-demand services, and his failure to account for the upward pull caused by the labels' concerns about potential CRB precedent. Katz AWRT ¶ 236.

1. Beats "The Sentence"

497. The first service upon which Professor Rubinfeld relies is the limited free service offered for a time by Beats, a service he refers to by the name of one feature, "The Sentence." Rubinfeld CWRT ¶¶ 179-189; 5/6/15 Tr. 2092:22-25 (Rubinfeld) (confirming that he was talking about the service identified as the Limited Free Service in Appendix 1 of his Written Direct Testimony, SX Ex. 127).

498. Beats is primarily a paid, subscription, on-demand streaming service. Since its launch in January 2014, Beats Music has offered a paid-subscription music streaming service that allows users to have on-demand access to any song in the Beats catalog, download music for offline listening, and have access to Beats-generated playlists, among other features. Katz AWRT ¶ 237 (citing Beats Music, "What is Beats Music," *available at* https://support.beatsmusic.com/hc/en-us/articles /200459130-What-

Is-Beats-Music-, *site visited* April 9, 2015). The service has a playlist-creation feature known as "The Sentence." *Id*.

499. Beats also offers a free trial of its paid-subscription service. For users who complete a free trial but do not sign up for a subscription, Beats offers a free service with limited features (the "Beats Limited Service"). As Pandora's Simon Fleming-Wood explained, "After the trial period expires, and the on-demand features are no longer available, it appears that users are able to continue using The Sentence portion of the Beats service in some fashion (it is not entirely clear for how long); the goal, however, appears mainly to be to try to convert users to paid subscribers of the full Beats service, not to run a standalone streaming service."). Fleming-Wood CWRT ¶ 14. The Beats Limited Service initially included the ability to use The Sentence and listen to the playlists that it generated. Katz AWRT ¶ 237. Thus, what SoundExchange characterizes as a standalone free service ("The Sentence") actually starts off with a fully on-demand trial for two weeks.

500. As Professor Katz demonstrated, the royalty rates for the Beats Limited Service are unreliable as indicators of rates that would be negotiated in an effectively competitive market. Moreover, to the extent that one actually analyzes the Beats royalty rates, they demonstrate that Professor Rubinfeld's interactivity adjustment is much too small. Katz AWRT ¶ 239.

a. The Beats Limited Free Service Provided Extra-Statutory Functionality.

501. There are significant differences between the Beats limited free service and the rights provided under the statutory license. [[

[redacted]

]].

502. Professor Rubinfeld testified that the Beats Limited Service [[[redacted]]] 5/5/15 Tr. 1900:25-1901:2 (Rubinfeld). He conceded that "it's quite possible" that Beats is allowed to make performances in ways that would not be compliant with the statutory license," 5/6/15 Tr. 2095:21-2096:1 (Rubinfeld). However, he failed to make any accommodation in his analysis for any differences between what Beats is able to do and what the statutory license would allow. 5/6/15 Tr. 2096:9-2096:15 (Rubinfeld).

b. The Beats Limited Free Service Was a Tiny Part of a Larger Service and Appears To Have Been Discontinued, so its Nominal Rates Are Not Meaningful.

503. As explained by Professor Katz, the royalty rate for the Beats Limited Service in the U.S. is **[[**[redacted]

[redacted]]]. The *entire* Beats service was reported to have only 111,000 users as of March, 2014. *See* Fleming-Wood CWRT ¶ 15. Moreover, as shown below, the royalty payments made by Beats to the three major record companies from January to November 2014 **[[**[redacted]**]]**.

Table 12: Beats Content Fees and Label Plays for [[[redacted]**]]**

[redacted]

Katz AWRT ¶ 240, Table 12; *see* 5/6/15 Tr. 2092:6-2093:17 (Rubinfeld) (discussing small number of plays on the Limited Free Service, as evidenced in SX Ex. 127, Appendix 1). This indicates that very few Beats users used the Beats Limited Service.

504. In addition, the Beats Limited Service no longer appears to be offered as a music streaming service. The Beats website now describes this free option as follows: "If your Free Trial Period expires and you have not subscribed to a paid subscription to the Service, you will still be able to access some of the Service (very limited features), but you will no longer be able to play full-length versions of songs, etc." Katz AWRT ¶ 241;

accord 5/6/15 Tr. 2093:18-2094:14 (Rubinfeld) (confirming that his Appendix 1 shows that payments and reports for the Limited Free Service to Sony stopped after October 2014); *id.* at 2094:20-2094:22 ("it's quite possible that they no longer offer the free service"); *id*. at 2095:15-2095:19 (agreeing that you're no longer able to continue to use The Sentence to play full-length tracks of songs after the end of that trial").

505. The small size of the service and its apparent demise render it unsuitable as a benchmark for royalty rates in an effectively competitive market. As Professor Katz explained, these trivial payments "may have been of secondary concern to the parties in the context of their larger relationship, and the termination of the service is consistent with the possibility that Beats Music agreed to a licensing arrangement that turned out not be financially viable." Katz AWRT ¶ 241.

506. It is also unreasonable to rely on license fees for the Beats Limited Service, given that the purpose of the service was to "encourage people to subscribe to the [full Beats] service." *See* SX Ex. 29 at 46; *accord* 5/13/15 Tr. 3648:20-3619:14 (Littlejohn) (prompts to subscribe); *see also* SX Demonstratives D12-1, D12-2, D12-3 (users are repeatedly presented with prompts to subscribe during and after the free-trial). The agreement included [[ ]] The existence of these [[ ]] further renders Professor Rubinfeld's analysis unreliable: the royalty rates cannot be properly interpreted in isolation, but only in the context of the (much) larger agreement. Professor Rubinfeld did not properly take this fact into account. Katz AWRT ¶ 242.

507. Instead, Professor Rubinfeld looked only at the rates that apply when [[ ]] Katz AWRT ¶

243 (citing Rubinfeld CWRT ¶ 183). [[ ]] Katz AWRT ¶ 243.

508. Thus, Professor Katz concluded that even the lower rates may be too high. As Professor Rubinfeld states, the [[ ]]. Katz AWRT ¶ 244.

509. Professor Katz illustrated his point with a hypothetical example, showing how record companies and Beats could agree to a higher than stand-alone royalty on the free service and a lower than stand-alone royalty on the subscription service in order to increase Beats' incentive to convert users to the subscription service. Katz AWRT ¶ 245. In sum, the Beats Limited Free Service royalty rates are "unreliable as indicators of rates that would be negotiated in an effectively competitive market." Katz AWRT ¶ 239.

2. Nokia MixRadio

510. Nokia offers a free streaming service (MixRadio) and a paid-subscription service (Nokia MixRadio Plus) that is available only to purchasers of Nokia mobile

devices. Rubinfeld CWRT ¶ 199. Professor Rubinfeld claims that the royalties paid by the free service corroborates his proposed rates [[ ]] Rubinfeld CWRT ¶¶ 200-01.

511. The purpose of the MixRadio service, however, is very clear – to sell Nokia phones. As described by Mr. Harrison of Universal, "In 2012, Universal entered into a direct agreement with Nokia for a customized webcasting service that would be bundled with Nokia devices. The idea was for Nokia to have a brand-specific music streaming service to help differentiate its phones. The service launched with a free-to-the-consumer streaming service available to each user owning a Nokia device." Harrison CWDT ¶ 51.

512. At the outset, Professor Rubinfeld admitted that: "The Nokia agreements are . . . unique in certain respects. [[ ]]." Rubinfeld CWDT ¶ 25. As described by Mr. Harrison, MixRadio is "unique and very different from a statutory license for a number of reasons, including that the fees Nokia pays Universal are [[ ]], and [Universal] authorize[s] Nokia provide limited caching of sound recordings." Harrison CWDT ¶ 52.

513. As Professor Katz demonstrated, however, the royalty rates for the MixRadio Service are unreliable as indicators of rates that would be negotiated in an effectively competitive market for license with the same rights as a statutory license.

514. [[ ]] Katz AWRT ¶ 248 (citing SNDEX0240233-42 at SNDEX0240242). In other words, MixRadio was an outlier and therefore unreliable even as a basis for corroborating a benchmark. In addition, Microsoft acquired Nokia's interest in MixRadio and press reports indicate that in July 2014 Microsoft put MixRadio in "maintenance mode" and subsequently sold the service. Katz AWRT ¶ 248.

a. Extra-Statutory Functionality

515. Professor Rubinfeld's evaluation of Nokia MixRadio ignored the fact that the service offered extra-statutory functionality. Professor Rubinfeld originally contended that the Nokia free service is "comparable" to statutory services, Rubinfeld CWRT ¶ 201, but he conceded that the service "permits users to play cached radio stations via Nokia devices while offline." Rubinfeld CWRT ¶ 199. Professor Rubinfeld admitted that the caching feature of the service "[[ ]]" 5/6/15 Tr. 2087:22-2088:14 (Rubinfeld); *see* Katz AWRT ¶ 250 (Caching is not allowed under the statutory license). The labels refer to MixRadio as [[ ]]. IHM Ex. 3498. SoundExchange itself has admitted that MixRadio provides "some extra-statutory functionality." SoundExchange's Opposition to Licensee Services' Renewed Motion to Strike Section III.E of the Written Rebuttal Testimony of Daniel Rubinfeld at 11, 12.

516. Professor Rubinfeld also ignored the fact that certain of the Nokia MixRadio agreements [[ ]]. Fischel & Lichtman SWRT ¶ 13. Professor Rubinfeld did not account for these [[ ]].

517. Professor Rubinfeld instead opined that [[ ]] 5/6/15 Tr. 2089:3-13 (Rubinfeld). That question was answered by Professor Rubinfeld himself. He cited a study conducted by SoundExchange in his Written Direct Testimony in which Professor McFadden found that caching for offline listening is valuable to end users. McFadden WDT Table 5, ¶¶ 58, 62. *See* Rubinfeld CWDT ¶ 171. This upward effect of caching on license fees [[ ]] IHM Ex. 3502 at 1.

518. In his benchmark analysis, Professor Rubinfeld advocated adjusting the interactive royalty rates to account for the different value consumers placed upon an interactive service compared to a noninteractive service. Rubinfeld CWDT ¶ 207. Professor Rubinfeld made no adjustment to the royalty rate for Nokia MixRadio to account for the fact that the service offers valuable extra statutory functionality. Consequently, Professor Rubinfeld provides no principled way to establish whether the per-play rate paid by Nokia for MixRadio supports or undermines his proposed statutory rate. Katz AWRT ¶ 251.

b. Unique Value to Nokia and Negotiation as Part of Larger Deal

519. Despite acknowledging that the Nokia agreements are "unique in certain respects," Rubinfeld CWDT ¶ 25, Professor Rubinfeld essentially turned a blind eye to the most distinguishing factor of the Nokia MixRadio agreements – the service was bundled with the sale of Nokia devices and provided a minimum guarantee tied to the sale of those devices. Rubinfeld CWDT ¶ 192; *accord* Rubinfeld CWRT ¶¶ 199, 201. Thus, Nokia MixRadio contributed to Nokia's profits through mechanisms that made a license uniquely valuable for Nokia.

520. Professor Katz testified that, because the Nokia MixRadio app was pre-installed on Nokia devices, "the streaming service increased the value of these devices and Nokia would have been expected to earn higher profits from the sale of those devices. Because Nokia would have obtained additional benefits in the form of increased hardware sales, this factor could be expected to have increased the negotiated royalty rate in comparison to what would be negotiated by a record company and a standalone

streaming service." Katz AWRT ¶ 249. Indeed, it appears that [[ ]]. Katz AWRT ¶ 252 n. 346.

521. Another significant difference ignored by Professor Rubinfeld is that the Nokia rate is just one rate for one country, taken from a contract that [[ ]]. Katz AWRT ¶ 252 n. 345 (citing [[ ]]). As Professor Katz opined, "[[ ]]." Katz AWRT ¶ 252. Professor Rubinfeld provides no analysis indicating how to account for this factor. Moreover, he does not report any information on the number of plays or the magnitude of the royalties paid by Nokia for this service in comparison [[ ]]. Katz AWRT ¶ 252.

522. Despite the fact that the Nokia MixRadio service cannot properly be viewed in isolation, Professor Rubinfeld's opinion is internally inconsistent in that he [[ ]]. Katz AWRT ¶ 247. Accord, Fischel & Lichtman Supp. WRT ¶ 5 ("[[ ]]"); Shapiro Supp. WRT at 19 ("If he is correct that the Nokia MixRadio service is a 'near-DMCA compliant service,' it would make no sense for Nokia [[

[redacted]

[redacted]]]").

3. Rhapsody UnRadio

523. Professor Rubinfeld also asserts that Rhapsody's "unRadio" service also provides evidence confirming the reasonableness of his benchmark. Rubinfeld CWRT ¶¶ 196-98.

524. But as Professor Katz explained, Rhapsody's radio service is a subscription service that has valuable features that statutory services cannot offer, and so Rhapsody's royalty rates do not provide meaningful corroboration of Professor Rubinfeld's proposed benchmark royalty rates for statutory services. Moreover, the royalties for Rhapsody unRadio are small components of much larger agreements involving interactive services. Katz AWRT ¶ 254. unRadio is also a subscription service that is only offered for free for a limited time.

a. Extra-Statutory Functionality

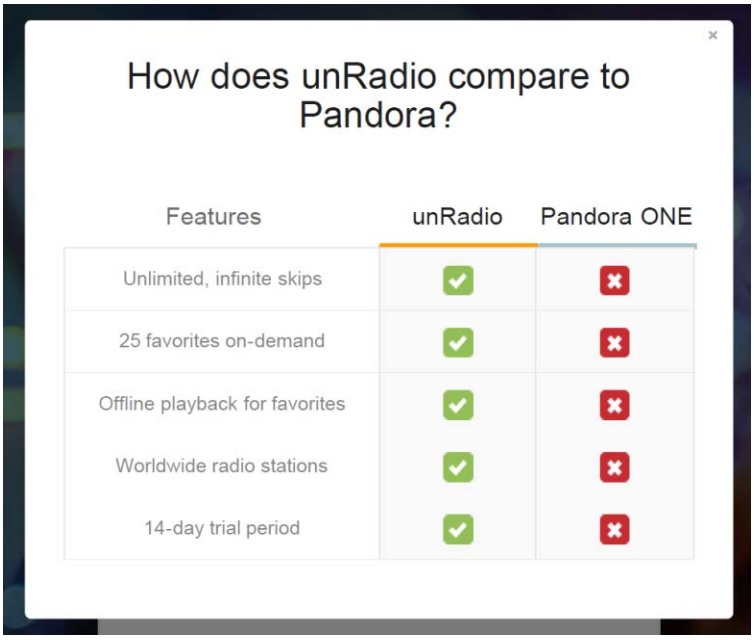
525. Professor Rubinfeld fails to take into account the fact that unRadio offers many extra-statutory features, including unlimited skips, caching for offline playback, on-demand playback of 25 "favorite" songs, and previews of upcoming songs to be played. *See* Littlejohn WRT ¶¶ 16-22; Fleming-Wood CWRT ¶¶ 4-7; Fischel & Lichtman SWRT ¶¶ 8-9) ([[[redacted]]]); Katz AWRT ¶¶ 255-56; Shapiro SWRT at 18, n.67; 5/6/15 Tr. 2042:9-2044:1 (Rubinfeld) ("It does have some functionality, which would go beyond what would be appropriate for statutory service."). Rhapsody's contracts with the major record companies describe the Rhapsody Radio Service as [[

[redacted]

[redacted]

[redacted]]], at least some of which are clearly extra-statutory. Katz AWRT ¶ 256. Faced with this evidence, SoundExchange now concedes that the UnRadio service "offers some limited on demand functionality." SoundExchange's Opposition to Licensee Services' Renewed Motion to Strike Section III.E of the Written Rebuttal Testimony of Daniel Rubinfeld at 10-11.

526. Indeed, although Professor Rubinfeld claims that the functionality of the Rhapsody unRadio service "is very similar to customizable services like Pandora", Rubinfeld CWRT ¶ 196, Rhapsody itself highlights the significant differences between unRadio and Pandora:



Katz AWRT ¶ 255. Professor Katz concluded that the rights granted by the Rhapsody licenses are more valuable than those of the statutory webcasting license. Katz AWRT ¶ 257.

527. At least one of the Rhapsody licenses also [[redacted]]. Katz AWRT ¶ 258.

b. Negotiated as Part of Larger Deal

528. Additionally, Rhapsody unRadio [[redacted]]. Using the royalty data reported by Professor Rubinfeld, Rubinfeld CWRT Appendix 1, Professor Katz testified that the total royalty payments for Rhapsody's radio service (listed under the column heading "Collaborative Products") were [[redacted]].

Table 14: Rhapsody Royalty Payments to [redacted]

[redacted]

Katz AWRT ¶ 259, Table 14.

529. Professor Shapiro agrees that the agreement, taken in isolation, is not reliable. Shapiro Supp. WRT at 18 ("Furthermore, the number of unRadio performances [[ ]] since unRadio launched in June 2014. As such a minor item in Rhapsody's much larger licensing agreement, the royalty rates paid for the unRadio service do not offer reliable information for corroborating any benchmark.")

530. Professor Katz also noted that the effective per-play rates paid by Rhapsody for its unRadio service to [[ ]]. As Professor Katz explained, these [[ ]]. Moreover, the wide divergence between the [[ ]]. Thus, Professor Katz concluded that the actual effective rates likely reflect contractual interactions (likely among that different products offered by Rhapsody) that make it impossible to understand what the true rates are without conducting an analysis of the amendments and the underlying contracts—something Professor Rubinfeld did not do in his testimony. Katz AWRT ¶ 260.

4. Spotify Free

531. Professor Rubinfeld also claims that the Spotify "Shuffle" service provides corroborative evidence of his proposed benchmark rate. Spotify's "Free Tier" offering includes both the ad-supported version of its fully on-demand service available on desktop, laptop, and tablet computers, and a more limited mobile functionality called "Shuffle," the part of the offering on which Professor Rubinfeld focuses. Rubinfeld CWRT ¶¶ 191-92.

a. Extra-Statutory Functionality

532. As with the other III.E services, Professor Rubinfeld fails to account for the extra-statutory functionality of the Shuffle service. For example, [[ ]]. Katz AWRT ¶ 262; *accord* 5/6/15 Tr. 2086:7-2087:7 (Rubinfeld). *See* Rubinfeld CWDT ¶ 50 n.22 (explaining that the Shuffle service "provides elements of interactivity.") Professor Rubinfeld conceded on cross-examination that a statutory licensee can offer none of the above features, 5/6/15 Tr. 2086:7-12 (Rubinfeld) (agreeing that at least some of what Spotify was paying for was for functionality that exceeded the rights available under the statutory license).

533. In addition to allowing the features of the service offering described above, Spotify's agreements with [[

[redacted]]]. Katz AWRT ¶ 263.

b. Spotify Shuffle Rates As Part of a Larger Deal

534. As with the other agreements for the III.E Services, the rates and other terms for all of the Spotify products ([[[redacted]]] makes it difficult to interpret the meaning of any individual royalty rate.

Table 16: Spotify Royalty Payments to [[redacted]]

[redacted]

Katz AWRT ¶ 264, Table 16.

535. Indeed, as Professor Katz explained, the fact that the per-play rates listed in the agreements are [[[redacted]]] As he further explained, [[[redacted]]]

[redacted]]]. Thus, Professor Katz concluded that per-play rates do not provide a reliable basis on which to corroborate Professor Rubinfeld's proposed benchmark rates. Katz AWRT ¶ 265.

536. The rate structure of the Spotify agreements also appear to have had a [[redacted]] that undermines its usefulness as corroboration Professor Rubinfeld's proposed benchmark rates – that of affecting the statutory rates. [[redacted]]]. Katz AWRT ¶ 266.

537. Professor Rubinfeld partially addresses the issue of interdependent royalty rates, but he offers an incomplete analysis that lacks factual foundation. Professor Rubinfeld states that the Spotify free service is [[redacted]]]. Rubinfeld CWRT ¶ 194. He asserts that "[o]ne can reasonably assume that the rate of [[redacted]] is lower than it would be if the Spotify free service did not [[redacted]]]." Rubinfeld CWRT ¶ 195. However, as Professor Katz explained, [[redacted]]]. For this reason, the [[redacted]] per-play fee may be higher than it would be if Spotify had [[redacted]]]. Katz AWRT ¶ 267. As a result, Professor Rubinfeld does not appear to have focused on meaningful per-play rates.

538. Significantly, Professor Katz showed that the effective per-performance rate paid by Spotify [[ ]] per-play rate reported by Professor Rubinfeld. This is true even before adjusting for [[ ]], all of which would tend to cause the Spotify rate to exceed the rate that might be set for a statutory service in an effectively competitive market. Katz AWRT ¶¶ 269-70.

539. As Professor Katz explained, the reason that the effective rates are so [[ ]], confirmatory evidence for his proposed benchmark. Katz AWRT ¶ 268-70. Thus, rather than corroborating Professor Rubinfeld's proposed benchmark, the Spotify rates contradict his proposed benchmark. Katz AWRT ¶ 269.

Table 17: Spotify Effective per-Play Royalty Rates for [[ ]]

Katz AWRT ¶ 269, Table 17.

540. Furthermore, Professor Katz explained that although the contractual per-play royalty rates for Spotify's Free Tier on the one hand and Spotify's subscription services on the other [[ ]] further evidence that Professor Rubinfeld's reliance on data for subscription services undermines the reliability of his analysis. Katz AWRT ¶ 270.

F. THERE IS NO EVIDENCE SUPPORTING AN INCREASE IN RATES OVER THE TERM.

541. There is no support for SoundExchange's proposal to increase rates year over year during the license term.

542. [[ ]]

543. [[ ]]

544. [[ ]]

545. Moreover, Professor Rubinfeld admitted that there is no "theoretical reason why we would expect prices just to go up." 5/5/15 Tr. 1761:5-16 (Rubinfeld).

546. [[ ]]

547. Moreover, Professor Rubinfeld admitted that his proposed year-over-year increase was not due to past convergence, but to his "anticipation that the technology will create even more convergence going forward." 5/5/15 Tr. 1829:13-18 (Rubinfeld). He admitted that his opinion was "not based on hard data," and that "I can't prove to you for sure where we're going to be because we are talking about the future." *Id.* 1829:19-1830:15.

548. [[ ]]

549. [[ ]]

550. As Professor Shapiro noted, Professor Rubinfeld's explanation of the progression of the rates in the interactive benchmark was "jarring" and Professor Rubinfeld did not provide "what would be an adequate explanation." 5/8/15 Tr. 2736:18-2737:7.

IX. THE JUDGES SHOULD NOT ADOPT A "GREATER OF" FEE STRUCTURE OR A PERCENTAGE OF REVENUE FEE FOR SIMULCASTING.

551. SoundExchange has proposed a "greater-of" royalty based structure, with services paying the great-of the applicable per-performance rate or the applicable percentage of revenue. SoundExchange Proposed Rates and Terms §380.3(a). The evidence demonstrates that SoundExchange's proposed revenue-based fee would serve as a tax that would deter investment and would be distortionary, contrary to section 114, and unworkable.

A. SOUNDEXCHANGE'S PROPOSED PERCENTAGE OF REVENUE-BASED ROYALTY IS DISTORTIONARY AND WILL DISCOURAGE INNOVATION AND INVESTMENT.

552. A percentage of revenue-based fee would inefficiently suppress innovation and the incentives for services to improve their service quality. A percentage royalty "amounts to discrimination among buyers based on their ability to generate benefits (as measured by revenues) from the use of licenses." Katz AWRT ¶ 120. Such discrimination will "inefficiently suppress innovation and investment incentives." *Id.*

553. As noted by Professor Katz, there is substantial economic authority for the principle that, "when an input seller charges higher prices to those buyers that generate greater value from the input (due to having either lower costs or the ability to generate greater benefits from a given amount of the input), this pattern of input pricing dampens the buyers' incentives to invest in lowering their costs or improving their goods and services." Katz AWRT ¶ 121 (including authorities cited in fn. 174).

554. "The higher prices charged to buyers better able to generate value from the input serves as a tax on innovation and investment, and a tax on an activity discourages

it." Katz AWRT ¶ 122 (noting that the magnitude of this effect is dependent on the size of the percentage royalty rate); 5/11/15 Tr. at 2886:21-2888:3 (Katz) ("JUDGE STRICKLER: In that sense, a percentage-of-revenue prong has the economic effect of a tax? THE WITNESS: Exactly.").

B. SOUNDEXCHANGE'S PROPOSED PERCENTAGE OF REVENUE-BASED ROYALTY IS CONTRARY TO THE STATUTORY REQUIREMENT THAT LICENSE FEES REFLECT THE RELATIVE CONTRIBUTIONS OF THE TRANSMITTING ENTITY AND COPYRIGHT OWNER.

555. The Web IV Commencement Notice asks: Would a royalty rate calculated as a percentage of webcasters' revenue be ''disproportionate'' to webcasters' use of sound recordings? Professor Katz concluded that the answer is "yes," with respect to simulcasters. Katz AWRT ¶ 116; *Web IV Commencement*, 79 FR 412, 414.

556. The evidence reflects that simulcasters make substantial non-music contributions to their programmatic offerings (*e.g.*, on-air personalities, sports, talk, local information, news, traffic, etc.). *See* Part III.A, *supra*. If, as SoundExchange has proposed, revenues are the basis of music performance royalty fees, licensees that create greater value for their service using inputs other than sound recordings would pay more for the use of the sound recordings (all else equal). Katz AWRT ¶¶ 117-18 (finding that "[a] percentage-of-revenue royalty is particularly inappropriate for web simulcasting given the contribution of other programming elements").

557. As explained by Professor Katz, under a percentage-of-revenue royalty, the greater the service's own contribution to its product through non-music programming, the more the service pays relative to the contribution of sound recordings. Katz AWRT

¶ 117. This result "runs counter to the statutory objective of having the license fees reflect relative contributions to value." *Id.*

C. SOUNDEXCHANGE'S PERCENTAGE OF REVENUE PROPOSAL IS GROSSLY OVERINCLUSIVE AND NOT ADMINISTRABLE FOR SIMULCASTERS.

558. In addition to the conceptual problems discussed above, SoundExchange's percentage of revenue proposal is grossly over-inclusive and would create a practical and administrative nightmare for simulcasters due to the nature of their business.

559. SoundExchange's percentage of revenue proposal calls for "55% of Attributable Revenue from activities in the United States" to be paid by commercial webcasters, including radio station simulcasters, for all "digital audio transmissions, including simultaneous digital audio transmission of over-the-air broadcasts." SoundExchange Proposed Rates and Terms § 380.3(a)(1); Weil WRT at 2. To derive "Attributable Revenue," services must start with their "Gross Revenue," which is essentially all revenue "paid, payable, credited, or creditable to Licensee, received or receivable . . . or recognized by Licensee . . . from all sources in connection with the provision of a Service". SoundExchange Proposed Rates and Terms § 380.3(d)(1)(ii); Weil WRT 2-3; 5/14/15 Tr. 3928:10-18 (Weil).

560. Under SoundExchange's proposed procedures, simulcasters must then derive "Adjusted Revenue" by subtracting specified categories of revenue and expenses, such as certain taxes and sales of sound recording products. SoundExchange Proposed Rates and Terms § 380.3(d)(1)(iii); Weil WRT at 3; 5/14/15 Tr. 3928:10-18 (Weil). SoundExchange then allows services to reduce the Attributable Revenue by "Non-attributable Revenue," which comes in two categories: (i) revenue derived from

"products or services that do not involve the Service" where such products or services are "Bundled" with the Service, and (ii) revenue derived from "sales of advertising, sponsorships, promotions, product placements, referrals, and the like that is attributable to terrestrial radio broadcasts." Weil WRT at 3; 5/14/15 Tr. 3929:7-12 (Weil).

561. SoundExchange's proposal necessarily requires simulcasters to allocate between their various lines of business. SoundExchange proposes to base the required allocation upon a "Fair Method of Allocation," defined as "a reasonable method, employed in good faith and in accordance with U.S. GAAP, to allocate revenues: (A) to the products or services that are Bundled with the Service but that do not involve the Service; or (B) to terrestrial radio broadcasts." SoundExchange Proposed Rates and Terms § 380.3(d)(vii); Weil WRT at 3; 5/14/15 Tr. 3930:13-16. (Weil).

1. SoundExchange's Definition of Revenue Is Grossly Overinclusive.

a. Any Percentage of Revenue Metric Must Account for Differences in the Use and Importance of Music, But SoundExchange's Rate Proposal Does Not.

562. Although not addressed in SoundExchange's rate proposal, Professor Rubinfeld admitted that his proposed percentage of revenue fee should only be applied to the revenue attributable to music programming. Indeed, Professor Rubinfeld testified at the hearing:

> Q: Let me talk for a minute about your recommended percentage of revenue play. Let me ask you to assume hypothetically that a simulcaster performs music for about half of its programming and has talk programming for the other half. It's not your opinion, is it, that the simulcaster should pay 55 percent of its total simulcast revenue under the revenue part of your fee formula?

> A: That is not my opinion. I would presume that the percentage of revenue would be applied to only the music portion of the programming.

5/6/15 Tr. 2056:16-2057:2 (Rubinfeld) (emphasis added); *see also* 5/4/15 Tr. 1520:2-8 (Lys) (another SoundExchange expert testifying that "if there's no music played on [a] show, then it stands to reason that the revenue allocated to that – of that show should not be allocated to attributable revenue."). Yet Professor Rubinfeld offered no testimony or proposal as to how one should determine the applicable revenue against which to charge his proposed fee. *Id.* 2057:3-7.

563. Nevertheless, SoundExchange's percentage of revenue proposal contains no adjustment for the fact that that not all of the programming on music-formatted stations, and their simulcasts, is music. Weil WRT at 6; 5/14/15 Tr. 3930:17-3931:5 (Weil). Indeed, simulcast and terrestrial music-formatted stations feature a wide variety of non-music content that consumers value. *See supra* Part III.D. Yet, the definition of Attributable Revenue, as proposed by SoundExchange would include revenue derived from sports, news, talk and comedy programming as well as revenue derived from programming that includes both music and non-music elements; there is no exclusion for such revenue. SoundExchange Proposed Rates and Terms § 380.3(a).

564. Professor Weil testified that "it would be logical to account for the fact that non-music programming may draw listeners and result in advertising revenue and, therefore, revenue attributable to the percentage of revenue analysis should exclude revenue attributable to non-music programming." Weil WRT at 8. Professor Weil illustrated this issue at the hearing by discussing the case of a radio morning program the audience of which listened mostly because of the morning show host, as opposed to the

music played (5/14/15 Tr. 3930:17-3932:23 (Weil); *see also* Weil WRT at 9), as well as the case of one sound recording played during a three hour simulcast of a baseball game. 5/14/15 Tr. 3932:24-3934:6 (Weil). Both cases would require some form of adjustment to account for the substantial non-music programming that is driving the revenue, and SoundExchange's proposal is silent on the issue. 5/14/15 Tr. 3930:17-3934:6 (Weil). This defect makes SoundExchange's proposal for Attributable Revenue unusable on its face.

565. Similarly, Professor Katz, although he opposes a percentage-of-revenue fee, demonstrated how the importance of non-music programming affected the percentage-of-revenue rates set in SDARS II, and how those rates are above the upper bound of a range of reasonable rates for simulcasting. Katz WDT Part VIII.B.

566. Jon D. Pedersen, iHeartMedia's Chief Financial Officer testified that SoundExchange's approach "ignores the non-music components of iHeartMedia's simulcast service by treating all simulcast revenues as subject to its revenue share." Pedersen WRT ¶ 15. Mr. Pedersen noted that this is a "significant oversight" because [[ ]] He further testified that iHeartMedia's [[ ]]. Pedersen WRT ¶¶ 15, 23.

567. Ron Wilcox of Warner was the only major label witness for SoundExchange whose written testimony directly addressed definitions of revenue and related issues in support of SoundExchange's rate proposal. [[

[redacted]]]

568. [[[redacted]]] There is no evidence in the record of any deal between a major label and a simulcaster that includes a percentage of revenue metric with respect to simulcasting. [[[redacted]]].

569. [[[redacted]]] But the rate proposal leaves fundamental issues subject to question, at least as pertains to simulcasters, and Mr. Wilcox was unable to clarify them when asked, even given his involvement in preparing the proposal. For example:

[[[redacted]]]

[[redacted]]

b. SoundExchange's Definition of Revenue Is Overly Inclusive in Other Ways, with Fundamentally Unfair Results.

570. SoundExchange's definition of "revenue" is also overly broad is other ways. Pedersen WRT ¶ 20 ([[redacted]]) (providing testimony that SoundExchange's definition is [[redacted]]) For example, there is no deduction for advertising agency expenses, [[redacted]] Pedersen WRT ¶ 22; Herring AWRT ¶ 56(b) (providing that this deduction is standard in Pandora's experience and is provided for in the revenue definitions of other statutory licensees); *see also* Herring AWRT ¶ 56

[8] Under the current per-play metric it would not.

(identifying other failures to exclude categories of revenue recognized in the industry and by the regulations governing other statutory licensees).

571. Mr. Herring, Pandora's Chief Financial Officer, observed that appropriate exclusions from the definition of revenue grew from the Judges' recognition in the Satellite I proceeding that "[i]n order to properly implement a revenue-based metric, a definition of revenue that properly relates the fee to the value of the rights being provided is required." Herring AWRT ¶ 58 (citing to *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, Docket No. 2006-1 CRB DSTRA ("*Satellite I*"), Fed. Reg. Vol. 73, No. 16 p. 4087 (Jan. 24, 2008)). When SoundExchange attempted to eliminate those exclusions in the Satellite II proceeding, the Judges rejected that attempt, explaining that they were "driven by the admonition in SDARS-I to include only those revenues related to the value of the sound recording performance rights at issue in this proceeding." *Id.*

572. SoundExchange's percentage of revenue proposal is one-sided and fundamentally unfair to licensees in other ways. For example, the proposal requires payment of 55% of revenue "paid, payable, credited, or creditable to License, [or] received or receivable by Licensee." SoundExchange Proposed Rates and Terms at 5 (definition of "Gross Revenue"). [[ ]]; Weil WRT at 9. Professor Weil testified that he "cannot think what logic would compel a broadcaster to pay cash royalties as a fraction of cash it might never receive in the future. One pays royalties with cash, not with accounts receivable." Weil WRT at 10. Indeed, the revenue definitions

governing satellite radio and preexisting services exclude "bad debt expense" (§ 382.11 at (3(v)) and "bad debts actually written off during the reporting period" (§ 382.2 at (2)), as does the definition that applies to New Subscription Services (37 C.F.R. § 383.2 at (g)(viii) (requiring inclusion only of bad debts "recovered")). Herring AWRT ¶ 56(d).

2. SoundExchange's Percentage of Revenue Proposal Is Not Reasonably Administrable for Simulcasters.

a. The Indeterminacy and Ambiguity of SoundExchange's Percentage of Revenue Regulations Is Not Administrable and Will Lead to Disputes.

573. The application of one definition of revenue to the entire marketplace of webcasters, which includes hundreds of simulcasters, is inherently problematic. Mr. Pedersen, the Chief Financial Officer of iHeartMedia, testified that in his "experience in the music industry, there is no one-size-fits-all definition of revenue that could apply sensibly to all webcasters. Rather, consistent with the direct-licensing agreements that iHeartMedia has reached with various record labels, revenue definitions must be tailored to both the webcaster and the record label involved." Pedersen WRT ¶ 6; *see also* Katz AWRT ¶ 123-24 (providing testimony that although administering royalties calculated as a percentage of the licensee's revenues apparently is tenable for some statutory services (*e.g.*, services that do nothing other than engage in webcasting and for which the content is virtually entirely music), there would be serious practical obstacles for simulcasting).

574. SoundExchange's own accounting expert, Professor Lys provided instructive guidance on the importance of "tailored" agreements with clear terms:

> [T]he individual nature of the agreements (along with their short-term horizon) allow for a tailor-made definition of revenue that is particularly relevant to the streaming service and its business model. This individuality minimizes the chances of a dispute, as the two sides would

> have likely been negotiating and discussing business terms, and are therefore more familiar to each other.

Lys CWDT ¶ 61. Professor Lys also testified at the hearing:

> Q: Professor, you would agree that from an accounting perspective, it is always preferable to base contracts on a financial definition that is clear cut to administer and easy to audit, correct?
>
> A: Holding everything else constant, yes.
>
> Q: And you would agree that for revenue, such a definition requires clear rules as to what is and is not included in the revenue measure, as well as the availability of reliable financial records to implement the revenue measures, correct?
>
> A: Correct.

5/29/15 6726:3-15 (Lys).

575. Even Mr. Wilcox confirms that issues relating to the definition of revenue and related inclusions, exclusions, and allocations are situation-and-service-specific. For example, Wilcox states:

> [[ ]]
>
> Whether this deduction is permitted and the terms of any such deduction depend on the specific circumstances of the agreement being negotiated as well as the service's business model. If a directly licensed streaming service has income streams attributable to a combination of WMG's music and some other product or service, [ ]

Wilcox WDT at 13-14. This asserted focus on "specific circumstances" and "business models" and "[[ ]]]" is the antithesis of the industry-wide rate-setting that is the task of the Judges.

576. Despite this recognition on both sides for the need for "tailored" definitions of revenue that take into account the specific "streaming service and its business model," SoundExchange seeks to impose an industry-wide set of accounting procedures that ignore the vast differences in the affected services. SoundExchange's proposed percentage-of-revenue regulations require each simulcaster to interpret a host of ambiguous terms, including, but not limited to: (i) what constitutes "Non-Attributable Revenue", (ii) whether products and services are "Bundled" with one another, (ii) whether the "Bundled" products or services "do not involve the Service," (iv) what portion of the "Bundled" services that do "involve the Service" should be allocated to "Attributable Revenue," (v) what portion of the simulcasters "sales of advertising, sponsorships, promotions, product placements, referrals, and the like" should be "attributable to terrestrial radio," and (vi) what is a "Fair Method of Allocation," or a "reasonable method" of allocation. *See* SoundExchange's Proposed Rates and Terms § 380.3(d).

577. Professor Weil instructs that "there is no uniquely correct way to allocate revenues among business activities. … Nor are there principles of economic or accounting logic that point toward a particular choice among competing methods for allocating revenues." Weil WRT at 4; 5/14/2015 Tr. 3923:11-2924:23,3927:18-3931:15 (Weil). In the end, any choices regarding allocation will be arbitrary. Weil WRT at 5. There is no way to "get from a regulation that requires us to 'be fair' to a unique or preferred allocation method." Weil WRT at 4.

578. As Professor Lys testified, one can expect parties to interpret the applicable accounting rules to their advantage. 5/29/15 6725:22-6726:1 (Lys) ("Q:

Where accounting discretion is allowed under GAAP or otherwise, you would expect market participants to interpret the rules to their advantage, correct? A; Yes[.]").

579. An indeterminate definition of revenue will not work for the services, in terms of establishing and allocating revenue, or for SoundExchange, in terms of auditing the same. As SoundExchange's accounting expert testified: "[W]here a revenue definition is open to multiple interpretations or where the definition permits the party to exclude revenue that cannot be accounted for through general ledger accounts maintained in the ordinary course of business, the definition is virtually certain to be deficient from an accounting and auditing perspective." 5/29/15 Tr. 6726:16-6728:1 (Lys).

580. Ambiguous rules and the resulting self-serving interpretations of all parties will invariably lead to disputes. Weil WDT at 4 ("If the Copyright Royalty Judges require calculation of royalties based in whole or in part on percentages of revenues in situations where not all revenues of the business are subject to the fee (for example, as here, because they are not all tied to the limited activity that is subject to a royalty obligation), they will surely cause inevitable disputes (and potentially litigation) over allocation methods and resulting royalties."); 5/29/15 6725:17-21 (Lys) (discretion offered by GAAP "opens the door to intentional as well as inadvertent accounting manipulation"); Lys CWDT ¶ 61 (the "individual nature" of negotiated agreements with "tailor-made definition[s] of revenue . . . minimizes the chances of a dispute").

b. Specific Problems with Bundled Sales of Advertising

581. The major source of revenue for broadcasters is advertising. Weil WRT at 3. Advertising revenue can come from many sources for broadcasters. For the stream in particular, that can include "pre-roll" advertisements (those advertisement that precede

the playing of the stream once selected by the listener), and ads inserted into the stream. Weil WRT at 3; Dimick WDT ¶ 23; Downs WDT ¶ 12. Additionally, advertisers sell advertising for the over-the-air broadcasts (that are often simulcast over the stream), website advertising, and other ecommerce revenue (*e.g.*, email and text campaigns to listeners on behalf of advertisers, social media campaigns). Weil WRT at 3; SX Ex. 1579 at 54-62. Advertising sales are typically sold in "bundles" – that is, together, for one price. Weil WRT at 6; 5/26/15 Tr. 5877:2-5878:8; Pedersen WRT ¶ 10 ("[[ ]]").

582. The issue of bundled sales demonstrates the indeterminacy of SoundExchange's proposal. According to SoundExchange's rate proposal, "Bundled" sales should divided between "Attributable Revenue" and "Non-Attributable" based on a "Fair Method of Allocation," which in turn is defined as a "reasonable" method "employed in good faith and in accordance with U.S. GAAP." *See* SoundExchange Proposed Rates and Terms at 6. The presence of such bundles makes the determination of the advertising revenues of web simulcasting difficult, and any proposed allocation is likely to be contentious. Katz AWRT ¶ 125. No further guidance is provided.

583. There is no present obligation for broadcasters to allocate their revenue among their over-the-air operations, their streaming operations, and any other of their business activities. Weil WRT at 4; Pedersen ¶ 11 ([ ]]).

584. Furthermore, the difficulties that can arise in SoundExchange's generalized approach are "compounded by the fact that each webcaster has its own

accounting practices, which would render the application of a one-size-fits-all revenue definition yet more difficult." Pedersen WRT ¶ 7; *see also* Weil WRT at 8 ("Given that there are hundreds of broadcasters that simulcast their over-the-air broadcasts, and their particular business models and level of accounting sophistication vary, the interpretations of how to allocate revenue will vary.").

585. To illustrate the problem, suppose that a broadcaster can make several offerings to a prospective advertiser: over-the-air radio, streaming radio, a web site, and sponsorship of music concerts. The broadcaster sells to an advertiser for a single price the rights to place ads in all four outlets (*e.g.*, advertising spots on the over-the-air, pre-roll advertising for the stream, banner advertising on the website, and sponsorship of the concert). Weil WRT at 6. Allocation amongst these various operations might be done in several different ways, with no way being uniquely correct. *Id*. Amongst other defensible allocation methods, a simulcaster might employ the Best Estimate of Selling Price for each line of business (if available), or count the applicable number of individuals to each activity (listeners to over-the-air, listeners to the simulcast, number of visitors that click on the banner ad, etc.), but that requires a vast amount of data, not all of which is necessarily available to all simulcasters. *Id*. Or one could possibly associate the value of each activity to the listener or viewer, or attempt to allocate based on time spent with each activity. *Id.* Each of these approaches has its own complications. *Id.* The record does not establish that any of them is administrable by simulcasters.

586. Allocating between terrestrial radio and over-the-air radio revenue streams raises similar concerns. Weil WRT at 7; *see also* Pedersen ¶¶ 10-11. "For example, if advertising is sold for the over-the-air broadcast and the stream, allocation of the revenue

between the two might be required under SoundExchange's proposal. But, if the advertiser did not specifically contemplate receiving the benefit of the streaming audience, or the advertiser assigned a zero value to that audience, then allocation of any amount of the over-the-air advertising revenue to the streaming business line has no economic basis." Weil WRT at 7-8. Broadcasters testified that they have experienced circumstances in which advertisers assigned little to no value to the stream. *See supra* Part IV.A.

587. Other problems arise for simulcasters attempting to allocate between multiple stations and/or multiple formats. The advertiser "might place certain parameters on the advertising (such as demographics and time), but might be agnostic on other variables." Weil WRT at 8. Some of the advertisements appear on music formatted stations, and some do not. The simulcaster might then need to make a further allocation between the music formatted stations and a non-music formatted station. *Id.*

588. Although SoundExchange's proposed regulations invoke Generally Accepted Accounting Principles (GAAP) to assist with these allocations, GAAP is of little use in these circumstances. There is no GAAP definition of "Fair Method of Allocation." Pedersen WRT ¶ 9. Professor Weil testified that "Generally Accepted Accounting Principles (GAAP) do not require a company to allocate revenue in all instances, nor do they provide a unique way, or even a preferred way, to do it." Weil WRT at 4; *see also* Pedersen ¶ 10 ("[[ ]]. Even in those circumstances in which GAAP provides for allocation, such

allocation is dependent upon having relevant data to support such an allocation, and may ultimately simply be based on management discretion. 5/14/15 Tr. 3958:17-3960:9 (Weil).

589. There is also no evidence of an industry accepted standard for allocation of revenue under the above circumstances. Weil WRT at 8. The potential for using Nielsen ratings to assist with such allocations was raised at the hearing; however, Nielsen ratings have only recently been implemented for gauging simulcasting audiences. Dimick WDT ¶ 18 ("streaming audience measurement remains in its infancy"). Moreover, Nielsen audience measurement data is not a panacea, as even Nielsen Broadcast ratings do not exist for every market and these data must be purchased by the broadcaster at great expense. 5/26/15 Tr. 5825:9-5826:9 (Dimick).

590. Ron Wilcox of Warner, who is not an accountant, suggests in his written testimony that a fair method "[[ ]] But this general principle is not determinative, as Wilcox's own testimony confirms. 5/7/15 Tr. 2517:13-2518:22 (Wilcox) (suggesting use of [[ ]] as [[ ]]

591. There is nothing about comparing [[ ]] in SoundExchange's rate proposal, even if for Mr. Wilcox it is [[ ]] Moreover, there is no evidence from any broadcaster (or any other knowledgeable source) that such [[ ]] are available so pervasively (including with respect to simulcast) that they might be able to serve as a basis for allocation. And, while Mr. Wilcox focused on [[ ]] in his responses on cross-examination, apparently in an

attempt to avoid the proposition that there is no single way to allocate, his written testimony actually suggests two additional metrics that one [[ ]] Wilcox WDT at 14. Presumably, because these are only examples, there could be others that might be applied.

592. "Because there are many 'reasonable' ways to allocate revenue—but no uniquely right way—there would be unending disputes about the reasonableness of the broadcaster approaches to this allocation problem." Weil WRT at 7.

D. SOUNDEXCHANGE'S PROPOSED "GREATER OF" FORMULA RESULTS IN AN INEQUITABLE ALLOCATION OF RISKS IN FAVOR OF THE RECORD COMPANIES.

593. The issue of risks created by the chosen royalty structure was raised by the Web IV Commencement Notice, which asks "[i]s there an ''intrinsic'' value to a performance of a sound recording that is omitted if a percentage of revenue royalty rate were to be adopted?" Web IV Commencement, 79 Fed. Reg. 412, 414. The Web IV Commencement Notice also sought "evidence, testimony and argument on whether this risk [of licensor harm due to licensees potentially maximizing share rather than profit] could be mitigated by combining a percentage-of-revenue based royalty rate with a significant minimum fee." *Id.*; *see also* Katz AWRT ¶ 146.

594. SoundExchange proposes to install a greater of structure with a substantial per performance rate, coupled with a very high percentage of revenue rate prong. But, as Professor Katz explained, a "greater of" royalty structure misallocates risk "by creating a structure in which the streaming service bears almost all of the risk and the record company is largely insulated from downside risk while sharing in upside benefits for which it has little responsibility." Katz AWRT ¶ 140.

595. Professor Rubinfeld attempts to justify SoundExchange's "greater of" structure by raising concerns that, where there is solely a percentage of revenue prong, a webcaster might earn very low revenues and record companies would have no choice but to enter statutory licenses with very low royalty rates. Rubinfeld CWDT ¶¶ 98-105. However, even if such cases were to arise, they would not justify a two-prong structure, rather, they would be a reason not to adopt a revenue prong. Katz AWRT ¶ 145. Professor Katz testified that it is preferable to avoid the problems of the revenue prong entirely by maintaining a statutory royalty structure that includes only a per-play prong, which isolates the record company from risk—it gets paid whenever its intellectual property is used and bears no risk associated with the webcaster's rate of monetization. Katz AWRT ¶ 147 (also noting that this same logic applies to establishing a per-play floor in conjunction with a percentage of revenue fee).

596. Professor Rubinfeld also asserts, without foundation, that record companies should "share in the potentially substantial returns that may be generated by services that offer incremental value to listeners." Rubinfeld CWDT ¶¶ 95-96. But there is "no economic justification for rewarding record companies for the incremental value created by webcasters given that, by definition, the incremental value is that created by the webcaster above and beyond that created directly by the music itself." Katz AWRT ¶ 148. A webcaster's revenues per play will "reflect its success or failure in competing with other webcasters and terrestrial radio." *Id*. ¶ 149. That success or failure will not be driven by the music available to the webcaster; the same music is available to all webcasters and broadcasters. *See supra* Part III.A.6. Simulcasters must differentiate themselves based on programmatic elements other than music, which is the "least

unique" thing they have to offer. 5/26/15 Tr. 5810:17-20 (Dimick); *see supra* Part III.A.6. The risk, which is borne by the webcaster, all stems from the webcaster's ability to execute its chosen business model. Katz AWRT ¶ 149.

597. Furthermore, webcasters have plenty of incentive to remain successful, or they will go out of business. Even if the webcaster's mediocre or poor performance were to affect the record company, any such effects on the record company (which has a wide variety of outlets for its recordings) would be small compared to the negative effects faced by the webcaster for such performance. Katz AWRT ¶ 149.

598. In any event, "[t]rue risk sharing would share the risks associated with variability in *profits*, not revenues." Katz AWRT ¶ 150. As Professor Katz explained, under a grater of structure tied to revenue, a webcaster that undertook costly investment that turned out to succeed in raising its revenues, but not by as much as the cost of the investment, would simultaneously see its profits fall and its royalty payment rise. Katz AWRT ¶ 150.

599. SoundExchange's greater of approach, which involves a very high per-performance rate, coupled with a very high percentage of revenue fee (based on revenue and not profits), is a classic "heads I win, tails you lose" for simulcasters. Indeed, "if it is improper or unfair for rights holders to lose out on the risk of upside increases in revenue," why is it "proper and fair for webcasters to bear the full risk of downside declines in revenue"? Fischel & Lichtman WRT ¶ 108.

E. THERE IS NO "REVEALED PREFERENCE" FOR A GREATER OF STRUCTURE FOR SIMCULASTING.

600. Professor Rubinfeld also attempts to justify SoundExchange's recommended two-prong royalty structure by pointing out that private parties have, in several instances, entered into licensing contracts that contain multiple prongs. He asserts that these contracts imply that parties have a "revealed preference" for this structure and that it therefore serves the joint interests of licensors and licensees. *See* Rubinfeld CWDT ¶ 97. There are several weaknesses in Professor Rubinfeld's position.

601. As discussed by Professor Katz, the "greater of" formulation may largely be an artifact of the lack of competition among the record companies in Professor Rubinfeld's benchmark market. As shown above, the structure insulates the record companies from any downside risk but provides a significant upside benefit and, therefore, it constitutes a form of price discrimination. Katz AWRT ¶ 142.

602. There is also a very significant difference between a two-party contract and a statutory license regime. "Over the life of a two-to-four-year contract, a streaming service and record company typically will know which prong will be the binding one. However, when the same structure is applied to many different streaming services, different prongs may apply to different firms at different times, potentially creating uncertainty and distorting the allocation of risk." Katz AWRT ¶ 144.

603. This effect has been manifest in every direct deal for statutory webcasting that includes a percentage of revenue prong as part of a "greater of" fee structure. [[

[redacted]

]]

604. Last, the direct license agreements in evidence are not supportive of the greater of approach to simulcasters. For instance, many of the privately negotiated

contracts do not contain both per-play and percentage-of-revenue prongs—19 of 45 major-label contracts examined by Professor Rubinfeld have no per-play royalty prong. Katz AWRT ¶ 143; *see also* Fischel & Lichtman WRT ¶ 107. Moreover, aside from the agreement between iHeartMedia and Warner Music Group, none of agreements examined by Professor Rubinfeld are with simulcasters, and the [[ ]]; 5/4/15 Tr. 1474:23-1475:20 (Lys) (testifying that of the 62 agreements Professor Lys reviewed, which were the same as Professor Rubinfeld's agreements, 61 were with interactive services and the last one was between iHeartMedia and Warner).

605. [[ ]] Fischel & Lichtman AWDT ¶ 85; *see also id*. ¶ 90 ([[ ]]).[9] Based on the numerous agreements they reviewed, Professors Fischel and Lichtman determined [[ ]] *Id*. ¶ 85 (emphasis added).

[9] Professors Fischel and Lichtman reviewed 28 agreements entered into by iHeartMedia in recent years, and Pandora's agreement with the group of independent labels represented by Merlin. Fischel & Lichtman AWDT ¶ 17; IHM Exs. 3340, 3342, 3343, 3345, 3347, 3349, 3351-3370; SX Exs. 0033, 0034.

606. Indeed, the market evidence stands in [[ ]] Fischel & Lichtman AWDT ¶ 88 Professors Fischel and Lichtman found that under the iHeartMedia/Warner deal, [[ ]] *Id.* (citing to Warner Agreement at 14). Furthermore, under the 27 independent label deals they reviewed, the [[ ]] *Id.* (citing to, for example, [[ ]]).

X. THE JUDGES SHOULD ADOPT NAB'S PROPOSED TERMS AND REJECT SOUNDEXCHANGE'S CONTRARY TERMS.

607. Pursuant to 37 C.F.R. § 351.4(b)(3), NAB's revised proposed rates and terms are included herewith as Appendix A ("NAB Proposed Rates and Terms (June 19, 2015)"). The NAB Proposed Rates and Terms (June 19, 2015) are substantially similar to those proposed by NAB as part of its Written Direct Statement; the limited substantive changes are discussed below. A redline of the NAB Proposed Rates and Terms (June 19, 2015) against the existing regulations is provided at the end of Appendix A.

608. Consistent with NAB's proposal for a rate specifically for simulcasters, NAB proposes to maintain separate regulations for commercial broadcasters (per existing 37 C.F.R. Part 380, Subpart B), and likewise opposes SoundExchange's proposal to strike Subpart B from the regulations.

A. NAB'S PROPOSED NEW DEFINITION OF "BROADCAST RETRANSMISSION" SHOULD BE ADOPTED.

609. NAB has proposed a revision to the definition of "Broadcast Retransmissions" as follows:

> Broadcast Retransmissions means transmissions made by or on behalf of a Broadcaster over the Internet, wireless data networks, or other similar transmission facilities that are primarily retransmissions of terrestrial over-the-air broadcast programming transmitted by the Broadcaster through its AM or FM radio station, including transmissions containing (1) substitute advertisements; (2) other programming substituted for programming for which requisite licenses or clearances to transmit over the Internet, wireless data networks, or such other transmission facilities have not been obtained; and (3) substituted programming that does not contain Performances licensed under 17 U.S.C. 112(e) and 114. Broadcast Retransmissions do not include transmissions in which the sound recordings that are performed are customized to a user.

See NAB Proposed Rates and Terms (June 19, 2015) § 380.11.

610. As discussed extensively above, a simulcast (*i.e.*, "Broadcast Retransmission") is intended to be essentially the same programming as the over-the-air transmission of a terrestrial broadcaster. *See supra* Part III.A. This includes sound recordings, as well as the vast amount of non-music programming that is simulcast, including news, traffic, weather, talk shows, on-air personalities, contests, sports programs, emergency and public service announcements, etc. *See id*. The definition has been revised from the version submitted with NAB's Written Direct Statement to more closely tie the simulcast to the over-the-air broadcast and to make clear that simulcasts are not customized.

611. Simulcasters do not customize their music programming for specific listeners but rather create a package of content that they then deliver to all of their listeners. *See supra* Part III.A. NAB's proposed definition for "Broadcast Retransmissions" properly excludes from its ambit such customized channels. *See* NAB Proposed Rates and Terms (June 19, 2015) § 380.11 ("Broadcast Retransmissions do not

include transmissions in which the sound recordings that are performed are customized to a user.").

612. Some flexibility is needed, however, for simulcasters regarding the advertisements that they transmit. Certain broadcasters sell advertising spots specific to their stream. *See supra* Part IV.A. Even those broadcasters that adhere to the stringent Nielsen TLR guidelines, which limit their ability to insert advertisements into their stream, some flexibility is needed for advertiser demands for exchanging out advertising—for example, the exchange of a national advertisement in for a local advertisement. *See supra id*. NAB's proposed definition properly permits this. *See* NAB Proposed Rates and Terms (June 19, 2015) § 380.11 (permitting Broadcast Retransmissions to include "substitute advertisements"). Indeed, SoundExchange has acknowledged in the past that "simulcasts are not always 100% identical to [over-the-air] broadcasts, due to ad substitution and occasional program substitution." *See* SX Ex. 1574 ¶ 3(d).

613. Some flexibility also is needed for programming for which a broadcaster has rights to broadcast but not to simulcast. In such cases broadcasters should be permitted to substitute alternative programming without forfeiting their status as a simulcaster transmitting "Broadcast Retransmissions." NAB's proposed definition properly permits this. *See* NAB Proposed Rates and Terms (June 19, 2015) § 380.11 (permitting Broadcast Retransmissions to include "programming substituted for programming for which requisite licenses or clearances to transmit over the Internet, wireless data networks, or such other transmission facilities have not been obtained").

614. Finally, the definition of Broadcast Retransmissions should not be so restrictive as to prohibit broadcasters from substituting programming that does not fall within the scope of the statutory licenses at issue at all, such as permitting insertion of directly licensed sound recordings. NAB's proposed definition properly permits this. *See* NAB Proposed Rates and Terms (June 19, 2015) § 380.11 (permitting Broadcast Retransmissions to include "substituted programming that does not contain Performances licensed under 17 U.S.C. 112(e) and 114"). Allowing such substitution will promote competition and there is no reason to penalize broadcasters for adjusting their programming to enhance their competitive position in the marketplace in ways that do not implicate the statutory rights at issue (except by reducing their royalty obligations).

B. THE JUDGES SHOULD CONTINUE TO REQUIRE THAT AUDITORS BE LICENSED CPAS.

615. The current audit provisions in the regulations allow SoundExchange to audit a Service after filing a Notice of Intent to Audit with the Copyright Royalty Judges. 37 C.F.R. § 380.15(c). The provisions require that audits performed by SoundExchange be performed by an independent and Qualified Auditor, which is defined as "a Certified Public Accountant." 37 C.F.R. § 380.11. The requirement that audits be conducted by Certified Public Accountants has been in the regulations for the last ten years. *See Web II*, 72 Fed. Reg. at 24109 ("[T]he Copyright Royalty Judges are requiring that the auditor be certified and independent of both SoundExchange and the Service being audited."). It should remain there.

616. SoundExchange proposes to modify the definition of "Qualified Auditor" in the regulations, to "a person, who by virtue of education or experience, is appropriately

qualified to perform an audit to verify royalty payments related to performances of sound recordings." SoundExchange Proposed Rates and Terms, § 380.2. For several reasons, this proposal should be rejected.

617. First, the Judges rejected a prior request from SoundExchange to remove the CPA requirement for good reason. They held:

> Likewise, we find that requiring the auditor to be certified further raises confidence levels in the audit. CPAs have experience in the field of accounting, are familiar with the accepted standards and practices for auditing, and are governed by standards of conduct. If technical skills are required to process the data of a Service, the auditor can request assistance. In sum, the Copyright Royalty Judges are requiring that the auditor be certified and independent of both SoundExchange and the Service being audited.

Web II, 72 Fed. Reg. at 24109; *see also* Herring AWRT ¶ 70. While SoundExchange sought in *Web II* to permit in-house personnel to conduct "technical audits," the Judges found that "[w]hile technical audits by in-house personnel might be cheaper for the Collective, we conclude that it is more important, in the interest of establishing a high level of credibility in the results of the audit, that the auditor be independent of both parties." *Id*. (quoting Final Rule and Order in Digital Performance Rights in Sound Recordings and Ephemeral Recordings, Docket No. 2005-1 CRB DTRA, 72 Fed. Reg. 24109 (May 1, 2007)). No evidence has been presented in this proceeding that would suggest a different outcome.

618. Second, SoundExchange's proposal provides no objective standard for the parties, or any third party, to rely upon in evaluating a proposed auditor's qualifications. Weil WRT at 11; *see also* Herring AWRT ¶ 69 (questioning the clarity of the "education or experience" language included in SoundExchange's definition of Qualified Auditor).

Qualifying an auditor based upon "appropriate" education or experience invites future disputes. Weil WRT at 11.

619. Third, SoundExchange's proposal improperly would enable audits to be conducted by non-CPAs and even persons who are not independent and objective, such as SoundExchange's own in-house personnel. *See* SoundExchange Proposed Rates and Terms, § 380.2; *see also* Weil WRT at 11. Having a CPA perform an audit provides a number of benefits that would be lost if this requirement were removed. "CPAs are governed by the principles, rules, and requirements promulgated by their applicable state accountancy boards and the professional organizations with which they affiliate, including state CPA organizations and the national trade association, American Institute of Certified Public Accounts (AICPA)." Weil WRT at 11. These rules carry with them an obligation to the public at large, requiring CPA's to "act in a way that will serve the public interest, honor the public trust, and demonstrate a commitment to professionalism." Weil WRT at 12. Such a duty is particularly relevant in the context of a regulation governing a public benefit such as webcasting. *Id.*

620. Applicable rules also require CPAs to act with integrity, objectivity, due care, competence and diligence. *Id.*; 5/14/15 Tr. 3934:15-3935:15 (Weil); *see also* Herring AWRT ¶ 71. "These professional standards will help ensure a level of integrity and objectivity that may be lost under SoundExchange's proposed definition of 'Qualified Auditor.'" Weil WRT at 13. It would be a "step backwards" to remove the requirement for the benefits the CPA requirement. 5/14/15 Tr. 3937:23-3938:14 (Weil).

621. The testimony of Ron Wilcox of Warner, who is not an accountant, is unpersuasive. Mr. Wilcox claims that it is more important to have industry experience

than a CPA certification. Wilcox WDT at 15. But Professor Weil opined that while not all CPAs may be qualified to perform a webcasting audit, those "doing the audits, in addition to having requisite industry knowledge, should be CPAs." Weil WRT at 13; 5/14/15 Tr. 3934:15-3935:3 (Weil). Mr Herring, Pandora's CFO and himself a CPA, testified that it is common across many industries for CPAs, when auditing an industry with which they might not have particular familiarity, to "bring in technical experts to help them make sure the audit is correct, but the overall audit is still governed by their expertise as auditors and through their code of conduct and their training as CPAs." 5/13/15 Tr. 3403:23-2404:11 (Herring). Industry competence will be ensured by the CPA requirement, because a CPA would only accept an engagement that he or she was competent to undertake. Weil WRT at 13.

622. While there are no agreements between simulcasters and the major record labels that include a percentage of revenue model, [[ ]] require that audits be conducted by CPAs. *See. e.g.*, [[ ]] Therefore, any suggestion that market agreements dictate a specific resolution on this point is wrong.

623. The need for a CPA requirement is heightened if there is to be a percentage of revenue royalty model (which, as NAB demonstrates elsewhere, there should not be). Professor Weil testified that he "cannot imagine a circumstance in which [he] would recommend that a non-CPA be engaged in complex allocations of revenue, where there are no uniquely right answers and one party or the other can provide logic to support several different methods." Weil WRT at 13.

C. THE JUDGES SHOULD NOT SHORTEN THE REPORTING AND PAYMENT PERIOD.

624. SoundExchange proposes to reduce the time for payment of royalties due from 45 days to 30 days. SoundExchange Proposed Rates and Terms § 380.4(c). Despite shortening the reporting period by a full third, SoundExchange maintains its position that the 1.5% per-month late fee should apply. SoundExchange Proposed Rates and Terms § 380.4(c), (e).

625. SoundExchange's proposal is inconsistent with many other sets of statutory rates and terms that include a 45-day – rather than a 30-day – payment period. Mr. Bender admitted that the 45-day payment period "applies to the categories" of statutory licensees, "including webcasters":

> Q. And it's true, isn't it, that many other types of licensees are currently subject to a 45-day payment deadline, correct? Well, for example, preexisting subscription services?
>
> A. Yes, it applies to all the categories.
>
> Q. All other categories?
>
> A. All other categories, including webcasters.
>
> Q. And that 45-day period for other types of licensees other than webcasters will be in place for several more years, correct?

A. Yes.

See 5/8/15 Tr. 2582:15-2583:1 (Bender); *see also* 37 C.F.R. § 382.4(b) (setting 45-day payment period for pre-existing subscription services through 2017); *id*. § 382.13(c) (setting 45-day payment period for SDARS through 2017); *id*. § 384.4(c) (setting 45-day payment period for business establishment services through 2018). In this very proceeding, SoundExchange proposed rates and terms for noncommercial educational webcasters that include a 45-day period for reporting streaming usage that exceeds the specified ATH minimum fee threshold. NRBNMLC Ex. 7034 attach. at 4.

626. Moreover, as the Judges are aware and as Mr. Herring has testified, SoundExchange already has raised this issue in the context of the pending rulemaking proceeding regarding notice and recordkeeping requirements, where SoundExchange also sought to accelerate the analogous deadline for submitting reports of use from 45 to 30 days. Herring AWRT ¶ 65. The NAB and many other licensees vigorously opposed that proposal in the context of that proceeding, recounting the burdens and difficulties that broadcasters experience in meeting the current deadline of 45 days as well as their concerns with shortening the reporting period to 30 days. *See* Joint Comments of the National Association of Broadcasters and the Radio Music License Committee Regarding the Copyright Royalty Judges' Notice of Recordkeeping Rulemaking, Docket No. 14-CRB-0005 (RM), 61-63 (June 30, 2014) (providing comments and attaching over a dozen Broadcaster Declarations); *see also* Herring AWRT ¶ 65 ("Pandora and a number of other statutory licensees have opposed that recommendation and filed detailed comments explaining their opposition.").

627. iHeartMedia witness Jon Pederson testified in this proceeding that [[ ]]. There is no evidence that accelerating the time period for reporting will improve the quality of reporting, or, indeed, improve SoundExchange's ability to make payments faster. Herring AWRT ¶ 66

628. As Mr. Herring has testified:

> There is no reason to rule on that topic here as well when it has been fully litigated elsewhere – or to give SoundExchange a second avenue for pursuing its desired result. Moreover, if the Judges reject SoundExchange's proposal in that separate proceeding to shrink the timing for submitting reports of use (thus maintaining the current 45-day window), it would make little sense to rule here that statements of account and payments should be submitted in a shorter 30-day window. As should be obvious, the statements of account and payment calculations are premised on the performances contained in the reports of use; if the reports are still being completed and vetted when the payment comes due (under the shorter 30-day window), it raises the possibility that the statements of account and payments could suffer from inaccuracies or – more likely – licensees would essentially be forced to complete their reports of use in 30 days to avoid such inaccuracies even though the deadline would be 45 days.

Herring AWRT ¶ 65.

629. The payment timing provision should reflect the large number and varying levels of operational resources of radio broadcasters. As compared to many of the participants in this proceeding, there are hundreds of broadcasters that are substantially smaller, with substantially fewer resources to devote to administrative tasks. *See* Weil WRT at 8.. Substantially shortening the payment and reporting periods would unreasonably burden those broadcasters.

630. If an unprecedented percentage-of-revenue royalty is adopted, shortening the time period to report is even more troublesome. Weil WRT at 9 ("to the extent that the regulations adopt a percentage-of-revenue fee structure, computations will require more, not less, time, to deal with the accounting issues I have discussed."); Pederson WRT ¶ 24.

D. THE JUDGES SHOULD ADOPT NAB'S PROPOSED ATH DEFINITION.

631. NAB has proposed to clarify the definition of "Aggregate Tuning Hours" ("ATH") as follows to make clear that ATH that do not include "Performances" subject to the statutory license do not affect a licensee's fee or reporting obligations:

> Aggregate Tuning Hours means the total hours of programming transmitted by or on behalf of the Broadcaster during the relevant period to all listeners within the United States of Broadcast Retransmissions from a single terrestrial AM or FM radio station . In computing Aggregate Tuning Hours, a Broadcaster may exclude any discrete programming segments and any half hours of programming that do not include any Performance. By way of example, if a service transmitted one hour of programming containing Performances to 10 simultaneous listeners, the service's Aggregate Tuning Hours would equal 10. If one half hour of that hour did not include any Performance, the service's Aggregate Tuning Hours would equal 5. As an additional example, if one listener listened to a service for 10 hours and all 10 hours contained Performances, the service's Aggregate Tuning Hours would equal 10.

See NAB Proposed Rates and Terms (June 19, 2015) § 380.11.

632. The SoundExchange-NPR agreement supports a definition for ATH that excludes listener hours that do not include sound recordings. That agreement specifies an annual ATH allotment, but only "Music ATH" that include sound recording performances of musical works count toward the allotment. NRBNMLC Ex. 7024 at 7, 9. The Webcaster Settlement Agreement term sheet between NAB and SoundExchange reflects that SoundExchange did not consider talk programming to trigger ATH

thresholds. *See* SX Ex. 1574 ¶ 6(b) (by estimating ATH at 12 sound recording performances per hour, this supports the idea that the term sheet was referring to ATH for licensed sound recordings only).

633. As broadcasters Mr. Emert and Mr. Henes testified, it does not make sense for record companies to benefit from programming that does not include any of their content. Emert WDT ¶ 46; Henes WDT ¶ 31. As Mr. Emert observed, "NewLife FM transmits many hours of talk programming, and [he] do[es] not think that it is reasonable for this programming to count toward meeting these [ATH] thresholds when NewLife FM receives no value from its statutory license payment for program segments that do not include sound recordings." Emert WDT ¶ 46. Similarly, Mr. Henes testified at trial that the proposal "would separate the tuning hours to music as opposed to – like our station, half of our programs is programs, teaching and talk programs. Why would we want to pay a music fee for those programs?" 5/21/15 Tr. 5273:5-5273:9 (Henes).

E. THE JUDGES SHOULD ADOPT A SINGLE LATE FEE FOR A LATE PAYMENT OR STATEMENT OF ACCOUNT, AND THEY SHOULD SET THAT LATE FEE AT THE RATE ESTABLISHED BY 26 U.S.C. § 6621

634. SoundExchange proposes that licensees "shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date." SoundExchange Proposed Rates and Terms § 380.4(e). NAB proposes to make clear that in the event the Licensee's payment and statement of account are late, only a single late fee will be assessed. *See* NAB Proposed Rates and Terms (June 19, 2015) § 380.13(e). ("A Broadcaster shall pay a late fee for each instance in which any payment or any statement

of account is not received by the Collective in compliance with applicable regulations by the due date . . . A single late fee shall be due in the event both a payment and statement of account are received by the Collective after the due date."). Pandora proposes the same language regarding a "single late fee." *See* Pandora Proposed Rates and Terms § 380.3(e).

635. A key purpose of a late fee is to compensate a person for the lost time value of money or property that is not remitted when it should have been. *See, e.g.*, *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992) ("The cost of delay in receiving money to which one is entitled is the loss of the time value of money, and interest is the standard form of compensation for that loss"). So long as SoundExchange has received the actual royalty payment, it will be able to accrue interest on that payment until it processes and distributes that money. It is even more unreasonable to argue for the assessment of two separate late fees. A single late fee is more than sufficient to motivate licensees to make timely payments and accounting; duplicative late fees (which could add up to 3.0% per month, or 36% per year) are unnecessary, and would be unreasonable and usurious. *See also* Herring WDT ¶ 37.

636. SoundExchange makes clear that its real purpose is to impose an additional 18% penalty to punish services as an "incentive" for timely filing. *See* Bender WRT at 3 ("If a separate fee were not assessed for untimely statements of account, services would have no inventive to submit their accounting statements in a timely manner."). Mr. Bender's position assumes that licensees would simply shirk their responsibilities under the statutory license without this added penalty, and there is no evidence in the record supporting his position.

637. The Judges have previously rejected an additional late fee for late reports of use. In the remanded decision in *Web III*, the Judges rejected SoundExchange's request for an additional late fee, stating that "[t]he Judges are not persuaded that a late fee for reports of use is necessary" and that "SoundExchange failed to meet its burden with regard to this proposal." *Web III*, 79 Fed. Reg. at 23126.

638. With respect to the late fee rate, NAB and iHeartMedia propose to lower the current 1.5% (or 18% per annum late fee rate). The current annual rate is significantly above other statutory rates,[10] as well as the prime rate, currently 3.25% per year.[11] A more reasonable rate would be, as NAB and iHeartMedia have proposed, tied to 26 U.S.C. § 6621, which establishes an annual interest rate equal to the federal short-term rate, plus three percentage points, or plus five percentage points where the late payment exceeds $100,000. Such a rate is more tied to the then current interest rate environment than the unchanging 18% rate.

F. ALLOWING BROADCASTERS TO RECOVER OVERPAYMENTS IS AN EQUITABLE APPROACH.

639. NAB joins iHeartMedia in requesting that the regulations allow for Broadcasters to recover overpayments.

> Overpayments. If the Broadcaster determines, within three (3) calendar years of paying to the Collective a monthly amount due, that the Broadcaster overpaid the royalty payments due under § 380.12, the Broadcaster may reduce the royalty payments due on its next monthly

[10] For example, rates established by 18 U.S.C. § 3612 (f)(2) and 28 U.S.C. § 1961, both currently at 0.28% per annum. *See* http://www.uscourts.gov/services-forms/fees/post-judgement-interest-rate (last visited June 18, 2015); http://www.federalreserve.gov/releases/h15/ (last visited June 18, 2015).; *see also* http://www.txnd.uscourts.gov/post-judgment-rates (last visited June 18, 2015).

[11] http://www.bankrate.com/rates/interest-rates/wall-street-prime-rate.aspx (last visited June 18, 2015).

> payment(s) by the amount of the overpayment, until the full amount of the overpayment has been recouped. The Broadcaster shall include in its statement of account for each month in which it is deducting amounts to recover an overpayment such information as is necessary to calculate the amount of the overpayment.

See NAB Proposed Rates and Terms (June 19, 2015) § 380.13(j).

640. NAB also joins Pandora in requesting a clarification to the Statement of Account signature block, that provides:

> This attestation shall not prevent a Broadcaster from making good faith revisions or adjustments to its Statements of Account that it later determines to be necessary to accurately reflect its liabilities due under this Subpart.

See NAB Proposed Rates and Terms (June 19, 2015) § 380.13(f)(8).

641. SoundExchange resists such changes. *See* Bender WRT at 5. It is, inequitable, however, to charge late fees against licensee underpayments while, at the same time, relieving SoundExchange of any requirement to refund royalties to a licensee resulting from overpayments. 6/2/15 Tr. 7143:10-19 (Bender). SoundExchange proposes to retain these payments even if the licensee notified SoundExchange of the overpayment error the very next month. *Id*. at 7143:20-23. SoundExchange, however, is able to adjust accounts to rectify reporting and other errors that occurred in prior distributions, so that if SoundExchange makes a mistake and distributes too much money to a particular copyright owner in a month, it will correct that by reducing payments to that copyright owner in the future. *Id*. at 7142:24-7144:9 (Bender). If SoundExchange insists on late fees applicable to underpayments, it should, at a minimum, be required to return overpayments or to credit them to a licensee's future royalty obligations.

642. SoundExchange also should continue to be required to accept corrections to a licensee's previously submitted statement of account. *See* Bender WRT at 5. As Mr. Herring testified:

> SoundExchange has recently taken the position with Pandora that we cannot revise or adjust a previously submitted statement of account because the first version submitted was certified as accurate under the existing signature requirement in the regulations. Although we make every attempt to ensure that our statements of account are true and accurate, that should not prevent us from revising and resubmitting those statements if, in good faith, we discover that we have miscalculated our statutory liabilities in some way. The object should be getting it right and making sure SoundExchange's members are paid properly.

Herring WDT ¶ 37.

G. LACK OF VALUE AND TECHNICAL ISSUES SUPPORT A FEE EXCLUSION FOR SHORT PERFORMANCES

643. NAB has proposed two new exclusions to the definition of Performance under the regulations:

> (4) A performance of a sound recording that is 15 seconds or less in duration; or
>
> (5) A second connection to the same sound recording from someone from the same IP address.

See NAB Proposed Rates and Terms (June 19, 2015) § 380.11 (Definitions).

644. With respect to the minimum duration requirement, Mr. Newberry of Commonwealth Broadcasting testified that:

> it doesn't make sense to charge a fee for a song the listener demonstrates by his or her actions that he or she doesn't want to hear. If the listener quickly shuts off the stream, the song has no value to either the listener or to the radio station. When a listener quickly stops the stream, it is clear that the listener was not interested in hearing the song.

Newberry WDT ¶ 34. Likewise, when a listener tunes in to a simulcast to hear the final 10 seconds of a song, that listener has received no benefit from that performance. Because of this, NAB proposes that performances of 15 seconds or less be exempted from the definition of "performance." Mr. Bender, CFO of SoundExchange, acknowledged that SoundExchange's opposition to this term is that services shouldn't allow listeners to skip songs which would cut down on the service's financial obligations for sole performances – but conceded that listeners "cannot skip songs on a simulcast [of an] over the air broadcast." 6/2/15 Tr. 7145:1-17 (Bender).

645. Moreover, Professor Katz observed that many of Professor Rubinfeld's benchmark interactive services agreements include "duration minima," which "make both economic and common sense":

> if a full play of a recording is valued at a given price, then the play of a small fraction of the recording is likely not worth the same price, all else equal. Consider simulcasting. A consumer tuning in and hearing the last few seconds of a song may derive little enjoyment from that play, and hearing those few seconds may contribute little to his or her willingness to listen to the simulcast and be exposed to advertising. Indeed, one can identify situations in which a fractional play actually has a negative value for the listener and—consequently—the service. For example, if a user turns on a service, hears a recording that he or she doesn't like, and turns off the service, then all else equal that play will have a negative value for the service.

Katz AWRT ¶ 105. Professor Katz concluded that: "a better approach than adjusting for differences between the treatment of short-duration performances in interactive-services licenses and statutory licenses would be to harmonize the terms by exempting short-duration performances from having to pay statutory royalties." *Id.* ¶ 107.

646. NAB also proposes that "second connections to the same sound recording from someone from the same IP address," be excluded from the definition of

"performance." Jean-Francois Gadoury, Chief Technology Officer of Triton Digital, identified two potential technical issues that may arise when listeners connect to a simulcast, which could result in the overcounting of performances. Gadoury WDT ¶¶ 4-12. He first described the scenario of a "discovery connection by a media application," in which the listener's media application will "initiate a connection to a given stream and only seek to receive the header information returned by the streaming server software to which it is connecting. Upon receiving this information the media application might then proceed in connecting a second time to the streaming server." *Id.* ¶ 5. In such an instance, two connections may be registered, but there is only one listener connected. *Id.* ¶ 6. In a second scenario, there may be network connection disruptions—meaning that unfavorable network conditions may cause a disconnection of the listener's media application from the stream. *Id.* ¶¶ 7-9. A reconnection by that listener or his or her media application will result in two connections, again with only one listener. *Id.* ¶ 10.

647. SoundExchange has provided no evidence to dispute the above technical issues that can result in the over-counting of connections. Bender WRT at 12-13 (discussing the technical issues identified by Mr. Gadoury, but providing no evidence to the contrary); 6/2/15 Tr. 7146:9-12 (Bender) ("Q: Your testimony does not assert that the technical issues cited by Mr. Gadhoury are implausible, correct? A: No."). Moreover, Mr. Bender agreed in his Written Rebuttal Testimony that "any reconnection made by the same listener's device due to a technical glitch would not be a second performance under the current regulations." Bender WRT at 13. Therefore, to assist in the accuracy of counting performances and to clarify the issue for the simulcasting industry, NAB's proposal for the elimination of a "second connection to the same sound recording from

someone from the same IP address" from the definition of "performance" should be adopted.

H. THE DISRUPTIVE NATURE OF AUDITS COMPELS A LIMIT OF SIX MONTHS FOR ALL SOUNDEXCHANGE AUDITS.

648. NAB proposes that SoundExchange be obligated to complete an audit within six months from the date the notification of intent to audit is served on the Broadcaster. *See* NAB Proposed Rates and Terms (June 19, 2015) §380.15. SoundExchange concedes that an entity being audited is disruptive – time spent managing the audit is time spent away from the normal duties of an employee. 5/4/15 Tr. 1519:2-5 (Lys). Six months is more than a reasonable time to complete an audit so as not to prolong the licensee's distractions and costs. SoundExchange has presented no evidence to the contrary.

I. A NOTICE AND CURE PROVISION IS REASONABLE AND A COMMON COMMERCIAL TERM.

649. NAB has proposed to add a "Notice and Cure" provisions to the regulations:

> For any material breach of these regulations by a Broadcaster that the Collective intends to assert in any way against the Broadcaster, the Collective shall first provide notice of such material breach to the Broadcaster by certified mail, and the Broadcaster shall have 30 days from the receipt of such notice of material breach to cure such material breach.

See Revised NAB Proposed Rates and Terms (June 19, 2015) § 380.11.

650. SoundExchange opposes such a provision. Bender WRT ¶ 8. SoundExchange's seems to suggest that it wants the option to informally contact a licensee of a breach (*id.*); however, NAB's language does not foreclose that option. In any event, notice and cure provisions, aside from being commonplace contractual terms,

appear in agreements entered into evidence in this matter. [[ ]]

J. NAB'S REVISED MINIMUM FEE PROVISION SHOULD BE ADOPTED AS IT CONFORMS THE PROVISION TO SIMULCASTERS.

651. NAB has proposed to the following minimum fee provision:

> Minimum fee. Each Broadcaster will pay an annual, nonrefundable minimum fee of $500 for each of its terrestrial AM and FM radio stations for which Eligible Transmissions are made by or on behalf of such Broadcaster for each calendar year or part of a calendar year during 2016-2020 during which the Broadcaster is a licensee pursuant to licenses under 17 U.S.C. 112(e) and 114, provided that a Broadcaster shall not be required to pay more than $50,000 in minimum fees in the aggregate (for 100 or more such radio stations). For the purpose of this subpart, each individual stream (*e.g.*, primary radio station, HD multicast radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum, except that identical streams for simulcast stations will be treated as a single stream if the streams are available at a single Uniform Resource Locator (URL) and performances from all such stations are aggregated for purposes of determining the number of payable performances hereunder. Upon payment of the minimum fee, the Broadcaster will receive a credit in the amount of the minimum fee against any additional royalties payable for the same calendar year for the same channel or station

See NAB Proposed Rates and Terms (June 19, 2015) § 380.12(c).

652. SoundExchange appears only to argue that this provision would be unreasonable because it would maek the minimum fee due only "for each of a broadcaster's AM/FM radio stations, rather than for each of its individual channels." Bender WRT at 16. NAB does not understand SoundExchange's concern, however, as this provision addresses simulcasting only, so each radio station is a channel subject to the minimum fee.

K. BROADCASTERS NEED SOME REPORTING AND PAYMENT FLEXIBILITY FOR THIRD PARTY PROGRAMMING

653. NAB has proposed a provision to allow Broadcasters to estimate Performances contained in third party programming that they use in their simulcasts:

> Programming Provided by Third Parties. In the case of programming provided by third parties to a Broadcaster, the Broadcaster shall make commercially reasonable, good-faith efforts to cause such third parties to provide information regarding the number of Performances in such programming. If, however, some or all of that information is not provided to the Broadcaster, the Broadcaster may either (i) make a good faith estimate of the total number of Performances in such programming, multiplied by the number of Aggregate Tuning Hours of transmissions of such programming if the Broadcaster has a reasonable basis for such estimate, or (ii) estimate the number of Performances in such programming by multiplying the total number of Aggregate Tuning Hours of transmissions of such programming by 1 Performance per hour in the case of radio station programming reasonably classified as news, business, talk or sports and 12 Performances per hour in the case of transmissions or retransmissions of all other radio station programming.

See NAB Proposed Rates and Terms (June 19, 2015) § 380.12(d).

654. Mr. Newberry described the problems that broadcasters have reporting song-specific performances on syndicated and network programming. Newberry WDT ¶ 29 (describing how "significant amounts of syndicated and network programming broadcast by radio stations was delivered to stations in ways that would not allow stations to count the number of listeners to each song included in those programs). As a result, during the WSA negotiations, NAB sought and was given the ability for broadcasters to pay on the basis of Aggregate Tuning Hours (assuming a certain number of songs played each hour instead of counting actual performances on a recording-by-recording basis). *Id.*; *see* SX Ex. 1574 § 6(b) (WSA Term Sheet in which SoundExchange expressly recognizes the "operational challenges" associated with "per performance" reporting and

allows broadcasters to "estimate the performances during" third party programming hours to be reported on an ATH basis).

655. The problems with reporting the number of performances in connection with third party programming was further described in NAB's comments submitted in the Notice and Recordkeeping rulemaking, many broadcasters transmit third party programming. *See* Joint Comments of the National Association of Broadcasters and the Radio Music License Committee Regarding the Copyright Royalty Judges' Notice of Recordkeeping Rulemaking, Docket No. 14-CRB-0005 (RM), 46 (June 30, 2014). "Broadcasters have particularly acute problems reporting on third-party programming (i.e., 'syndicated programming'), as they receive little, if any, information from the programming providers regarding the recordings included in that programming (either the identifying information for the recordings or when they are played)." *Id*. One negative result from this is that some broadcasters choose not to stream valuable and unique programming because of the problems determining performances. *Id*. at 47. SoundExchange presented no evidence of harm to it from this proposal. A reasonable solution with respect to Performances contained in third party programming is to allow simulcasters to make the good faith estimates proposed by NAB.

XI. PROPOSED CONCLUSIONS OF LAW

A. THE HISTORY OF THE SOUND RECORDING PERFORMANCE RIGHT AND CONGRESS'S CONSISTENT FINDINGS THAT BROADCASTING IS ENTITLED TO DIFFERENT TREATMENT THAN OTHER SERVICES CONFIRMS THAT RATE SETTING UNDER SECTION 114 MUST TAKE INTO ACCOUNT RADIO'S SPECIAL STATUS AND THE PUBLIC INTEREST IT SERVES.

656. Rates for the statutory licenses at issue should take into account the context out of which these licenses arose and the underlying constitutional and congressional purpose for which copyright law exists. As discussed below, simulcasting was not the reason that Congress granted the sound recording performance right. Rather, the right was created to respond to the perceived threat to the recording industry from on-demand streaming (SoundExchange's preferred benchmark in this case) and, to a lesser extent, from offerings of multiple channels of commercial-free music. S. Rep. No. 104-128, 12 13 (1995), reprinted in 1995 U.S.C.C.A.N. 356 (hereinafter "1995 Senate Report"). In contrast, Congress recognized that radio programs (1) are available without subscription; (2) do not rely upon interactive delivery; (3) provide a mix of entertainment and non-entertainment programming and other public interest activities to local communities to fulfill FCC licensing conditions; (4) promote, rather than replace, record sales; and (5) do not constitute "multichannel offerings of various music formats." 1995 Senate Report, at 15. Each of the enumerated features is characteristic of the programming of radio broadcasters regardless of whether the transmission is disseminated over the air or streamed via the Internet.

657. Moreover, Congress acted with the recognition that the ultimate purpose of copyright law is "to stimulate artistic creativity for the general public good," not to grant an unbounded property right to copyright owners in their works. *Fogerty v.*

Fantasy, Inc., 510 U.S. 517, 527 (1994). Thus, one of its goals in designing the statutory license was to ensure that the new sound recording performance right did not "hamper[] the arrival of new technologies" and "stimulate[d] the development and application of new Internet distribution methods." *See* 1995 Senate Report at 15; S. Rep. No. 105-190 at 2, 8 (1998).

1. The Valuation of the Rights at Issue Should Be Determined with an Eye Toward the Public, Not Private, Purpose of Copyright Law.

658. A copyright is a limited right that Congress has chosen to grant in specifically enumerated circumstances. The Patent and Copyright Clause in the United States Constitution outlines the limited circumstances in which Congress may award such protection and "is both a grant of power and a limitation." *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966). The clause permits Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. Art. I, § 8, cl. 8.

659. Thus "the limited grant [of the Copyright power] is a means by which an important public purpose may be achieved." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). That purpose is to provide an incentive "to stimulate artistic creativity for the general public good" and to foster access to creative works. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Fogerty*, 510 U.S. at 527 ("[C]opyright law ultimately serves the purpose of enriching the general public through access to creative works."); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 at 146 (1989) (holding that Copyright Clause "reflects a balance between the need to

encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the 'Progress of Science and useful Arts'").

660. Accomplishing that goal requires a "delicate balance" between achieving the desired incentive for authors and furthering the public's interest in the free flow of ideas and information and the benefits that obtain from permitting the public to use and build upon creative works. *See, e.g., Stewart v. Abend*, 495 U.S. 207, 230 (1990) (referring to "the delicate balance Congress has labored to achieve"); *Sony*, 464 U.S. at 429 (stating that Congress's task of delineating copyright law "involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand.").

661. Consistent with this public purpose of copyright law, Congress has carefully delineated the rights of copyright owners of various works of authorship as well as the numerous limitations and exemptions to those rights. *See* 17 U.S.C. § 106 (enumerating exclusive rights); *id.* §§ 107-121 (identifying numerous limitations and exceptions to those rights).

662. Two such limited exclusive rights are at issue in this proceeding – the public performance right and the reproduction right. The right of public performance empowers the copyright owner – subject to any applicable limitations, exemptions, or compulsory licenses – to grant or deny another permission to perform a work in a public forum or medium. 17 U.S.C. §§ 106(4), (6). The right of reproduction empowers the copyright owner – again subject to any applicable limitations, exemptions, or compulsory licenses – to grant or deny another permission to make copies of the work. *Id.* § 106(1).

2. There Is Not – and Never Has Been – a General Sound Recording Public Performance Right; the Section 114 Statutory License at Issues Is an Exception to that Overarching Rule.

663. At no point in our nation's history have sound recordings been subject to a full public performance right. Rather, public performances of sound recordings made in virtually all settings – including in bowling alleys, restaurants, retail stores, community parades, elevators, banks, and, importantly, terrestrial radio – may be made without first having to obtain the permission of the sound recording copyright owner. *See* 17 U.S.C. § 106.

664. The sound recording public performance right covering certain digital audio transmissions, which is involved in this proceeding, constitutes the sole exception to this general rule. *Compare* 17 U.S.C. § 106(4) (granting general public performance right with respect to multiple types of copyrighted works, but excluding sound recordings) *with id.* §§ 106(6), 114 (granting limited public performance only for certain "digital audio transmission[s]"). The webcasting public performance statutory license at issue in this proceeding covers a limited class of sound recording public performances made via certain such digital audio transmissions – *i.e.*, those that conform to the numerous and detailed restrictions and eligibility requirements laid out in section 114(d)(2)(C). The ephemeral reproduction statutory license applies to certain ephemeral reproductions that are made to facilitate certain webcasting performances and that comply with the enumerated eligibility requirements specified in 17 U.S.C. § 112(e).

3. Congress Has Resisted Granting a Broad Sound Recording Performance Right in Order to Protect the Long-Standing, Mutually Beneficial Relationship Between Radio Broadcasters and the Record Industry.

665. The task of valuing the limited digital sound recording performance and ephemeral rights at issue in this case should be undertaken in light of the history, evolution, and limited nature of the sound recording public performance right. While composers of musical compositions have long held rights of public performance and reproduction in their musical works, Congress repeatedly refused to grant any copyright protection at all to sound recordings prior to 1971, and it refused to recognize any right of public performance in sound recordings until 1995. When a public performance right finally was granted, Congress made the right narrow in scope and tailored to address specific concerns expressed by the record companies. In other words, the accretion of sound recording copyright protection has been gradual and limited. Much of the reason for that gradual evolution has been Congress's recognition of (i) the unique relationship between radio broadcasters and the record industry, and (ii) the extraordinary promotional value to the record companies of radio air play.

666. Since the advent of radio in the 1920s, radio broadcasters and the recording industry have enjoyed a mutually beneficial relationship: record companies provide free music and the right to perform that music without compensation, and radio stations give the record companies free promotion in the form of public performances of sound recordings. There is recognition of benefit to both sides, and no right to seek direct compensation. Record companies do not have a right to charge for performances; radio broadcasters do not have a right to be paid for the promotional benefit they confer. Nevertheless, experience has shown that in the marketplace, the greater value is being

conferred by the broadcasters on the record companies. As shown above, the record companies spend [[ ]] each year to convince broadcasters to play their music. *See supra* ¶ 103.

667. Congress has repeatedly recognized that public performances, particularly by radio broadcasters, promote sales of sound recordings and that granting a performance right would disrupt the mutually beneficial relationship between record companies and radio broadcasters, who provided these valuable public performances in their broadcasts. *See* Subcomm. on Courts, Civil Liberties, and the Admin. of Justice, House Comm. on the Judiciary, Performance Rights in Sound Recordings, at 54-55 (Comm. Print 1978) (hereinafter "1978 Register's Report"). Thus, Congress, has been careful to ensure that extensions of copyright protection in favor of the recording industry did not "upset[] the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades." 1995 Senate Report, at 13-17.

668. In 1971, Congress first afforded limited copyright protection to sound recordings in the form of protection against unauthorized reproductions of such works. At the same time, however, it expressly decided not to grant any public performance right in sound recordings. *See* H.R. Rep. No. 92-487, at 3 (1971); S. Rep. No. 92-72, at 3 (1971).

669. During the comprehensive revision of the Copyright Act in 1976, Congress again considered, and rejected, a sound recording performance right. *See* 1975 Senate Report, at 87-88; H.R. Rep. No. 94-1476, at 106, *reprinted in* 1976 U.S.C.C.A.N. 5659 (1976) (hereinafter "1976 House Report"). The rationale for the rejection of a

sound recording performance right was described by the (prevailing) minority views on the Senate Judiciary Committee, as follows:

> Broadcasters and jukebox operators render a service to both performers and recording companies by playing new recordings; under S.1361, they would now be required to pay statutory fees to those who benefit from this arrangement. For years, record companies have gratuitously provided records to stations in hope of securing exposure by repeated play over the air. The financial success of recording companies and artists who contract with these companies is directly related to the volume of record sales, which, in turn, depends in great measure upon the promotion efforts of broadcasters.

S. Rep. No. 93-983, at 225-26 (1974) (minority views of Messrs. Eastland, Ervin, Burdick, Hruska, Thurmond, and Gurney) (emphasis added).

4. Congress Refused to Grant any Public Performance Right in Sound Recordings until 1995; Even Then, it Recognized the Need to Protect Radio Broadcasters' Relationship with the Record Industry and Granted the Right Only With Respect to Interactive and Subscription Services.

670. Not until 1995 – nearly a quarter century later – did Congress create a narrow performance right in sound recordings encompassing a limited category of digital transmissions in the Digital Performance Rights in Sound Recordings Act ("DPRA"). *See* Pub. L. No. 104-39 (1995). As discussed below, the limited right was granted in response to particularized concerns unrelated to the broadcast industry or to noninteractive, nonsubscription webcasting services and explicitly rejected requests by both the Copyright Office and the recording industry for a broad public performance right.

671. When Congress first created a limited public performance right for sound recordings in the "DPRA, the accompanying Senate Report made clear that the right "should do nothing to change or jeopardize the mutually beneficial economic relationship

between the recording and traditional broadcasting industries." 1995 Senate Report, at 15; H.R. Rep. No. 104-274, at 12 (1995) ("1995 House Report"). As the Senate Judiciary Committee observed:

> The Committee, in reviewing the record before it and the goals of this legislation, recognizes that the sale of many sound recordings and the careers of many performers have benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The Committee also recognizes that the radio industry has grown and prospered with the availability and use of prerecorded music.

1995 Senate Report, at 15; 1995 House Report, at 12. The Senate Report thus confirmed that "[i]t is the Committee's intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings." The Senate Report, at 15 (emphasis added).

672. Consistent with this longstanding commitment, the DPRA expressly exempted from sound recording performance right liability nonsubscription, noninteractive transmissions, including "broadcasting and related transmissions." 1995 Senate Report, at 17 (emphasis added); Pub. L. No. 104-39, § 3. Thus, under DPRA, radio broadcasters did not have to pay royalties to sound recording copyright holders for their broadcasts or for any other nonsubscription digital transmissions.

673. In explaining its refusal to impose new burdens on radio broadcasters, Congress identified numerous features of radio programming that place such programming beyond the concerns that animated the creation of the limited public

performance right in sound recordings. Specifically, radio programs (1) are available without subscription; (2) do not rely upon interactive delivery; (3) provide a mix of entertainment and non-entertainment programming and other public interest activities to local communities to fulfill FCC licensing conditions; (4) promote, rather than replace, record sales; and (5) do not constitute "multichannel offerings of various music formats." 1995 Senate Report, at 15. Each of the enumerated features is characteristic of the programming of radio broadcasters regardless of whether the transmission is disseminated over the air or streamed via the Internet.

674. Adoption of a narrowly framed performance right in sound recordings only occurred when the evolution of digital transmission technologies raised concerns that interactive and subscription digital transmissions could evolve in a way that might directly displace record sales. Congress specifically had in mind so-called celestial jukeboxes, pay-per-play, and subscription music business models whereby consumers either could (a) request, and receive for a fee, particular sound recordings delivered by one or another digital delivery mechanism, or (b) subscribe to multiple channels of commercial-free digital audio offerings – *e.g.*, through their cable television operator. 1995 Senate Report, at 14-15; 1995 House Report, at 12-13. Such services could provide a consumer with the opportunity to hear specific recordings of the consumer's choice on demand, or with sufficient specificity to provide a substitute for record ownership. 1995 Senate Report, at 13-15 (describing celestial jukeboxes, pay-per-play, and subscription business models); 1995 House Report, at 12-13 (same).

675. At the same time, both the DPRA and the 1998 Digital Millennium Copyright Act ("DMCA") were explicitly designed to stimulate the development and

application of the new Internet distribution methods and thereby facilitate the rapid and convenient delivery of sound recordings to consumers. S. Rep. No. 105-190, at 2, 8 (1998).

676. In response to this concern, Congress granted sound recording copyright owners the right to be compensated solely for two types of public performances: those occurring via interactive digital transmissions, as well as those occurring via subscription digital transmissions. Pub. L. No. 104-39, § 3 (1995). The DPRA defined an "interactive service" as "one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large does not make a service interactive." Pub. L. No. 104-39, § 3 (codified as amended at 17 U.S.C. § 114(j)(7)); *see also* 1995 Senate Report, at 33-34; 1995 House Report, at 25-26.

677. To account for the spectrum of risks posed by different business models to the displacement of record sales, Congress enacted a three-tiered system of protection for administering the new right. On the top level were interactive services that create risks of cutting significantly into record companies' traditional sources of revenue. As the Senate Judiciary Committee observed, such services were "most likely to have a significant impact on traditional record sales." 1995 Senate Report, at 16. For these services, Congress provided the record companies with a substantial potential substitute source of income by granting them new, exclusive rights in the public performance of their sound recordings by such services. On the bottom level were services, such as radio broadcasters, that were perceived to pose no significant threat to the recording industry.

Congress expressly exempted such services from the sound recording performance right. On the middle level were subscription services, which were deemed to pose, at most, a limited risk to the record industry's traditional revenues. For these services, Congress gave the record companies a limited right subject to a statutory license. Pub. L. No. 104-39, § 3 (1995); 1995 Senate Report at 16.

678. The three-part division of services drawn by Congress is particularly instructive for this case. Congress sharply distinguished the treatment of (1) interactive services – SoundExchange's preferred benchmark – from (2) noninteractive subscription services – from (3) broadcasting. Congress was clear that the former were deemed the most likely to substitute for other record company revenue streams. Noninteractive subscription services caused the next level of concern. Broadcasting and related transmissions caused the least concern.

679. And, as discussed below, when Congress expanded the performance right to include non-subscription noninteractive services, it retained the three-part division among (1) interactive services, (2) noninteractive services, and (3) broadcasting.

680. The 1995 Senate Report further made clear that the DPRA, in adopting only a very limited public performance right, was expressly rejecting the views of both the recording industry and the Copyright Office that a broader right was warranted:

> Notwithstanding the views of the Copyright Office . . . that it is appropriate to create a comprehensive performance right for sound recordings, the Committee has sought to address the concerns of record producers and performers regarding the effects that new digital technology and distribution systems might have on their core business without upsetting the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades.

> Accordingly, the Committee has chosen to create a carefully crafted and narrow performance right, applicable only to certain digital transmissions of sound recordings.

1995 Senate Report, at 13 (emphasis added); *id.* at 3-4, 7; 1995 House Report, at 2-5, 12.

5. The 1998 DMCA Continued to Reflect Congress' Intent to Protect Radio Broadcasters' Relationship with the Record Industry.

681. In 1998, Congress enacted the DMCA, eliminating some of the DPRA's exemptions and expanding the types of transmissions that would be subject to the performance right and eligible for a statutory license, including nonsubscription webcasting and simulcasting. *See, e.g.*, 17 U.S.C. § 114(d)(2) (1998); H.R. Rep. No. 105-796, at 80 (1998) (Conf. Rep.) ("The amendment to subsection (d)(2) extends the availability of a statutory license for subscription transmissions to cover certain eligible nonsubscription transmissions."). The relevant DMCA amendments were inspired by and directed to "a remarkable proliferation of music services offering digital transmissions of sound recordings to the public," primarily via the Internet. *See Staff of H. Comm. on the Judiciary, 105th Cong.*, at 50 (Comm. Print 1998). "In particular," the House Manager reported, "services commonly known as 'webcasters' have begun offering the public multiple highly-themed genre channels of sound recordings on a nonsubscription basis." *Id.* As used in the legislative history, the term "webcaster" referred to "services" originating on the Internet and offering "a diverse range of programming," often "customized" to an individual user's preferences, *id*.

682. The resulting digital sound recording performance right retains the three-part structure adopted in the DPRA based on the perceived risk to the recording industry of substitution for sales of sound recordings. Thus, section 114 continues to distinguish

among (i) exempt transmissions (terrestrial radio, including digital broadcast radio), (ii) transmissions that are subject to a statutory license (noninteractive digital transmissions that meet certain conditions), and (iii) transmissions that require the permission of each sound recording copyright owner whose recordings are performed as part of the transmission (interactive transmissions). *See* Pub. L. No. 105-304, § 405(a) (1998).

683. There is very little explanation of the DMCA amendments in the legislative history. The most enlightening statement appears in the Conference Report, which states:

> Section 114(d)(1)(A) is amended to delete two exemptions that were either the cause of confusion as to the application of the DPRA to certain nonsubscription services (especially webcasters) or which overlapped with other exemptions (such as the exemption in subsection (A)(iii) for nonsubscription broadcast transmissions). The deletion of these two exemptions is not intended to affect the exemption for nonsubscription broadcast transmissions.

H.R. Rep. No. 105-796, at 80 (1998) (Conf. Report). Thus, nothing in the DMCA was intended to affect, and nothing can reasonably be construed as affecting, the DPRA's objectives of (i) protecting the broadcasting industry and its ability to deliver public-interest-oriented programming to the general public without burdening the industry with an additional copyright fee, and (ii) preserving the mutually beneficial relationship that existed between record companies and broadcasters. And nothing in the fact that over-the-air broadcasts are also being streamed over the Internet diminishes these long-recognized benefits.

684. In sum, the legislative history of the DPRA and DMCA demonstrates a legislative intent to preserve the mutually beneficial relationship between the broadcasting and recording industries that springs from the enormous promotional value

to the record companies and artists that radio airplay generates. This historical background should frame the Judges' determination of the royalty rates applicable to Radio Broadcasters in this proceeding.

B. THE APPLICABLE LEGAL STANDARD: THE RATES AND TERMS THAT MOST WILLING BUYERS WOULD PAY MOST WILLING SELLERS IN AN HYPOTHETICAL EFFECTIVELY COMPETITIVE MARKETPLACE

685. The Copyright Royalty Judges are required to:

> establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base [their] decision on economic, competitive and programming information presented by the parties, including—
>
> > **(i)** whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and
> >
> > **(ii)** the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.
>
> In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A).

17 U.S.C. § 114(f)(2)(B).

686. The meaning of the "willing buyer/willing seller" standard is not in serious dispute. The parties' lead economic experts all agree that the standard requires the rates to reflect those of a hypothetical competitive market in which no statutory license exists. *See* PFF Part VI.A.

687. The requirement of effective competition has been established by the Librarian of Congress and is confirmed by the Copyright Royalty Judges, legislative history, basic economics, rate-setting principles, and even SoundExchange's economic expert Professor Rubinfeld. *See* PFF ¶ 177.

1. The Librarian of Congress and the Copyright Royalty Judges Have Made Clear that the Applicable Legal Standard Requires a Hypothetical Effectively Competitive Market.

688. Congress has directed the Copyright Royalty Judges to "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(2)(B) (emphasis added). In the first rate-setting proceeding after the willing-buyer-willing-seller standard was created, the Librarian of Congress made clear that this statutory reference should be construed as "'the rates to which, absent special circumstances, most willing buyers and willing sellers would agree' in a competitive marketplace." *See* 67 Fed. Reg. 45239, 45244-45 (July 8, 2002) (emphasis added) (internal citation omitted).[12]

689. The statute expressly requires the Judges to follow the Librarian of Congress's interpretation. *See* 17 U.S.C. § 803(a)(1).

690. In light of the statutory command to follow the Librarian's prior interpretations, the Copyright Royalty Judges consistently and repeatedly have applied this competition requirement in past rate-setting proceedings. For example, in the first rate-setting proceeding after Congress replaced prior Copyright Arbitration Royalty

[12] Notably, in his references to the applicable statutory standard in his written direct testimony, Professor Rubinfeld never quoted or discussed this requirement. *See* 5/5/2015 Tr. 1919:4-1922:14 (Rubinfeld). Indeed, Professor Rubinfeld chose to elide over the requirement of effective competition when quoting from the *Web III Remand* decision. *Id.* at 1924:23-1928:13.

Panels with the Copyright Royalty Judges, the Judges affirmed the effective competition requirement. *Web II*, 72 Fed. Reg. at 24091 (observing that "[a]n effectively competitive market is one in which super-competitive prices or below-market prices cannot be extracted by sellers or buyers . . . .).

691. In the most recent webcasting proceeding, the Judges once again emphasized the effective competition requirement.

> [A]s the Librarian of Congress held in *Web I*, the "willing seller/willing buyer" standard calls for rates that would have been set in a "*competitive* marketplace." 67 FR at 45244-45 (emphasis added). *See also Web II*, 67 FR at 24091-93 (explaining that *Web I* required an "effectively competitive market" rather than a "perfectly competitive market." (emphasis added)).

Web III Remand, 79 Fed. Reg. at 23114 n.37 (emphasis in original). As a result of this consistent history, the effective competition requirement cannot be seriously disputed.

2. Basic Economic Principles Confirm that the Rate-Setting Standard Requires a Hypothetical Effectively Competitive Marketplace.

692. Basic economic principles likewise make clear that fees set in this proceeding must be those that would be established in an effectively competitive market. *See generally* Katz WDT ¶¶ 5, 17, 18-34; *see also* Shapiro WDT at 3, 10-16 (using term "workably competitive market"). The key attribute of a competitive market is that prices are constrained by multiple sellers offering substitute goods. As Professor Katz describes it, "buyer choice is the essence of competition because it's the possibility of substituting the products of one seller for another that drives sellers to want to compete." *See* 5/26/15 Tr. 5649:4-8 (Katz); *accord* 5/11/15 Tr. 2802:14-2803:8 (Katz); Katz WDT ¶¶ 32-34.

693. Even SoundExchange's economic witness in *SDARS II*, Dr. Ordover, recognized that rates must be set in a hypothetically competitive market. The Copyright Royalty Judges observed that:

> Dr. Ordover chose interactive subscription services because of his belief that they represent voluntary transactions in a competitive marketplace free of regulatory overhang. He also opined that such transactions provide sufficient information based on multiple buyer/seller interactions, are not distorted by the exercise of undue market power on either the buyer's or seller's side . . . .

See Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23054 at 23062 (Apr. 17, 2013) ("SDARS II") (emphasis added).

694. The centralized licensing permitted by section 114 is inconsistent with competitive market pricing. As Professor Katz explains:

> Economic analysis indicates that the price set in a market with a single seller and a few large buyers will tend to give rise to prices much closer to the pure monopoly prices than to a competitive price even if the parties are equally skilled and sophisticated bargainers.

Katz WDT ¶¶ 38, 39; *accord* Shapiro WDT at 14 ("When SoundExchange is negotiating with a music user on behalf of a group of record companies, those negotiations by definition do not include any element of price competition among those record companies."). Previous decisions have confirmed that under the statutory standard, "neither sellers nor buyers can be said to be 'willing' partners to an agreement if they are coerced to agree to a price through the exercise of overwhelming market power." *Web II*, 72 Fed. Reg. at, 24091.[13]

[13] As described in PFF Part VI.A, negotiations done in a market where goods are complements are even more inconsistent with competitive market pricing.

695. To prevent this exercise of market power – i.e., the ability to elevate the market price above the competitive level – Congress empowered the Copyright Royalty Judges to set statutory license rates if the parties are unable to reach agreement, which will ensure that the resulting rates and terms are kept to the competitive level. As Professor Katz testified:

> [F]rom the perspective of economics, it would make no sense for Congress to have enacted a statutory rate-determination process if Congress intended that monopolistic license fees could meet the statutory standard. If Congress had intended monopoly rates to prevail, then it could simply have created the statutory license and given SoundExchange antitrust immunity unilaterally to set rates on behalf of the industry. Congress did not do so.

696. Katz WDT ¶ 16; Shapiro WDT at 11 ("a market that is monopolized or controlled by a cartel is *not* workably competitive. If such markets were considered workably competitive, the concept of workable competition would lose all meaning."). The creation of a rate-determination process and its willing-buyer/willing seller standard can best be reconciled with economic principles and common sense by interpreting willing buyers as those who have meaningful choices among competing sellers, rather than facing a single, all-or-nothing offer from a monopolist. Katz WDT ¶ 17.

697. As discussed in NAB's Proposed Findings of Fact, Part VI.A., *supra*, a competitive market standard serves the public interest and is consistent with economic policy. In Professor Katz's words, "[m]any U.S. public policies, including antitrust and regulatory policies, seek to protect competition because of the benefits it delivers to consumers. These benefits typically arrive in the form of lower, cost-based prices, greater innovation and variety, and/or improved product and service quality." *See supra* PFF

¶ 183. In this regard, the requirement of effective competition is consistent with Copyright's goal of benefiting public, not private interests.

698. Further, as shown in NAB's Proposed Findings of Fact, a monopolized market is not effectively competitive, and suppliers of complementary products do not compete with each other. Indeed, an oligopoly of suppliers of complementary products might charge higher prices than would a monopoly supplier.

699. Competition pushes prices towards the competing suppliers' marginal costs, including any opportunity costs or benefits, and in effectively competitive markets, prices will be near marginal cost. Thus, the public benefits from a competitive market in the form of lower, cost-based prices, greater innovation and variety, and/or improved product and service quality. *Id.* Thus, competition typically leads to a distribution of benefits that favors buyers; it does not simply split the gains from trade equally between buyers and sellers. *Id.*

3. Congress's Amendment of Section 114 in Response to The DOJ's Concern that the Statute Would Lead to Supra-Competitive Pricing Further Confirms Congress's Adoption of a Competitive Marketplace Rate-Setting Standard.

700. Congress's favorable response to the United States Department of Justice's concern that section 114 not result in supra-competitive pricing further confirms that Congress intended the willing buyer/willing seller standard to be applied in a competitive marketplace. Congress amended the antitrust immunity provision, section 114(e), in response to DOJ's concern that the prior proposed provision "could be read to provide statutory authority to record companies to form a licensing cartel. In light of the concentration of the record industry in which 6 major companies account for 80 to

85 percent of the U.S. market, this could, in the words of the Justice Department 'cause great mischief by allowing the formation of a cartel immune from antitrust scrutiny." Statement of Senator Patrick Leahy, Digital Performance Right in Sound Recordings Act of 1995, S. 227, 141 Cong. Rec. S-11961 (1995) *and* Letter from Acting Assistant Attorney General Kent Markus to Hon. Patrick Leahy, June 20, 1995, *reprinted in* Cong. Rec. S11961 col. 3 - S11962 col. 1 (1995).

701. Significantly, DOJ acceded to the continued exemption in the case of the statutory licenses here at issue on the basis that the review of rates and terms by a CARP would operate as a check on the supra-competitive rates that otherwise might be attained by the centralized licensing authority. *See* 141 Cong. Rec. S. 11,962-63 (daily ed. Aug. 8, 1995) (Letter from Assistant Attorney General Andrew Fois to Hon. Patrick Leahy, July 21, 1995) (noting that "any impasse on license fees, terms and conditions can be resolved by the rate panel, if necessary.").

4. In an Analogous Context, the ASCAP and BMI Rate Courts Have Interpreted "Reasonable" Rates To Signify Rates that Would Prevail in a Hypothetical Effectively Competitive Marketplace.

702. The analogous law of musical work performance rights rate-setting further confirms that the statutory willing buyer/willing seller standard refers to rates that would have been negotiated in a competitive marketplace.

703. The legislative history to the DMCA makes clear that Congress intended the "willing buyer/willing seller" standard to approximate competitive fair market value and not to lead to supra-competitive prices. The "willing buyer/willing seller" standard was introduced into section 114 by the DMCA in 1998. *See* DMCA § 405. The DMCA

Conference Report, which is the only committee report concerning the DMCA amendments to section 114, states that "consistent with existing law, a copyright arbitration proceeding should be impaneled to determine reasonable rates and terms." H.R. Rep. No. 105-796, at 86 (1998) (Conf. Rep.) (emphasis added).

704. In the analogous musical works performance rights context, the ASCAP and BMI rate courts have interpreted the phrase "reasonable rates and terms" as those that would prevail in a competitive market. By antitrust consent decree, the two major musical works performing rights organizations ("PROs"), ASCAP and BMI, must license musical works at "reasonable" rates; should voluntary negotiations fail, the rate courts perform a function similar to the Copyright Royalty Judges in setting "reasonable" rates and terms. [14]

705. The ASCAP rate court has made clear that "the appropriate analysis ordinarily seeks to define a rate or range of rates that approximates the rates that would be set in a competitive market." *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 576 (2d Cir. 1990) (*reprinting* Magistrate Judge Dolinger's S.D.N.Y. opinion) (emphasis added). The *Showtime* rate court observed that "the principal concern in seeking to determine a reasonable royalty is the policy of encouraging competition in the

[14] Under the terms of the ASCAP Consent Decree, an ASCAP licensee can apply to the U.S. district court that supervises the Decree for a determination of a reasonable rate. *See United States v. ASCAP*, No. 41-1395 (WCC), 2001 WL 1589999, at *6 (Art. IX (A-B)) (S.D.N.Y. June 11, 2001) (providing that if ASCAP and a licensee are unable to agree upon a license fee, "ASCAP may apply to the Court for the determination of a reasonable fee" and that "the burden of proof shall be on ASCAP to establish the reasonableness of the fee it seeks"). This review mechanism is commonly referred to as the "ASCAP Rate Court." A "BMI Rate Court" was created in 1994, although even before that time BMI operated under the terms of a Consent Decree with the Justice Department. *See United States v. Broadcast Music, Inc.*, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y 1966), decree modified, 1996-1 Trade Cas. (CCH) ¶ 71,378, at 76,891 (S.D.N.Y. Nov. 18, 1994) (providing that if BMI and a licensee are unable to agree upon a license fee, BMI "may forthwith apply to this Court for the determination of a reasonable fee" and that BMI shall bear the burden of establishing the reasonableness of the fee).

relevant industry and avoiding inflated pricing resulting from artificial market control." *Id.* at 577 (*reprinting* Dolinger opinion). In an observation equally true for the pending rate-setting proceeding, the court found that:

> The opportunity of users of music rights to resort to the rate court whenever they apprehend that ASCAP's market power may subject them to unreasonably high fees would have little meaning if that court were obliged to set a "reasonable" fee solely or even primarily on the basis of the fees ASCAP had successfully obtained from other users.

Id. at 570; *accord In re Application of MobiTV, Inc.*, 712 F.Supp.2d 206, 233 (S.D.N.Y. 2010), *aff'd sub nom. ASCAP v. MobiTV*, 681 F.3d 76 (2d Cir. 2012). The U.S. Court of Appeals for the Second Circuit affirmed the rate court's decision, finding that "Magistrate Dolinger performed the rate-setting task conscientiously, thoroughly, and fairly." *Showtime*, 912 F.2d at 571.

706. In a decision three years later, the ASCAP rate court affirmed these basic principles:

> As observed in prior decisions, the 1941 Consent Decree and its 1950 successor were designed to limit the perceived ability of ASCAP to utilize its control of most of the music licensing market to extract supra-competitive prices from its customers. Necessarily, then, in carrying out its obligation to set a "reasonable" rate within the meaning of Article IX(A) of the Decree, the rate court must concern itself principally with "defin[ing] a rate or range of rates that approximates the rates that would be set in a competitive market."

United States v. ASCAP (Application of Buffalo Broad. Co.), 1993-1 Trade Cas. (CCH) ¶ 70,153, at 69,655 (S.D.N.Y. 1993) (emphasis added) (*quoting Showtime*, 912 F.2d at 576) (internal citations omitted), *aff'd in part, vacated in part on other grounds*, 157 F.R.D. 173 (S.D.N.Y. 1994); *accord id.* at 69,656 (characterizing the market that rate courts "seek to create" in setting reasonable fees for ASCAP licenses as a "theoretical 'competitive' market"); *United States v. ASCAP (Application of Capital Cities/ABC,*

Inc.), 157 F.R.D. 173, 181 (S.D.N.Y. 1994) (citing with approval Magistrate Judge Dolinger's observation that role of rate court is to set rates that approximate competitive market rates).

- Just last year, the ASCAP rate court again emphasized the importance of setting rates that reflect those that would be set in a competitive market. *Pandora v. ASCAP*, 6 F.Supp.3d 317, 353-54 (S.D.N.Y 2014), *aff'd*, 785 F.3d 73 (2d Cir. 2015). Specifically, it observed:

- "ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music." *Id.* at 353 (quoting *ASCAP v. MobiTV*, 681 F.3d at 82).

- "[B]ecause music performance rights are largely aggregated in the PROs [performance rights organizations] which operate under consent decrees, 'there is no competitive market in music rights.'" *Id.* (quoting *Showtime*, 912 F.2d at 577).

- "Consequently, fair market value is a "hypothetical" matter." *Id.* (citing *Showtime*, 912 F.2d at 569).

- "In such circumstances, 'the appropriate analysis ordinarily seeks to define a rate or range of rates that approximates the rates that would be set in a competitive market.'" *Id.* at 354 (citing *Showtime*, 912 F.2d at 576).

707. The ASCAP and BMI rate courts likewise have characterized their task as setting "fair market value" – *e.g.*, "the price that a willing buyer and a willing seller would agree to in an arm's length transaction." *Showtime*, 912 F.2d at 569; *accord ASCAP v. MobiTV*, 681 F.3d at 82; *United States v. BMI (Application of Music Choice)*, 426 F.3d 91, 95 (2d Cir. 2005) ("The rate court is responsible for establishing the fair market value of the music rights, in other words, the price that a willing buyer and a willing seller would agree to in an arm's length transaction." (internal citations and quotations omitted)).

708. The interchangeable use by the rate courts of the concepts "reasonable," "fair market value," "competitive market," and "willing buyer/willing seller" confirms

that the concept of willing buyer/willing seller rates applicable here means competitive market rate – just as the Librarian held in the initial webcasting CARP proceeding and the Copyright Royalty Judges have confirmed in multiple rate-setting proceedings thereafter. *See supra* Part XI.B.1.

709. Consistent with this competitive marketplace requirement, the rate court has warned that prior agreements proffered as benchmarks must have been negotiated in a sufficiently competitive environment in order for them to serve as useful benchmarks. *See In re Application of MobiTV.*, 712 F.Supp.2d at, 233 (observing that in considering proposed benchmark agreements, rate court must ascertain that "'the assertedly analogous market under examination reflects an adequate degree of competition to justify reliance on agreements that it has spawned'" (quoting *United States v. BMI (In re Application of Music Choice)*, 426 F.3d 91, 96 (2d Cir.2005)); *accord Showtime*, 912 F.2d at 577. It has not hesitated to reject prior negotiated agreements proffered as benchmarks where they reflect the exercise of significant market power by the collective negotiating the agreement. *See, e.g.*, *Pandora v. ASCAP*, 6 F. Supp. 3d at 357 (rejecting two proffered benchmarks because "Sony and UMPG each exercised their considerable market power to extract supra-competitive prices") ; *Showtime*, 912 F.2d at 578-79, 582, 586 (rejecting agreements proffered by ASCAP as benchmarks due to ASCAP's significantly greater bargaining leverage and because "although they resulted from so-called 'arms length' negotiations, they do not necessarily reflect rates that have a discernible relationship to what a competitive – or even a partially competitive – market would produce").

5. SoundExchange's Theory that Countervailing Market Power Satisfies the Requirement for an Effectively Competitive Market Fails.

710. SoundExchange contends that its proposed benchmark license agreements were reached in a market that is sufficiently competitive. SoundExchange's benchmark agreements and fees emanate from a very different market than one described by the Librarian of Congress, the Judges, and the rate courts – one in which:

- the statutory license and SoundExchange does not exist;
- the three major record companies control exclusive repertoires that are complements, rather than substitutes, for one another (PFF Part VIII.A.1);
- these repertoires are undisputedly "must-haves" for the licensee services in that market (PFF Part VIII.A.1);
- the major labels are permitted to exercise their existing market dominance, derived from the consolidation of hundreds of thousands of sound recording copyrights into three major companies that control roughly 85% of the sound recording copyrights in the market. *See supra* PFF ¶¶ 172, 174.

711. Such a market clearly is not competitive. Nevertheless, SoundExchange argues that the mandate for effective competition is satisfied because some buyers in the marketplace have an undefined amount of bargaining leverage to capture an undefined amount of the available surplus. However, markets with a single seller and a few large buyers will tend to give rise to prices much closer to the pure monopoly price than to a competitive price even if the parties are equally skillful and sophisticated bargainers. *See* PFF Part VI.A. Moreover, when a licensor with market power faces two or more potential licensees, the resulting price will be even higher, and thus, further away from the competitive level. *Id.*

712. If the Copyright Royalty Judges were simply to replicate the rates that the record companies could negotiate with the webcasters on their own, that would eviscerate

the protections sought by the Justice Department and implemented by Congress to prevent the exercise of market power.

713. Moreover, the market on which SoundExchange relies – the licenses to interactive services – is precisely the market that Congress recognized should be treated differently than the market for statutory services.

6. The Copyright Act Requires the Judges To Set Different Rates for Different Types of Services; Simulcasters Are One Such Different Type of Service.

714. The section 114 statutory license at issue in this proceeding specifically mandates that the rates and terms set by the Copyright Royalty Judges "shall distinguish among the different types of eligible nonsubscription transmission services then in operation, and shall include a minimum fee for each such type of service." 17 U.S.C. § 114(f)(2)(B) (emphasis added). This is not a permissive request, but an affirmative obligation. The statute does not require the Judges to determine whether or not there are different types of services; clearly, in Congress's view, there are. Rather, the Judges must examine each of the different types of services and prescribe a royalty rate that accounts for the unique characteristics of those services and the effect on a competitive market rate for such services.

715. The legislative history of section 114, discussed in Part XI.A, above, indicates that simulcasters are one such type of service that should be distinguished in setting rates. Congress repeatedly recognized that broadcasters were different, and that broadcast performances benefitted record companies and artists. Among other things, Congress expressed concerns about threats to the recording industry posed by subscription and interactive services, but not by broadcasting and related transmissions.

Congress emphasized that "the sale of many sound recordings and the careers of many performers have benefitted considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported free, over-the-air broadcasting." *See supra* ¶ 671. And, in explaining the reason it did not extend a performance right to broadcasters, Congress identified numerous features of radio programming that placed such programming beyond the concerns that animated the creation of the public performance. *See supra* ¶ 673. Those features are equally true of simulcasting. *Id.*

7. The Additional Statutory Factors Do Not Change the Core Standard, But Do Make Clear that Promotion and Substitution of Other Revenue Streams – *i.e.*, Opportunity Costs – Must Be Considered.

716. The statute mandates that "the Copyright Royalty Judges shall base [their] decision on economic, competitive and programming information presented by the parties, including –

> (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and
>
> (ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk."

17 U.S.C. § 114(f)(2)(B) (emphasis added). The statute also provides that the Judges "may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A)." *Id.*

717. The legislative history of the sound recording performance right makes clear that Congress has long considered the promotional benefit that is conferred on the record companies and artists by airplay – particularly airplay by radio broadcasters – to be an essential element of the value received by record companies and artists from performances of sound recordings. *See supra* Part XI.A.3. Conversely, Congress also was concerned about the effect of certain services – most notably interactive services – on record sales. *See* 1995 Senate Report, at 16 (observing that interactive services are "most likely to have a significant impact on traditional record sales").

718. In keeping with this history, Congress made clear that the Copyright Royalty Judges must consider these promotional benefits and possible substitution risks in assessing what a willing buyer would pay a willing seller in a competitive market. This is not discretionary; it is mandatory. 17 U.S.C. § 114(f)(2)(B) (providing that Judges "shall base [their] decision on," *inter alia*, "whether use of the service may substitute for or may promote the sales of phonorecords" (emphasis added)).

a. The Economic Rationale for the Factor

719. This focus on promotional benefit to the record companies and artists makes economic sense. As Professor Katz testified :

> Some forms of music performance generate promotional benefits that, on balance, stimulate the sale of recordings, to the benefit of record companies. For example, terrestrial radio broadcasts have long been recognized as an important source of promotion for sound recordings, leading to higher record company sales of music to consumers. The existence of promotional benefits has implications for the bargain that would be reached between a willing buyer and willing seller of music performance rights: the royalties agreed to by a willing buyer and willing seller would reflect the promotional benefits generated by the buyer. Specifically, because the promotional benefits are equivalent to a fee paid by the buyer to the seller (*i.e.*, a form of payment in kind), economic

> theory predicts that, all else equal, a buyer that generates greater promotional benefits will pay a lower royalty fee.

Katz WDT ¶ 81; Shapiro WDT at 6 ("a service that promotes other profitable sales by the record company will pay a lower price in a workably competitive market (based on the lower economic cost to the record company of performances by this service)"). A willing seller would take these benefits into account in a competitive market.

720. The legislative history to the DPRA recognizes that interactive services are more likely to be substitutional than noninteractive services.

> "Of all the new forms of digital transmission services, interactive services are most likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales." H.R. Rep. No. 104-274, at 14 (1995).

Thus, Congress was particularly concerned by the potential substitution effects of interactive services, and for that reason, treated them differently than noninteractive services.

721. Because the promotional benefits of licensing to a service are a negative opportunity cost (or benefit) to the record companies, a net promotional benefit means that the record companies as willing sellers would be willing to pay a lower rate.

b. The Promotion/Substitution Factor Does Not Guarantee The Record Companies a Particular Level of Revenues But Rather Merely Directs The Judges To Consider Record Labels' Opportunity Costs and Benefits from Licensing Their Works to Particular Types of Services.

722. While the promotional/substitutional effect of a particular service is a statutorily mandated rate-setting consideration, it is part and parcel of the overall willing-

buyer-willing-seller/competitive market standard rather than a separate policy consideration in its own right. As the CARP found in *Web I*:

> [T]he willing buyer/willing seller standard is the only standard to be applied. The two factors enumerated in the statute do not constitute additional standards or policy considerations. Nor are these factors to be used after determining the willing buyer/willing seller rate as bases to adjust that determination upward or downward. The statutory factors are merely factors to be considered, along with any other relevant factors, in determining rates under the willing buyer/willing seller standard.

CARP Report at 21. The Librarian of Congress affirmed this determination, agreeing that the factor "does not constitute an additional standard or policy consideration to be used after rates are set to adjust a base rate upwards or downwards." *Web I*, 67 Fed. Reg. at 45244 (emphasis added). The Copyright Royalty Judges in subsequent webcasting rate-setting proceedings similarly followed this holding. *See Web II*, 72 Fed. Reg. at 24087 (observing that the two factors "do not constitute additional standards, nor should they be used to adjust the rates determined by the willing seller/willing buyer standard" (emphasis added)); *Web III Remand*, 79 Fed. Reg. at 23119 n.50 (finding that the two factors "are subsumed in its willing buyer/willing seller analyses").

723. Importantly, the factor does not embody a policy consideration of protecting record company revenues. Just as the Judges have concluded that the statute does not guarantee a particular rate of return to individual webcasters, *Web III Remand*, 79 Fed. Reg. at 23107, the statute similarly does not guarantee the record companies' existing revenues. That is more the province of the separate rate-setting standard under 17 U.S.C. § 801(b)(1)(B), which directs the Judges to set rates that, *inter alia*, "afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions." 17 U.S.C. § 801(b)(1)(B). The willing-

buyer-willing-seller standard, by contrast, simply considers the rates to which most willing buyers and willing sellers would agree in an effectively competitive market.

724. Rather than serving as a one-sided record label revenue guarantee, the promotion and substitution factor is best understood as a directive to take account of the record companies' opportunity costs and benefits caused by use of the statutory service when applying the willing buyer/willing seller standard. Where a type of service – such as radio simulcasting – "promote[s] the sales of phonorecords or otherwise … may enhance the sound recording copyright owner's other streams of revenue from its sound recordings," it should be rewarded through lower rates. *See* 17 U.S.C. § 114(f)(2)(B)(i). Conversely, if a type of service "substitute[s] for … the sales of phonorecords or otherwise may interfere with … the sound recording copyright owner's other streams of revenue from its sound recordings, it should be subject to higher rates. *Id.*

725. The focus on opportunity costs is clear from the use of the word "other" in the factor's identification of revenue streams: "whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's <u>other</u> streams of revenue from its sound recordings." *Id*. (emphasis added). In other words, the revenue stream that is the focus of the factor is not the revenue stream from statutory webcasting; it is the effect of the service on "other streams of revenue."

726. Moreover, the relevant opportunity costs identified by the factor are the opportunity costs from "use of the [licensed] service." *Id*. The dual focus of the promotion/substitution factor in a non-exhaustive list of relevant factors confirms that the factor only requires a consideration of the <u>opportunity costs and benefits</u> that record

companies experience when licensing the statutory services at issue. As such, the factor is not an invitation to protect the record companies' existing revenue levels or to cover their fixed costs.

C. THE NAB'S RATE PROPOSAL

727. The Section 114 statutory license at issue in this proceeding mandates that the rates and terms set by the Judges "shall distinguish among the different types of eligible nonsubscription transmission services then in operation, and shall include a minimum fee for each such type of service." 17 U.S.C. § 114(f)(2)(B).

728. Radio simulcasting is unique and has characteristics that make appropriate the determination of a rate that is different and lower than the rate applicable to customized webcasters. *See* PFF Part III.

729. Radio broadcasters' core business is their over-the-air broadcast within their local footprint, and they can reach their audience through this activity without having to pay sound recording royalties. *See* PFF III.A. This ability renders simulcasting less essential to their business as compared with a pureplay webcaster and lowers the amount that a willing simulcast buyer would pay for the sound recording performance license at issue here.

730. In a competitive market, the value of the sound recording performance right is less for simulcasters than for Internet-only webcasting due to the comparatively smaller role of sound recordings in the programming for simulcasting. *See* PFF Part III.

731. Compared to custom webcasting, the programming for simulcasting uses far fewer sound recordings and contains far more non-music content, such as personality

centered shows and other hosted programs, news, weather, sporting events, and deejay talk. *See* PFF Part III.A. Thus, a willing simulcast buyer would pay less for the digital sound recording performance right than custom music services.

732. The Judges are required by 17 U.S.C. § 114(f)(2)(B)(i) to consider the promotional or substitutional effect of a service when setting royalty rates.

733. Over-the-air radio has enormous promotional value to the record companies and is one of the most significant driving forces in the sale of sound recordings. *See* PFF Part III.C. Over-the-air radio is important to the success of the recording industry and its artists. *See id.*

734. Record companies expend [[ ]] to induce radio stations to play their recordings and engage in countless activities to promote their sound recordings to terrestrial radio for the purpose of boosting sales. Therefore, it is reasonable to conclude that radio airplay confers **[[ ]]** in value. If the net promotional value of radio airplay did not exceed the **[[ ]]** that the record companies expend promoting to radio, the record companies would not incur these costs. *See* PFF ¶¶ 102-06.

735. The promotional benefit of public performances in influencing increased sales of sound recordings constitutes additional value (on top of any royalty payments) flowing to sound recording copyright owners and performing artists that would be considered as compensation by willing buyers and willing sellers in a competitive market. *See* PFF ¶¶ 199, 203, 214.

736. On a listener-for-listener basis, simulcasting provides the same promotional value as terrestrial radio. *See* PFF Part III.C.

737. Simulcasting does not pose any greater risk of displacing sales or licenses of sound recordings than the minimal risk posed by over-the-air radio, and SoundExchange's witnesses failed to provide any meaningful evidence, beyond pure speculation, that simulcasting is substitutional. *See* PFF Part III.C.

738. In light of the foregoing, the opportunity costs to the record companies of licensing simulcasting is near zero or negative. *See* PFF Part VI.C.1.

739. NAB's proposed fee of $0.0005 per performance is consistent with the fee that would be agreed for simulcasting in an effectively competitive market without a statutory license and is adopted.

740. NAB's proposed fee for Small Streaming Stations (with average concurrent listeners under 100, which is equal to 876,000 Aggregate Tuning Hours per year) is a fee that would be agreed in an effectively competitive market. The evidence shows that broadcasters cannot meaningfully earn revenues from such a small audience, it is in the public interest, and that there is benefit and no harm to record companies and artists from allowing simulcasting to reach such audiences.

741. A simulcaster as a willing buyer in a competitive market would not agree to pay a willing seller a share of its revenue in exchange for a license to perform sound recordings because such a fee does not properly account for the value contributed to the service by the simulcaster. *See* PFF Part IX.

742. A radio broadcaster as a willing buyer would not agree to pay a willing seller a share of its revenue in exchange for a license to perform sound recordings because such a fee metric does not take into account the different amount of music used by different services or the different amounts of music used by different types of stations, including talk-intensive or mixed-format stations. *See* PFF Part IX.

743. A percentage of revenue fee is unworkable as applied to simulcasters due to the intractable problems and controversies that would arise in connection with the allocation of bundled revenue among different stations, platforms and programs.

744. A percent of revenue fee metric is inappropriate to apply to simulcasters. *See* PFF Part IX.

745. A radio broadcaster as a willing buyer would not agree to pay a willing seller under a "greater of" metric because such a metric improperly places all risk on the buyer, as the seller will be paid even if the buyer sustains losses. *See* PFF Part IX.D, E.

746. A radio broadcaster as a willing buyer would not agree to pay a willing seller under a "greater of" metric because such a metric would, upon the buyer's making the business more successful, allow the seller to recover a higher amount for providing nothing more than it would have provided otherwise. *See* PFF Part IX.D, E.

747. NAB's proposed rates best reflect those that willing buyers would pay willing sellers in an effectively competitive market. *See* PFF Part VI.

D. REJECTION OF SOUNDEXCHANGE'S PROPOSED FEES AND FEE MODELS

748. SoundExchange has presented no case with respect to simulcasting, but has merely "bootstrapped" its arguments relative to custom webcasters to simulcasting.

749. SoundExchange's chief economist, Professor Rubinfeld, primarily based his fee model on benchmark agreements entered into by interactive streaming music services. His interactive benchmark analysis provides no evidence of the "rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller" for the sound recording public performance royalty. 17 U.S.C. § 114(f)(2); *See* PFF Part VIII.A. His benchmark analysis is pervasively flawed and unreliable because he:

- improperly relies on a proposed benchmark market that exhibits a marked lack of effective competition, where the repertoires of each of the three major record labels are complementary "must haves" in order for an interactive music service to operate successfully;
- improperly assumes that the commercial statutory webcasting market has converged with the interactive services market when it has not, particularly with respect to simulcasting;
- invalidly assumes that license fees will constitute the same percentage of revenue for both interactive music services and noninteractive statutory services;
- does not properly account for advertising-supported services in performing his interactivity adjustment to derive his proposed rate for noninteractive services;
- relies on improper and biased weighting in developing his average per-performance rate in a way that systematically and significantly inflated his proposed license fee;
- fails to account for services' non-license fee costs;
- does not properly account for differences in the promotional and substitutional effects of interactive music services on one hand and noninteractive statutory services on the other;
- does not properly account for the significantly less important role that sound recordings play on simulcast services as compared with interactive music services;
- underestimates the number of noncompensable plays in calculating his interactivity adjustment; and

- improperly relies on a survey by Professor McFadden's survey that does not corroborate Professor Rubinfeld's interactivity adjustment.

See PFF Part VIII.A. If only some of these flaws are corrected, Professor Rubinfeld's analysis corroborates NAB's fee proposal. *See* PFF Part VIII.A.

750. Professor Rubinfeld's other proposed benchmark analyses based on agreements with Apple, Beats, Nokia MixRadio, Rhapsody UnRadio, and Spotify Free similarly provide no evidence of the "rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller" for the sound recording public performance royalty. 17 U.S.C. § 114(f)(2); *see* PFF VIII.C, E. Rather, properly analyzed, the Apple benchmark and effective rates paid by [[ ]] support NAB's fee proposal. *See* PFF Part VIII.D; ¶ 219..

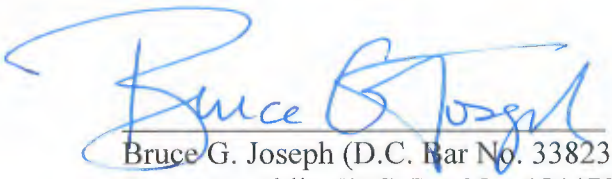
E. TERMS

751. The NAB's proposed terms best reflect those that would be reached between willing simulcast buyers and willing sellers in an effectively competitive market. *See* PFF Part X. SoundExchange's proposed conflicting terms do not. *See* PFF Part X. These include:

- Adopting NAB's definition of "Broadcast Retransmission" to define simulcasting;
- Continuing the requirement that audits be conducted by licensed certified public accountants and requiring them to be completed within 6 months;
- Maintaining the 45-day reporting and payment period;
- Making clear that the relevant definition of ATH excludes non-music programming
- Maintaining a single late fee for payments and setting a reasonable rate;

- Allowing broadcasters to recover overpayments;
- Excluding performances of 15 seconds or less from the definition of performances subject to fee; and
- Adopting a provision for notice and cure.

Respectfully submitted,



Bruce G. Joseph (D.C. Bar No. 338236)
Karyn K. Ablin (D.C. Bar No. 454473)
Michael L. Sturm (D.C. Bar No. 422338)
Jennifer L. Elgin (D.C. Bar No. 432975)
Christopher M. Mills (D.C. Bar No. 492840)
WILEY REIN LLP
1776 K St. NW
Washington, DC 20006
Phone: 202-719-7000
Facsimile: 202-719-7049

Counsel for the National Association of Broadcasters

June 19, 2015

PUBLIC VERSION

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2015, I caused copies of the foregoing document to be served via email on the following parties, which have consented to email service:

Cynthia Greer Sirius XM Radio, Inc. 1500 Eckington Place, NE Washington, DC 20002 cynthia.greer@siriusxm.com P: 202-380-1476 F: 202-380-4592 *Sirius XM Radio Inc.*	Patrick Donnelly Sirius XM Radio, Inc. 1221 Avenue of the Americas 36th Floor New York, NY 10020 patrick.donnelly@siriusxm.com P: 212-584-5100 F: 212-584-5200 *Sirius XM Radio Inc.*
Paul Fakler Martin Cunniff Jackson Toof Arent Fox LLP 1675 Broadway New York, NY 10019 Paul.Fakler@arentfox.com Martin.Cunniff@arentfox.com Jackson.Toof@arentfox.com *Counsel for Sirius XM Radio Inc.*	Gary Greenstein Wilson Sonsini Goodrich & Rosati 1700 K Street, NW, 5th Floor Washington, DC 20006 ggreenstein@wsgr.com P: 202-973-8849 F: 202-973-8899 *Counsel for Pandora Media, Inc.*
Christopher Harrison Pandora Media, Inc. 2101 Webster Street, Suite 1650 Oakland, CA 94612 charrison@pandora.com P: 510-858-3049 F: 510-451-4286 *Pandora Media, Inc.*	R. Bruce Rich Todd Larson Sabrina Perelman Weil, Gotshal & Manges LLP 767 Fifth Avenue New York, NY 10153 r.bruce.rich@weil.com todd.larson@weil.com sabrina.perelman@weil.com P: 212-310-8170 F: 212-310-8007 *Counsel for Pandora Media, Inc.*

C. Colin Rushing Bradley Prendergast SoundExchange, Inc. 733 10th Street, NW, 10th Floor Washington, DC 20001 crushing@soundexchange.com bprendergast@soundexchange.com P: 202-640-5858 F: 202-640-5883 *SoundExchange*	Glenn Pomerantz Kelly Klaus Anjan Choundhury Melinda LeMoine Munger, Tolles & Olson LLP 355 S. Grand Avenue, 35th Floor Los Angeles, CA 90071-1560 Glenn.Pomerantz@mto.com Kelly.Klaus@mto.com Anjan.Choudhury@mto.com Melinda.LeMoine@mto.com P: 213-683-9100 F: 213-687-3702 *Counsel for SoundExchange*
Catherine Gellis P.O. Box 2477 Sausalito, CA 94966 cathy@cgcounsel.com P: 202-642-2849 *Counsel for College Broadcasters Inc.*	David Golden Constantine Cannon LLP 1301 K Street, NW, Suite 13000N Washington, DC 20004 dgolden@constantinecannon.com P: 202-204-3500 F: 202-204-3501 *Counsel for College Broadcasters Inc.*
Harv Hendrickson, Chairman Russ Hauth 3003 Snelling Avenue, North Saint Paul, MN 55113 russh@salem.cc hphendrickson@unwsp.edu *National Religious Broadcasters Noncommercial Music License Committee*	Jeffrey Jarmuth Law Offices of Jeffrey Jarmuth 34 E Elm St Chicago, IL 60611-1016 jeff.jarmuth@jarmuthlawoffices.com P: 312-335-9933 F: 312-822-1010 *Counsel for Accuradio*
William Malone 40 Cobbler's Green 205 Main Street New Canaan, CT 06840 P: 203-966-4770 Malone@ieee.org *Counsel for Intercollegiate Broadcasting System, Inc. and Harvard Radio Broadcasting Co., Inc.*	George Johnson GEO Music Group 23 Music Square East, Suite 204 Nashville, TN 37203 george@georgejohnson.com P: 615-242-9999 *GEO Music Group*

Donna K. Schneider Associate General Counsel, Litigation & IP iHeartMedia, Inc. 200 E. Base Rd. San Antonio, TX 78209 DonnaSchneider@iheartmedia.com P: 210-832-3468 F: 210-832-3127 *Counsel for iHeartMedia, Inc.*	Mark Hansen John Thorne Evan Leo Kevin Miller Caitlin Hall Scott Angstreich Igor Helman Leslie Pope Matthew Huppert Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. 1615 M Street, NW, Suite 400 Washington, DC 20036 mhansen@khhte.com jthorne@khhte.com eleo@khhte.com kmiller@khhte.com chall@khhte.com sangstreich@khhte.com ihelman@khhte.com lpope@khhte.com mhuppert@khhte.com P: 202-326-7900 F: 202-326-7999 *Counsel for iHeartmedia, Inc.*
Kenneth Steinthal Joseph Wetzel King & Spaulding LLP 101 Second Street, Suite 2300 San Francisco, CA 94105 ksteinthal@kslaw.com jwetzel@kslaw.com P: 415-318-1200 F: 415-318-1300 *Counsel for the Corporation for Public Broadcasting*	David Oxenford Wilkinson Barker Knauer, LLP 2300 N Street, NW, Suite 700 Washington, DC 20037 doxenford@wbklaw.com P: 202-383-3337 F: 202-783-5851 *Counsel for National Association of Broadcasters and Educational Media Foundation*

Kevin Blair Brian Gantman Educational Media Foundation 5700 West Oaks Boulevard Rocklin, CA 95765 kblair@kloveair1.com bgantman@kloveair1.com P: 916-251-1600 F: 916-251-1731 *Educational Media Foundation*	Gregory A. Lewis National Public Radio, Inc. 1111 North Capital Street, NE Washington, DC 20002 glewis@npr.org P: 202-513-2050 F: 202-513-3021 *Counsel for National Public Radio, Inc. (NPR)*
Frederick Kass Intercollegiate Broadcasting System, Inc. 367 Windsor Highway New Windsor, NY 12553-7900 ibs@ibsradio.org ibshq@aol.com P: 845-565-0003 F: 845-565-7446 *Intercollegiate Broadcasting System, Inc.*	Kurt Hanson AccuRadio, LLC 65 E. Wacker Place, Suite 930 Chicago, IL 60601 kurt@accuradio.com P: 312-284-2440 F: 312-284-2450 *AccuRadio, LLC*
Jacob B. Ebin Akin Gump Strauss Hauer & Feld LLP One Bryant Park Bank of America Tower New York, NY 10036-6745 jebin@akingump.com P: 212-872-7483 F: 212-872-1002 *Counsel for Pandora Media, Inc.*	Ethan Davis King & Spalding 1700 Pennsylvania Avenue, NW Suite 200 Washington, DC 20006 edavis@kslaw.com Tel: 202-626-5400 Fax: 202-626-3737 *Counsel for National Public Radio, Inc.*

/s/ Wesley Weeks
Wesley E. Weeks

NAB's Proposed Rates and Terms (June 19, 2015)

37 C.F.R. § Part 380 Subpart B (Rates and Terms Applicable to Broadcasters)[1]

§380.10 General.

(a) Scope. This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions made by or on behalf of Broadcasters as set forth herein in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by or on behalf of Broadcasters as set forth herein in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2016, through December 31, 2020.

(b) Legal compliance. Broadcasters relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations not inconsistent with the rates and terms set forth herein.

(c) Relationship to voluntary agreements. Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and digital audio services shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

§380.11 Definitions.

For purposes of this subpart, the following definitions shall apply:

Aggregate Tuning Hours means the total hours of programming transmitted by or on behalf of the Broadcaster during the relevant period to all listeners within the United States of Broadcast Retransmissions from a single terrestrial AM or FM radio station . In computing Aggregate Tuning Hours, a Broadcaster may exclude may exclude any discrete programming segments and any half hours of programming that do not include any Performance. By way of example, if a service transmitted one hour of programming containing Performances to 10 simultaneous listeners, the service's Aggregate Tuning Hours would equal 10. If one half hour of that hour did not include any Performance, the service's Aggregate Tuning Hours would equal 5. As an additional example, if one listener listened to a service for 10 hours and all 10 hours contained Performances, the service's Aggregate Tuning Hours would equal 10.

[1] The National Association of Broadcasters are participating in the Judges' separate rulemaking on notice and recordkeeping (including reports of use). Docket No. 14-CRB-0005 (RM). NAB understands that to be the proceeding in which the Judges are considering notice and recordkeeping issues. Accordingly, NAB does not address such issues in this proceeding or in these proposed rates and terms. NAB's position on notice and recordkeeping issues and its proposed regulations are set forth in the Joint Comments of the National Association of Broadcasters and the Radio Music License Committee Regarding the Copyright Royalty Judges' Notice and Recordkeeping Rulemaking, June 30, 2014, and those parties' Joint Reply Comments in that same rulemaking, filed on September 5, 2014.

Broadcaster means an entity that:

(1) Has, either directly or through an affiliated entity that controls, is controlled by, or is under common control with Broadcaster, a business owning and operating one or more terrestrial AM or FM radio stations that are licensed as such by the Federal Communications Commission;

(2) Has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions of sound recordings pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114, and related ephemeral recordings;

(3) Complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; and

(4) Is not a noncommercial webcaster as defined in 17 U.S.C. 114(f)(5)(E)(i).

Broadcast Retransmissions means transmissions made by or on behalf of a Broadcaster over the Internet, wireless data networks, or other similar transmission facilities that are primarily retransmissions of terrestrial over-the-air broadcast programming transmitted by the Broadcaster through its AM or FM radio station, including transmissions containing (1) substitute advertisements; (2) other programming substituted for programming for which requisite licenses or clearances to transmit over the Internet, wireless data networks, or such other transmission facilities have not been obtained; and (3) substituted programming that does not contain Performances licensed under 17 U.S.C. 112(e) and 114. Broadcast Retransmissions do not include transmissions in which the sound recordings that are performed are customized to a user.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

Eligible Transmission shall mean a Broadcast Retransmission that is subject to licensing under 17 U.S.C. §114(d)(2) and the payment of royalties under 37 C.F.R. Part 380.

Ephemeral Recording is a phonorecord created for the purpose of facilitating an Eligible Transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C. 112(e).

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission but excluding the following:

(1) A performance of a sound recording that does not require a license under the United States Copyright Act, 17 U.S.C. §§ 101, et. seq. (e.g., a sound recording fixed before February 15, 1972);

(2) A performance of a sound recording for which the Broadcaster has previously obtained a license from the Copyright Owner of such sound recording;

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events, and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song);

(4) A performance of a sound recording that is 15 seconds or less in duration; or

(5) A second connection to the same sound recording from someone from the same IP address.

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant licensed in the jurisdiction where it seeks to conduct a verification.

Small Streaming Station is a terrestrial AM or FM radio station with respect to which Broadcast Retransmissions by or on behalf of the Broadcaster meet the following eligibility criteria:

(1) During the prior year Eligible Transmissions by or on behalf of the Broadcaster totaled less than 876,000 Aggregate Tuning Hours; and

(2) During the applicable year Broadcaster reasonably expects Eligible Transmissions of Broadcast Retransmissions to total less than 876,000 Aggregate Tuning Hours.

§380.12 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) Royalty rates. (1) For each of its Small Streaming Stations, Broadcasters shall pay only the minimum fee (as provided in §380.12(c)); provided that, one time during the period 2016-2020, a Broadcaster's station that qualified under the Small Streaming Station definition as of January 31 of one year unexpectedly made Eligible Transmissions in excess of 876,000 Aggregate Tuning Hours during that year, may choose to be treated as a Small Station during the following year notwithstanding paragraph (1) of the definition of "Small Station" if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 876,000 Aggregate Tuning Hours during that following year.

(2) In all other cases, royalties for Eligible Transmissions made pursuant to 17 U.S.C. 114, and the making of related ephemeral recordings pursuant to 17 U.S.C. 112(e), shall, except as provided in §380.13(g)(3), be payable at the rate of $0.0005 per Performance for the period January 1, 2016 through December 31, 2020.

(b) Ephemeral royalty. The royalty payable under 17 U.S.C. 112(e) for any reproduction of a phonorecord made by a Broadcaster during this license period and used solely by the Broadcaster to facilitate transmissions made pursuant to 17 U.S.C. 114 as and when provided in this section is deemed to be included within, and constitute 5% of, such royalty payments.

(c) Minimum fee. Each Broadcaster will pay an annual, nonrefundable minimum fee of $500 for each of its terrestrial AM and FM radio stations for which Eligible Transmissions are made by or on behalf of such Broadcaster for each calendar year or part of a calendar year during 2016-2020 during which the Broadcaster is a licensee pursuant to licenses under 17 U.S.C. 112(e) and 114, provided that a Broadcaster shall not be required to pay more than $50,000 in minimum fees in the aggregate (for 100 or more such radio stations). For the purpose of this subpart, each individual stream (e.g., primary radio station, HD multicast radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum, except that identical streams for simulcast stations will be treated as a single stream if the streams are available at a single Uniform Resource Locator (URL) and performances from all such stations are aggregated for purposes of determining the number of payable performances hereunder. Upon payment of the minimum fee, the Broadcaster will receive a credit in the amount of the minimum fee against any additional royalties payable for the same calendar year for the same channel or station.

(d) Programming Provided by Third Parties. In the case of programming provided by third parties to a Broadcaster, the Broadcaster shall make commercially reasonable, good-faith efforts to cause such third parties to provide information regarding the number of Performances in such programming. If, however, some or all of that information is not provided to the Broadcaster, the Broadcaster may either (i) make a good faith estimate of the total number of Performances in such programming, multiplied by the number of Aggregate Tuning Hours of transmissions of such programming if the Broadcaster has a reasonable basis for such estimate, or (ii) estimate the number of Performances in such programming by multiplying the total number of Aggregate Tuning Hours of transmissions of such programming by 1 Performance per hour in the case of radio station programming reasonably classified as news, business, talk or sports and 12 Performances per hour in the case of transmissions or retransmissions of all other radio station programming.

§380.13 Terms for making payment of royalty fees and statements of account.

(a) Payment to the Collective. A Broadcaster shall make the royalty payments due under §380.12 to the Collective.

(b) Designation of the Collective. (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Broadcasters due under §380.12 and to distribute such royalty payments to each

Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) and 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Board designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Collective.

(ii) The Copyright Royalty Judges shall publish in the Federal Register within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) Monthly payments. Broadcasters must make monthly payments where required by §380.12, and provide statements of account, for each month on the 45th day following the month in which the Eligible Transmissions subject to the payments and statements of account were made. All monthly payments shall be rounded to the nearest cent.

(d) Minimum payments. A Broadcaster shall make any minimum payment due under §380.12(b) by January 31 of the applicable calendar year, except that payment by a Broadcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of said date but begins doing so thereafter shall be due by the 45th day after the end of the month in which the Broadcaster commences to do so.

(e) Late fees. A Broadcaster shall pay a late fee for each instance in which any payment or any statement of account is not received by the Collective in compliance with applicable regulations by the due date. The amount of the late fee shall be the underpayment rate identified in 26 U.S.C. § 6621 applied to the amount of the late payment or the payment associated with a late statement of account. The late fee shall accrue from the due date of the payment or statement of account until the payment and statement of account are received by the Collective, provided that, in the case of a timely provided but noncompliant statement of account, the Collective has notified the Broadcaster within 90 days regarding any noncompliance that is reasonably evident to the Collective. A single late fee shall be due in the event both a payment and statement of account are received by the Collective after the due date. SoundExchange may compromise or elect to forego the late fee in the case of minor or inadvertent failures of a Broadcaster to make a timely payment or submit a timely statement.

(f) Statements of account. Any payment due under §380.12 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address (if any) and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(3) The signature of:

(i) The owner of the Broadcaster or a duly authorized agent of the owner, if the Broadcaster is not a partnership or corporation;

(ii) A partner or delegee, if the Broadcaster is a partnership; or

(iii) An officer of the corporation, if the Broadcaster is a corporation.

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Broadcaster is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned owner or agent of the Broadcaster, or officer or partner, have examined this statement of account and hereby state that it fairly presents, in all material respects, the liabilities of Broadcaster pursuant to 17 U.S.C. 112(e) and 114.

This attestation shall not prevent a Broadcaster from making good faith revisions or adjustments to its Statements of Account that it later determines to be necessary to accurately reflect its liabilities due under this Subpart.

(g) Distribution of royalties. (1) The Collective shall promptly distribute royalties received from Broadcasters to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify and pay the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Broadcaster equally based upon information provided under the report of use requirements for Broadcasters contained in §370.4 of this chapter and this subpart, except that in the case of electing Small Broadcasters, the Collective shall distribute royalties based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors. The Collective shall use its best efforts to identify and locate copyright owners and featured artists in order to distribute royalties payable to them under section 112(e) or 114(d)(2) of title 17, United States Code, or both. Such efforts shall include searches in Copyright Office public records and published directories of sound recording copyright owners.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (h)(1) of this section within 5 years from the date the Collective first distributes any other royalties for the same reporting period, then such distribution may be first applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State.

(i) Retention of records. Books and records of a Broadcaster and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

(j) Overpayments. If the Broadcaster determines, within three (3) calendar years of paying to the Collective a monthly amount due, that the Broadcaster overpaid the royalty payments due under § 380.12, the Broadcaster may reduce the royalty payments due on its next monthly payment(s) by the amount of the overpayment, until the full amount of the overpayment has been recouped. The Broadcaster shall include in its statement of account for each month in which it is deducting amounts to recover an overpayment such information as is necessary to calculate the amount of the overpayment.

§380.14 Confidential Information.

(a) Definition. For purposes of this subpart, "Confidential Information" shall include the statements of account and any information contained therein, including the amount of royalty payments and the number of Performances, and any information pertaining to the statements of account reasonably designated as confidential by the Broadcaster submitting the statement.

(b) Exclusion. Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) Use of Confidential Information. In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) Disclosure of Confidential Information. Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate written confidentiality agreement or an ethical obligation to maintain the Confidential Information of the Collective, who are engaged in the collection and distribution of royalty payments hereunder and activities related directly thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate written confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Broadcaster's statement of account pursuant to §380.15 or on behalf of a

Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to §380.16;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114(f) by the Broadcaster whose Confidential Information is being supplied, subject to an appropriate written confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate written confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114(f) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) Safeguarding of Confidential Information. The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but not less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§380.15 Verification of royalty payments.

(a) General. This section prescribes procedures by which the Collective may verify the royalty payments made by a Broadcaster.

(b) Frequency of verification. The Collective may conduct a single audit of a Broadcaster, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) Notice of intent to audit. The Collective must file with the Copyright Royalty Board a notice of intent to audit a particular Broadcaster, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Broadcaster to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, who may not be retained on a contingency fee basis and who shall be obligated to verify any underpayment or overpayment of royalties. The designation of the Qualified Auditor shall be binding on all parties. Any such audit shall be completed within 6 months of the date of the notification of intent to audit is served on the Broadcaster.

(d) Acquisition and retention of report. The Broadcaster shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) Acceptable verification procedure. An audit of Broadcaster's books and records, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) Consultation. Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Broadcaster being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Broadcaster reasonably cooperates with the auditor to remedy promptly any factual error or clarify any issues raised by the audit.

(g) Costs of the verification procedure. The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Broadcaster shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§380.16 Verification of royalty distributions.

(a) General. This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) Frequency of verification. A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) Notice of intent to audit. A Copyright Owner or Performer must file with the Copyright Royalty Board a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice who may not be retained on a contingency fee basis and who shall be obligated to verify any underpayment or overpayment of royalties. The designation of the Qualified Auditor shall be binding on all Copyright Owners and Performers. Any such audit shall be completed within 6 months of the date of the notification of intent to audit is served on the Broadcaster.

(d) Acquisition and retention of report. The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) Acceptable verification procedure. An audit of Broadcaster's books and records, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) Consultation. Before rendering any interim or final written report to a Copyright Owner or Performer, except where the Qualified Auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the Qualified Auditor, prejudice the investigation of such suspected fraud, the Qualified Auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the Qualified Auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) Costs of the verification procedure. The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear reasonable fees paid to the Qualified Auditor by the Collective for the verification procedure.

§380.17 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 5 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 5-year period. After expiration of this period, and except as may be subject to the common law or statutes of any State, the Collective may apply the unclaimed funds solely to offset any costs deductible under 17 U.S.C. 114(g)(3)(A). Nothing in this subsection is intended to preempt the laws of any State. The Collective shall render its best efforts to identify and locate copyright owners and featured artists in order to distribute royalties payable to them under section 112(e) or 114(d)(2) of title 17, United States Code, or both. Such efforts shall include searches in Copyright Office public records and published directories of sound recording copyright owners.

§380.18 Notice and Cure

For any material breach of these regulations by a Broadcaster that the Collective intends to assert in any way against the Broadcaster, the Collective shall first provide notice of such material breach to the Broadcaster by certified mail, and the Broadcaster shall have 30 days from the receipt of such notice of material breach to cure such material breach.

NAB's Proposed Rates and Terms (June 19, 2015)

37 C.F.R. § Part 380 Subpart B (Rates and Terms Applicable to Broadcasters)[1]

§380.10 General.

(a) Scope. This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions made by or on behalf of Broadcasters as set forth herein in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by or on behalf of Broadcasters as set forth herein in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, ~~2011~~2016, through December 31, ~~2015~~2020.

(b) Legal compliance. Broadcasters relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations not inconsistent with the rates and terms set forth herein.

(c) Relationship to voluntary agreements. Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and digital audio services shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

§380.11 Definitions.

For purposes of this subpart, the following definitions shall apply:

Aggregate Tuning Hours means the total hours of programming ~~that~~transmitted by or on behalf of the Broadcaster ~~has transmitted~~ during the relevant period to all listeners within the United States ~~from any channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions.~~of Broadcast Retransmissions from a single terrestrial AM or FM radio station . In computing Aggregate Tuning Hours, a Broadcaster may exclude may exclude any discrete programming segments and any half hours of programming that do not include any Performance. By way of example, if a service transmitted one hour of programming containing Performances to 10 simultaneous listeners, the service's Aggregate Tuning Hours would equal 10. If one half hour of that hour did not include any Performance, the service's Aggregate Tuning Hours would equal 5. As an additional example, if one listener listened to a service for 10 hours and all 10 hours contained Performances, the service's Aggregate Tuning Hours would equal 10.

[1] The National Association of Broadcasters are participating in the Judges' separate rulemaking on notice and recordkeeping (including reports of use). Docket No. 14-CRB-0005 (RM). NAB understands that to be the proceeding in which the Judges are considering notice and recordkeeping issues. Accordingly, NAB does not address such issues in this proceeding or in these proposed rates and terms. NAB's position on notice and recordkeeping issues and its proposed regulations are set forth in the Joint Comments of the National Association of Broadcasters and the Radio Music License Committee Regarding the Copyright Royalty Judges' Notice and Recordkeeping Rulemaking, June 30, 2014, and those parties' Joint Reply Comments in that same rulemaking, filed on September 5, 2014.

Broadcaster means an entity that:

(1) Has ~~a substantial~~, either directly or through an affiliated entity that controls, is controlled by, or is under common control with Broadcaster, a business owning and operating one or more terrestrial AM or FM radio stations that are licensed as such by the Federal Communications Commission;

(2) Has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions of sound recordings pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114, and related ephemeral recordings;

(3) Complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; and

(4) Is not a noncommercial webcaster as defined in 17 U.S.C. 114(f)(5)(E)(i).

~~*Broadcaster Webcasts* mean eligible nonsubscription transmissions made by a Broadcaster over the Internet that are not Broadcast Retransmissions.~~

Broadcast Retransmissions ~~mean eligible nonsubscription~~ means transmissions made by or on behalf of a Broadcaster over the Internet ~~that are~~, wireless data networks, or other similar transmission facilities that are primarily retransmissions of terrestrial over-the-air broadcast programming transmitted by the Broadcaster through its AM or FM radio station, including ~~ones with~~transmissions containing (1) substitute advertisements ~~or~~; (2) other programming ~~occasionally~~ substituted for programming for which requisite licenses or clearances to transmit over the Internet, wireless data networks, or such other transmission facilities have not been obtained~~. For the avoidance of doubt, a Broadcast Retransmission does not include~~; and (3) substituted programming that does not ~~require a license under United States copyright law or that is transmitted on an Internet-only side channel.~~ contain Performances licensed under 17 U.S.C. 112(e) and 114. Broadcast Retransmissions do not include transmissions in which the sound recordings that are performed are customized to a user.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. ~~For the 2011-2015 license period, the Collective is SoundExchange, Inc.~~

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

Eligible Transmission shall mean ~~either a Broadcaster Webcast or~~ a Broadcast Retransmission that is subject to licensing under 17 U.S.C. §114(d)(2) and the payment of royalties under 37 C.F.R. Part 380.

Ephemeral Recording is a phonorecord created for the purpose of facilitating an Eligible Transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C. 112(e).

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission ~~(*e.g.*, the delivery of any portion of a single track from a compact disc to one listener)~~ but excluding the following:

(1) A performance of a sound recording that does not require a license under the United States Copyright Act, 17 U.S.C. §§ 101, et. seq. (e.g., a sound recording ~~that is not copyrighted~~fixed before February 15, 1972);

(2) A performance of a sound recording for which the Broadcaster has previously obtained a license from the Copyright Owner of such sound recording; ~~and~~

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events, and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song)~~.~~;

(4) A performance of a sound recording that is 15 seconds or less in duration; or

(5) A second connection to the same sound recording from someone from the same IP address.

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant licensed in the jurisdiction where it seeks to conduct a verification.

Small Streaming Station is a terrestrial AM or FM radio station with respect to which Broadcast Retransmissions by or on behalf of the Broadcaster meet the following eligibility criteria:

~~*Small Broadcaster* is a Broadcaster that, for any of its channels and stations (determined as provided in § 380.12(c)) over which it transmits Broadcast Retransmissions, and for all of its channels and stations over which it transmits Broadcaster Webcasts in the aggregate, in any calendar year in which it is to be considered a Small Broadcaster, meets the following additional eligibility criteria:~~

(1) During the prior year ~~it made~~ Eligible Transmissions ~~totaling~~by or on behalf of the Broadcaster totaled less than ~~27,777~~876,000 Aggregate Tuning Hours; and

(2) During the applicable year ~~it~~Broadcaster reasonably expects ~~to make~~ Eligible Transmissions ~~totaling~~of Broadcast Retransmissions to total less than ~~27,777~~876,000 Aggregate Tuning Hours.

§380.12 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) Royalty rates. (1) For each of its Small Streaming Stations, Broadcasters shall pay only the minimum fee (as provided in §380.12(c)); provided that, one time during the period ~~2011-2015, a Broadcaster~~2016-2020, a Broadcaster's station that qualified ~~as a Small Broadcaster~~ under the ~~foregoing~~Small Streaming Station definition as of January 31 of one year~~, elected Small Broadcaster status for that year, and~~ unexpectedly made Eligible Transmissions ~~on one or more channels or stations~~ in excess of ~~27,777~~876,000 Aggregate Tuning Hours during that year, may choose to be treated as a Small ~~Broadcaster~~Station during the following year notwithstanding paragraph (1) of the definition of "Small ~~Broadcaster~~Station" if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding ~~27,777~~876,000 Aggregate Tuning Hours during that following year. ~~As to channels or stations over which a Broadcaster transmits Broadcast Retransmissions, the Broadcaster may elect Small Broadcaster status only with respect to any of its channels or stations that meet all of the foregoing criteria.~~

~~§ 380.12 Royalty fees for the public performance of sound recordings and for ephemeral recordings.~~

(2) In all other cases, royalties for Eligible Transmissions made pursuant to 17 U.S.C. 114, and the making of related ephemeral recordings pursuant to 17 U.S.C. 112(e), shall, except as provided in § 380.13(g)(3), be payable ~~on a per-performance basis, as follows:~~at the rate of $0.0005 per Performance for the period January 1, 2016 through December 31, 2020.

~~**(1)** 2011: $0.0017;~~
~~**(2)** 2012: $0.0020;~~
~~**(3)** 2013: $0.0022;~~
~~**(4)** 2014: $0.0023;~~
~~**(5)** 2015: $0.0025.~~

(b) Ephemeral royalty. The royalty payable under 17 U.S.C. 112(e) for any reproduction of a phonorecord made by a Broadcaster during this license period and used solely by the Broadcaster to facilitate transmissions ~~for which it pays royalties~~made pursuant to 17 U.S.C. 114 as and when provided in this section is deemed to be included within, and constitute 5% of, such royalty payments ~~and to equal the percentage of such royalty payments determined by the Copyright Royalty Judges for other webcasting as set forth in § 380.3~~.

(c) Minimum fee. Each Broadcaster will pay an annual, nonrefundable minimum fee of $500 for each of its ~~individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes~~terrestrial AM and FM radio stations for which Eligible Transmissions~~,~~ are made by or on behalf of such Broadcaster for each calendar year or part of a calendar year during ~~2011~~2016-~~2015~~2020 during which the Broadcaster is a licensee pursuant to licenses under 17 U.S.C. 112(e) and 114, provided that a

Broadcaster shall not be required to pay more than $50,000 in minimum fees in the aggregate (for 100 or more ~~channels or~~such radio stations). For the purpose of this subpart, each individual stream (e.g., primary radio station, HD multicast radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum, except that identical streams for simulcast stations will be treated as a single stream if the streams are available at a single Uniform Resource Locator (URL) and performances from all such stations are aggregated for purposes of determining the number of payable performances hereunder. Upon payment of the minimum fee, the Broadcaster will receive a credit in the amount of the minimum fee against any additional royalties payable for the same calendar year for the same channel or station. ~~In addition, an electing Small Broadcaster also shall pay a $100 annual fee (the "Proxy Fee") to the Collective for the reporting waiver discussed in § 380.13(g)(2).~~

(d) Programming Provided by Third Parties. In the case of programming provided by third parties to a Broadcaster, the Broadcaster shall make commercially reasonable, good-faith efforts to cause such third parties to provide information regarding the number of Performances in such programming. If, however, some or all of that information is not provided to the Broadcaster, the Broadcaster may either (i) make a good faith estimate of the total number of Performances in such programming, multiplied by the number of Aggregate Tuning Hours of transmissions of such programming if the Broadcaster has a reasonable basis for such estimate, or (ii) estimate the number of Performances in such programming by multiplying the total number of Aggregate Tuning Hours of transmissions of such programming by 1 Performance per hour in the case of radio station programming reasonably classified as news, business, talk or sports and 12 Performances per hour in the case of transmissions or retransmissions of all other radio station programming.

§380.13 Terms for making payment of royalty fees and statements of account.

(a) Payment to the Collective. A Broadcaster shall make the royalty payments due under § 380.12 to the Collective.

(b) Designation of the Collective.

(1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Broadcasters due under § 380.12 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) and 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in ~~this~~ paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Board designating a successor to collect and distribute royalty payments

to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Collective.

(ii) The Copyright Royalty Judges shall publish in the Federal Register within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) Monthly payments ~~***and reporting***~~. Broadcasters must make monthly payments where required by § 380.12, and provide statements of account ~~and reports of use~~, for each month on the 45th day following the month in which the Eligible Transmissions subject to the payments~~,~~ and statements of account~~, and reports of use~~ were made. All monthly payments shall be rounded to the nearest cent.

(d) Minimum payments. A Broadcaster shall make any minimum payment due under § 380.12(b) by January 31 of the applicable calendar year, except that payment by a Broadcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of said date but begins doing so thereafter shall be due by the 45th day after the end of the month in which the Broadcaster commences to do so.

(e) Late fees. A Broadcaster shall pay a late fee for each instance in which any payment~~,~~ or any statement of account ~~or any report of use~~ is not received by the Collective in compliance with applicable regulations by the due date. The amount of the late fee shall be ~~1.5% of a~~the underpayment rate identified in 26 U.S.C. § 6621 applied to the amount of the late payment~~,~~ or ~~1.5% of~~ the payment associated with a late statement of account ~~or report of use, per month, or the highest lawful rate, whichever is lower~~. The late fee shall accrue from the due date of the payment~~,~~ or statement of account ~~or report of use~~ until ~~a fully compliant~~the payment~~,~~ and statement of account ~~or report of use is~~are received by the Collective, provided that, in the case of a timely provided but noncompliant statement of account ~~or report of use~~, the Collective has notified the Broadcaster within 90 days regarding any noncompliance that is reasonably evident to the Collective. A single late fee shall be due in the event both a payment and statement of account are received by the Collective after the due date. SoundExchange may compromise or elect to forego the late fee in the case of minor or inadvertent failures of a Broadcaster to make a timely payment or submit a timely statement.

(f) Statements of account. Any payment due under § 380.12 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address (if any) and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(3) The ~~handwritten~~ signature of:

(i) The owner of the Broadcaster or a duly authorized agent of the owner, if the Broadcaster is not a partnership or corporation;

(ii) A partner or delegee, if the Broadcaster is a partnership; or

(iii) An officer of the corporation, if the Broadcaster is a corporation.

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Broadcaster is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned owner or agent of the Broadcaster, or officer or partner, have examined this statement of account and hereby state that it ~~is true, accurate, and complete to my knowledge after reasonable due diligence~~fairly presents, in all material respects, the liabilities of Broadcaster pursuant to 17 U.S.C. 112(e) and 114.

This attestation shall not prevent a Broadcaster from making good faith revisions or adjustments to its Statements of Account that it later determines to be necessary to accurately reflect its liabilities due under this Subpart.

~~**(g) *Reporting by Broadcasters in General.***~~
~~**(1)** Broadcasters other than electing Small Broadcasters covered by paragraph (g)(2) of this section shall submit reports of use on a per-performance basis in compliance with the regulations set forth in part 370 of this chapter, except that the following provisions shall apply notwithstanding the provisions of such part 370 of this chapter from time to time in effect:~~
~~**(i)** Broadcasters may pay for, and report usage in, a percentage of their programming hours on an Aggregate Tuning Hour basis as provided in paragraph (g)(3) of this section.~~
~~**(ii)** Broadcasters shall submit reports of use to the Collective on a monthly basis.~~
~~**(iii)** As provided in paragraph (d) of this section, Broadcasters shall submit reports of use by no later than the 45th day following the last day of the month to which they pertain.~~
~~**(iv)** Except as provided in paragraph (g)(3) of this section, Broadcasters shall submit reports of use to the Collective on a census reporting basis (*i.e.*, reports of use shall include every sound recording performed in the relevant month and the number of performances thereof).~~
~~**(v)** Broadcasters shall either submit a separate report of use for each of their stations, or a collective report of use covering all of their stations but identifying usage on a station-by-station basis;~~
~~**(vi)** Broadcasters shall transmit each report of use in a file the name of which includes:~~
~~**(A)** The name of the Broadcaster, exactly as it appears on its notice of use, and~~
~~**(B)** If the report covers a single station only, the call letters of the station.~~
~~**(vii)** Broadcasters shall submit reports of use with headers, as presently described in § 370.4(e)(7) of this chapter.~~
~~**(viii)** Broadcasters shall submit a separate statement of account corresponding to each of their reports of use, transmitted in a file the name of which includes:~~

(A) The name of the Broadcaster, exactly as it appears on its notice of use, and

(B) If the statement covers a single station only, the call letters of the station.

(2) On a transitional basis for a limited time in light of the unique business and operational circumstances currently existing with respect to Small Broadcasters and with the expectation that Small Broadcasters will be required, effective January 1, 2016, to report their actual usage in compliance with then-applicable regulations, Small Broadcasters that have made an election pursuant to paragraph (h) of this section for the relevant year shall not be required to provide reports of their use of sound recordings for Eligible Transmissions and related Ephemeral Recordings. The immediately preceding sentence applies even if the Small Broadcaster actually makes Eligible Transmissions for the year exceeding 27,777 Aggregate Tuning Hours, so long as it qualified as a Small Broadcaster at the time of its election for that year. In addition to minimum royalties hereunder, electing Small Broadcasters will pay to the Collective a $100 Proxy Fee to defray costs associated with this reporting waiver, including development of proxy usage data.

(3) Broadcasters generally reporting pursuant to paragraph (g)(1) of this section may pay for, and report usage in, a percentage of their programming hours on an Aggregate Tuning Hours basis, if

(i) Census reporting is not reasonably practical for the programming during those hours, and

(ii) If the total number of hours on a single report of use, provided pursuant to paragraph (g)(1) of this section, for which this type of reporting is used is below the maximum percentage set forth below for the relevant year:

(A) 2011: 16%;

(B) 2012: 14%;

(C) 2013: 12%;

(D) 2014: 10%;

(E) 2015: 8%.

(iii) To the extent that a Broadcaster chooses to report and pay for usage on an Aggregate Tuning Hours basis pursuant to this paragraph (g)(3), the Broadcaster shall

(A) Report and pay based on the assumption that the number of sound recordings performed during the relevant programming hours is 12 per hour;

(B) Pay royalties (or recoup minimum fees) at the per-performance rates provided in § 380.12 on the basis of paragraph (g)(3)(iii)(A) of this section;

(C) Include Aggregate Tuning Hours in reports of use; and

(D) Include in reports of use complete playlist information for usage reported on the basis of Aggregate Tuning Hours.

(h) ***Election of Small Broadcaster Status.*** To be eligible for the reporting waiver for Small Broadcasters with respect to any particular channel in a given year, a Broadcaster must satisfy the definition set forth in § 380.11 and must submit to the Collective a completed and signed election form (available on the SoundExchange Web site at *http://www.soundexchange.com*) by no later than January 31 of the applicable year. Even if a Broadcaster has once elected to be treated as a Small Broadcaster, it must make a separate, timely election in each subsequent year in which it wishes to be treated as a Small Broadcaster.

(i) ***Distribution of royalties.***

(g) Distribution of royalties. (1) The Collective shall promptly distribute royalties received from Broadcasters to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to

those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify and pay the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Broadcaster equally based upon information provided under the report of use requirements for Broadcasters contained in § 370.4 of this chapter and this subpart, except that in the case of electing Small Broadcasters, the Collective shall distribute royalties based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors. The Collective shall use its best efforts to identify and locate copyright owners and featured artists in order to distribute royalties payable to them under section 112(e) or 114(d)(2) of title 17, United States Code, or both. Such efforts shall include searches in Copyright Office public records and published directories of sound recording copyright owners.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (gh)(1) of this section within 35 years from the date of payment by a Broadcaster,the Collective first distributes any other royalties for the same reporting period, then such distribution may be first applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State.

(ji) Retention of records. Books and records of a Broadcaster and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

(j) Overpayments. If the Broadcaster determines, within three (3) calendar years of paying to the Collective a monthly amount due, that the Broadcaster overpaid the royalty payments due under § 380.12, the Broadcaster may reduce the royalty payments due on its next monthly payment(s) by the amount of the overpayment, until the full amount of the overpayment has been recouped. The Broadcaster shall include in its statement of account for each month in which it is deducting amounts to recover an overpayment such information as is necessary to calculate the amount of the overpayment.

§380.14 Confidential Information.

(a) Definition. For purposes of this subpart, “Confidential Information” shall include the statements of account and any information contained therein, including the amount of royalty payments and the number of Performances, and any information pertaining to the statements of account reasonably designated as confidential by the Broadcaster submitting the statement.

(b) Exclusion. Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) Use of Confidential Information. In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) Disclosure of Confidential Information. Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate written confidentiality agreement or an ethical obligation to maintain the Confidential Information of the Collective, who are engaged in the collection and distribution of royalty payments hereunder and activities related directly thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate written confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Broadcaster's statement of account pursuant to § 380.15 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.16;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114(f) by the Broadcaster whose Confidential Information is being supplied, subject to an appropriate written confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate written confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114(f) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) Safeguarding of Confidential Information. The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but not less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§380.15 Verification of royalty payments.

(a) General. This section prescribes procedures by which the Collective may verify the royalty payments made by a Broadcaster.

(b) Frequency of verification. The Collective may conduct a single audit of a Broadcaster, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) Notice of intent to audit. The Collective must file with the Copyright Royalty Board a notice of intent to audit a particular Broadcaster, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent

to audit shall be served at the same time on the Broadcaster to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, ~~and~~who may not be retained on a contingency fee basis and who shall be obligated to verify any underpayment or overpayment of royalties. The designation of the Qualified Auditor shall be binding on all parties. Any such audit shall be completed within 6 months of the date of the notification of intent to audit is served on the Broadcaster.

(d) Acquisition and retention of report. The Broadcaster shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) Acceptable verification procedure. An audit of Broadcaster's books and records, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) Consultation. Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Broadcaster being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Broadcaster reasonably cooperates with the auditor to remedy promptly any factual error or clarify any issues raised by the audit.

(g) Costs of the verification procedure. The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Broadcaster shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§380.16 Verification of royalty distributions.

(a) General. This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) Frequency of verification. A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) Notice of intent to audit. A Copyright Owner or Performer must file with the Copyright Royalty Board a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall

be conducted by an independent and Qualified Auditor identified in the notice~~, and~~ who may not be retained on a contingency fee basis and who shall be obligated to verify any underpayment or overpayment of royalties. The designation of the Qualified Auditor shall be binding on all Copyright Owners and Performers. Any such audit shall be completed within 6 months of the date of the notification of intent to audit is served on the Broadcaster.

(d) Acquisition and retention of report. The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) Acceptable verification procedure. An audit of Broadcaster's books and records, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) Consultation. Before rendering ~~a~~any interim or final written report to a Copyright Owner or Performer, except where the Qualified Auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the Qualified Auditor, prejudice the investigation of such suspected fraud, the Qualified Auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the Qualified Auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) Costs of the verification procedure. The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear ~~the~~ reasonable ~~costs of~~fees paid to the Qualified Auditor by the Collective for the verification procedure.

§380.17 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of ~~3~~5 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the ~~3~~5-year period. After expiration of this period, ~~the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding~~and except as may be subject to the common law or statutes of any State~~.~~, the Collective may apply the unclaimed funds solely to offset any costs deductible under 17 U.S.C. 114(g)(3)(A). Nothing in this subsection is intended to preempt the laws of any State. The Collective shall render its best efforts to identify and locate copyright owners and featured artists in order to distribute royalties payable to them under section 112(e) or 114(d)(2) of title 17, United States Code, or

both. Such efforts shall include searches in Copyright Office public records and published directories of sound recording copyright owners.

§380.18 Notice and Cure

For any material breach of these regulations by a Broadcaster that the Collective intends to assert in any way against the Broadcaster, the Collective shall first provide notice of such material breach to the Broadcaster by certified mail, and the Broadcaster shall have 30 days from the receipt of such notice of material breach to cure such material breach.

Index of Witness Testimony by Citation Format

Citation Format	Witness Name	Type of Testimony	Exhibit Number
Barros WRT	Glen Barros	Written Rebuttal	SX Ex. 0001
Bender WDT	Jonathan Bender	Written Direct	SX Ex. 0002
Bender WRT	Jonathan Bender	Written Rebuttal	SX Ex. 0023
Blackburn WDT	Dr. David Blackburn	Written Direct	SX Ex. 0003
Blackburn WRT	Dr. David Blackburn	Written Rebuttal	SX Ex. 0024
Burruss WRT	Jim Burruss	Written Rebuttal	SX Ex. 0004
Butler WRT	Sarah Butler	Written Rebuttal	SX Ex. 0005
Chiang WDT	Johnny Chiang	Written Direct	NAB Ex. 4004
Cutler WDT	Steven Cutler	Written Direct	IHM Ex. 3338
Danaher WDT	Brett Danaher	Written Direct	SX Ex. 2184
Dimick WDT	John Dimick	Written Direct	NAB Ex. 4002
Dimick WRT	John Dimick	Written Rebuttal	NAB Ex. 4009
Downs WDT	Ben Downs	Written Direct	NAB Ex. 4005
Emert WDT	Joseph Emert	Written Direct	NRBNMLC Ex. 7000
Fischel & Lichtman AWDT	Professor Daniel R. Fischel and Professor Douglas G. Lichtman	Amended Written Direct	IHM Ex. 3034

Citation Format	Witness Name	Type of Testimony	Exhibit Number
Fischel & Lichtman SWRT	Professor Daniel R. Fischel and Professor Douglas G. Lichtman	Supplemental Written Rebuttal	IHM Ex. 3371
Fischel & Lichtman WRT	Professor Daniel R. Fischel and Professor Douglas G. Lichtman	Written Rebuttal	IHM Ex. 3054
Fleming-Wood CWRT	Simon Fleming-Wood	Corrected Written Rebuttal	PAN Ex. 5364
Fleming-Wood WDT	Simon Fleming-Wood	Written Direct	PAN Ex. 5002
Foster WDT	Fletcher Foster	Written Direct	SX Ex. 0006
Fowler WRT	Jennifer Fowler	Written Rebuttal	SX Ex. 0007
Frear CWDT	David J. Frear	Corrected Written Direct	SXM Ex. 6000
Gadoury WDT	Jean-Francois Gadoury	Written Direct	NAB Ex. 4007
Hair WDT	Raymond Hair	Written Direct	SX Ex. 0008
Hanssens WRT	Professor Dominique M. Hanssens	Written Rebuttal	NAB Ex. 4012
Harleston WDT	Jeffery Harleston	Written Direct	SX Ex. 0009
Harrison CWDT	Aaron Harrison	Corrected Written Direct	SX Ex. 0010
Harrison WRT	Aaron Harrison	Written Rebuttal	SX Ex. 0025
Hauser WRT	Professor John R. Hauser	Written Rebuttal	IHM Ex. 3124

Citation Format	Witness Name	Type of Testimony	Exhibit Number
Henes WDT	Gene Henes	Written Direct	NRBNMLC Ex. 7011
Herring AWRT	Michael Herring	Amended Written Rebuttal	PAN Ex. 5016
Herring WDT	Michael Herring	Written Direct	PAN Ex. 5007
Huppe WDT	Michael Huppe	Written Direct	SX Ex. 0026
Huppe WRT	Michael Huppe	Written Rebuttal	SX Ex. 0026
Kass WDT	Frederick J. Kass	Written Direct	IBS/Harvard Ex. 9000
Katz AWRT	Professor Michael L. Katz	Amended Written Rebuttal	NAB Ex. 4015
Katz WDT	Professor Michael L. Katz	Written Direct	NAB Ex. 4000
Katz WRT	Professor Michael L. Katz	Written Rebuttal	NAB Ex. 4010
Kendall WRT	Dr. Todd D. Kendall	Written Rebuttal	IHM Ex. 3148
Kocak WDT	Robert Francis Kocak (Buzz Knight)	Written Direct	NAB Ex. 4003
Koehn WDT	Julie Koehn	Written Direct	NAB Ex. 4006
Kooker WDT	Dennis Kooker	Written Direct	SX Ex. 0012
Kooker WRT	Dennis Kooker	Written Rebuttal	SX Ex. 0027
Lexton WRT	Charlie Lexton	Written Rebuttal	SX Ex. 0013
Littlejohn WDT	Jeffery L. Littlejohn	Written Direct	IHM 3210
Lys CWDT	Professor Thomas Z. Lys	Corrected Written Direct	SX Ex. 0014
Lys WRT	Professor Thomas Z. Lys	Written Rebuttal	SX Ex. 0028

Citation Format	Witness Name	Type of Testimony	Exhibit Number
McBride WDT	Dr. Stephan McBride	Written Direct	PAN Ex. 5020
McFadden WDT	Professor Daniel McFadden	Written Direct	SX Ex. 0015
Morris WRT	Marissa Morris	Written Rebuttal	IHM Ex. 3211
Newberry WDT	Steven W. Newberry	Written Direct	NAB Ex. 4001
Pakman WDT	David Pakman	Written Direct	IHM Ex. 3216
Papish WDT	Michael Papish	Written Direct	IBS/Harvard Ex. 8000
Pedersen WRT	Jon D. Pedersen	Written Rebuttal	IHM Ex. 3220
Peterson WRT	Dr. Steven R. Peterson	Written Rebuttal	NAB Ex. 4013
Pittman WDT	Robert Pittman	Written Direct	IHM 3222
Poleman WDT	Tom Poleman	Written Direct	IHM 3226
Poleman WRT	Tom Poleman	Written Rebuttal	IHM Ex. 3231
Roberts WRT	Doria Roberts	Written Rebuttal	SX Ex. 0016
Rosin WRT	Larry Rosin	Written Rebuttal	PAN Ex. 5021
Rubinfeld CWDT	Professor Daniel Rubinfeld	Corrected Written Direct	SX Ex. 0017
Rubinfeld CWRT	Professor Daniel L. Rubinfeld	Corrected Written Rebuttal	SX Ex. 0029
Rysman WRT	Professor Marc Rysman	Written Rebuttal	SX Ex. 0018
Shapiro SWRT	Professor Carl Shapiro	Supplemental Written Rebuttal	PAN Ex. 5365

Citation Format	Witness Name	Type of Testimony	Exhibit Number
Shapiro WDT	Professor Carl Shapiro	Written Direct	PAN Ex. 5022
Shapiro WRT	Professor Carl Shaprio	Written Rebuttal	PAN Ex. 5023
Talley WRT	Professor Eric Talley	Written Rebuttal	SX Ex. 0019
Van Arman WDT	Darius Van Arman	Written Direct	SX Ex. 0020
Van Arman WRT	Darius Van Arman	Written Rebuttal	SX Ex. 0030
Weil WRT	Professor Roman L. Weil	Written Rebuttal	NAB Ex. 4011
Westergren WDT	Timothy Westergren	Written Direct	PAN Ex. 5000
Wheeler WDT	Simon Wheeler	Written Direct	SX Ex. 0021
Wheeler WRT	Simon Wheeler	Written Rebuttal	SX Ex. 0031
Wilcox WDT	Ron Wilcox	Written Direct	SX Ex. 0022
Wilcox WRT	Ron Wilcox	Written Rebuttal	SX Ex. 0032

The National Association of Broadcasters'
Proposed Findings of Fact and Conclusions of Law

Redaction Log

Paragraph	Description
Table of Contents	Apple iTunes Radio information designated as RESTRICTED by SoundExchange
6	Characterization of testimony designated as RESTRICTED by SoundExchange
9	On-demand Service Information designated as RESTRICTED by SoundExchange
10	Characterizations of and quotes from record label documents designated as restricted by SoundExchange
13	Apple iTunes Radio information designated as RESTRICTED by SoundExchange
16	Information designated as RESTRICTED by SoundExchange and iHM
51	Third party survey results from RESTRICTED Written Testimony of Michael L. Katz, designated as restricted by NAB
55	Third party survey results from RESTRICTED Written Testimony of Michael L. Katz, designated as restricted by NAB
65	Third party survey results from RESTRICTED Written Testimony of Michael L. Katz, designated as restricted by NAB
89	Characterizations of and quotes from testimony contained in the RESTRICTED 5/21/15 Hearing Transcript (Poleman)
91	Characterizations of and quotes from testimony contained in the RESTRICTED 5/21/15 Hearing Transcript (Poleman) and the RESTRICTED 5/13/15 Hearing Transcript (Morris)
92	Promotional testimony characterizations of and quotes from testimony contained in the RESTRICTED 5/13/15 Hearing Transcript (Morris)

94	Characterizations of and quotes from testimony contained in the RESTRICTED Deposition of Charlie Walk
97	Characterizations of and quotes from testimony contained in the RESTRICTED 4/28/15 Hearing Transcript (Kooker)
101	Characterizations of and quotes from testimony contained in the RESTRICTED Deposition of Charlie Walk
102	Characterizations of and quotes from testimony contained in the RESTRICTED Deposition of Charlie Walk
103	Record label financial information designated as RESTRICTED by SoundExchange
105	Characterizations of and quotes from testimony contained in the RESTRICTED Deposition of Charlie Walk
109	Characterizations of and quotes from testimony contained in the RESTRICTED Deposition of Charlie Walk
110	Third party survey results from RESTRICTED Written Testimony of Michael L. Katz, designated as RESTRICTED by NAB
112	Characterizations of and quotes from testimony contained in the RESTRICTED 4/28/15 Hearing Transcript (Kooker)
116	Characterizations of and quotes from testimony contained in the RESTRICTED 4/30/15 Hearing Transcript (Harrison)
123	Broadcaster financial information designated as RESTRICTED by NAB
127	Broadcaster financial information designated as RESTRICTED by NAB
128	Broadcaster financial information designated as RESTRICTED by NAB
130	Broadcaster financial information designated as RESTRICTED by NAB
131	Broadcaster financial information designated as RESTRICTED by NAB
132	Broadcaster financial information designated as RESTRICTED by NAB

137	Broadcaster financial information designated as RESTRICTED by NAB
144, Figure 4	Webcaster Licensee Fee Data designated as RESTRICTED by SoundExchange
145, Figure 5	Webcaster Licensee Fee Data designated as RESTRICTED by SoundExchange
147	Webcaster License Fee Data designated as RESTRICTED by SoundExchange
157	Webcaster Licensee Fee Data designated as RESTRICTED by SoundExchange
160	Royalty payment data designated as RESTRICTED by Pandora
165	Record label financial information designated as RESTRICTED by SoundExchange
166	Record label financial information designated as RESTRICTED by SoundExchange
167	Record label financial information designated as RESTRICTED by SoundExchange
190	Information designated as RESTRICTED by SoundExchange
193	Broadcaster financial information designated as RESTRICTED by NAB
194	Broadcaster financial information designated as RESTRICTED by NAB
218	Webcaster agreement data designated as RESTRICTED by Pandora and characterization of testimony contained in the RESTRICTED 4/29/15 Hearing Transcript (Huppe)
219	Royalty payment information designated as RESTRICTED by SoundExchange
221	Apple iTunes Radio data designated as RESTRICTED by SoundExchange
224	Broadcaster station data designated as RESTRICTED by NAB

236	Record label information designated as RESTRICTED by SoundExchange
270	Negotiation information designated as RESTRICTED by SoundExchange
281	Negotiation information designated as RESTRICTED by various parties
293	Characterizations of and quotes from testimony contained in the RESTRICTED 5/5/15 Hearing Transcript (Rubinfeld)
294	Record label competition information designated as RESTRICTED by SoundExchange
296	Characterization of testimony contained in the RESTRICTED 5/5/15 Hearing Transcript (Rubinfeld)
298	Characterization of testimony contained in the RESTRICTED 4/30/15 Hearing Transcript (Harrison)
299	Characterization of testimony contained in the RESTRICTED 5/7/15 Hearing Transcript (Wilcox)
305	Characterization of testimony contained in the RESTRICTED 5/5/15 Hearing Transcript (Rubinfeld)
306	Characterization of testimony contained in the RESTRICTED 5/5/15 Hearing Transcript (Rubinfeld)
307	Record label competition information (relating to UMG/EMI merger) designated as RESTRICTED by SoundExchange
308	Record label competition information (relating to UMG/EMI merger) designated as RESTRICTED by SoundExchange
309	Record label competition information (relating to UMG/EMI merger) designated as RESTRICTED by SoundExchange and characterization of testimony contained in the RESTRICTED 5/5/15 Hearing Transcript (Rubinfeld)
312	Record label competition information (relating to UMG/EMI merger) designated as RESTRICTED by SoundExchange
313	Record label competition information (relating to UMG/EMI merger) designated as RESTRICTED by SoundExchange

314	Record label competition information (relating to UMG/EMI merger) designated as RESTRICTED by SoundExchange and characterization of testimony contained in the RESTRICTED 5/5/15 Hearing Transcript (Rubinfeld)
315	Record label competition information (relating to UMG/EMI merger) designated as RESTRICTED by SoundExchange
316	Record label competition information (relating to UMG/EMI merger) designated as RESTRICTED by SoundExchange
317	Record label competition information (relating to UMG/EMI merger) designated as RESTRICTED by SoundExchange
318	Record label competition information (relating to UMG/EMI merger) designated as RESTRICTED by SoundExchange
319	Record label competition information (relating to UMG/EMI merger) designated as RESTRICTED by SoundExchange
322	Record label competition information (relating to UMG/EMI merger) designated as RESTRICTED by SoundExchange
323	Record label competition information (relating to UMG/EMI merger) designated as RESTRICTED by SoundExchange
324	Record label information designated as RESTRICTED by SoundExchange
325	Record label competition information (relating to UMG/EMI merger) designated as RESTRICTED by SoundExchange and characterization of testimony contained in the RESTRICTED 5/5/15 Hearing Transcript (Rubinfeld)
326	Quotation from testimony contained in the RESTRICTED 5/8/15 Hearing Transcript (Shapiro)
329	Record label competition information (relating to UMG/EMI merger) designated as RESTRICTED by SoundExchange
331	Record label data designated as RESTRICTED by SoundExchange and characterization of testimony contained in the RESTRICTED 5/5/15 Hearing Transcript (Rubinfeld)
332	Quotation from testimony contained in the RESTRICTED 5/5/15 Hearing Transcript (Rubinfeld)

341	Record label competition information designated as RESTRICTED by SoundExchange and characterization of testimony contained in the RESTRICTED 5/28/15 Hearing Transcript (Rubinfeld)
343	Characterizations of testimony contained in the RESTRICTED 5/5/15 Hearing Transcript (Rubinfeld)
348	Record label competition information designated as RESTRICTED by SoundExchange
356	Characterizations by Professor Katz of Professor Rubinfeld's RESTRICTED deposition testimony
357	Characterizations by Professor Katz of Professor Rubinfeld's RESTRICTED deposition testimony
361	Characterizations by Professor Katz of Professor Rubinfeld's RESTRICTED deposition testimony
363	Ad-supported services information designated as RESTRICTED
374	Characterizations of and quotes from testimony contained in the RESTRICTED 5/5/15 Hearing Transcript (Rubinfeld)
382	Marketplace analysis designated as RESTRICTED by SoundExchange
383, Table 6	Information designated as RESTRICTED by SoundExchange
384	Characterizations of and quotes from testimony contained in the RESTRICTED 5/12/15 Hearing Transcript (Katz)
385	Characterizations of and quotes from testimony contained in the RESTRICTED 5/12/15 Hearing Transcript (Katz)
386	Per-play data designated as RESTRICTED
387	Characterizations of and quotes from testimony contained in the RESTRICTED 5/12/15 Hearing Transcript (Katz)
394	Record label information designated as RESTRICTED by SoundExchange
403	Characterizations of and quotes from testimony contained in the RESTRICTED 5/28/15 Hearing Transcript (Rubinfeld)

406	Record label/service agreement information designated as RESTRICTED by SoundExchange
406 n. 7	Record label/service agreement information designated as RESTRICTED by SoundExchange
407	Characterizations of and quotes from testimony contained in the RESTRICTED 5/5/15 Hearing Transcript (Rubinfeld)
408	Record label/service agreement information designated as RESTRICTED by SoundExchange
409	Information designated as RESTRICTED by Pandora
441	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
443	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
445	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
446	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
447	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
448	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
449	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
450	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
451	Record label information designated as RESTRICTED by SoundExchange
452	Webcasting service information designated as RESTRICTED by Pandora
454	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange

455	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
456	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
457	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
458	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
460	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
461	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
Heading VIII.C.4	Apple information designated as RESTRICTED by SoundExchange
463	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
464	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
465	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
466	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
467	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
Heading VIII.C.5	Apple information designated as RESTRICTED by SoundExchange
468	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
469	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
470	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange

471	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
472	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
473	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
474	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
475	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
476	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
477	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
478	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
479	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
480	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
481	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
482	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
484	Apple agreements analysis containing information designated as RESTRICTED by SoundExchange
485	Apple iTunes Radio Data designated as RESTRICTED by SoundExchange
Heading VIII.D	Apple iTunes Radio Data designated as RESTRICTED by SoundExchange
487	Apple iTunes Radio Data designated as RESTRICTED by SoundExchange

488	Apple iTunes Radio Data designated as RESTRICTED by SoundExchange
489	Apple iTunes Radio Data designated as RESTRICTED by SoundExchange
490	Apple iTunes Radio Data designated as RESTRICTED by SoundExchange
491	Apple iTunes Radio Data designated as RESTRICTED by SoundExchange
492	Apple iTunes Radio Data designated as RESTRICTED by SoundExchange
493	Apple iTunes Radio Data designated as RESTRICTED by SoundExchange
501	Beats Limited Service information designated as RESTRICTED by SoundExchange
502	Characterizations of and quotes from testimony contained in the RESTRICTED 5/5/15 Hearing Transcript (Rubinfeld)
503	Beats Limited Service information designated as RESTRICTED by SoundExchange
503, Table 12	Beats Limited Service information designated as RESTRICTED by SoundExchange
506	Beats Limited Service information designated as RESTRICTED by SoundExchange
507	Beats Limited Service information designated as RESTRICTED by SoundExchange
508	Beats Limited Service information designated as RESTRICTED by SoundExchange
510	Nokia MixRadio Plus royalty rate information designated as RESTRICTED by SoundExchange
512	Nokia MixRadio Plus agreement information designated as RESTRICTED by SoundExchange
514	Nokia MixRadio Plus royalty rate information designated as RESTRICTED by SoundExchange

515	Quote from testimony contained in the RESTRICTED 5/5/15 Hearing Transcript (Rubinfeld); Information regarding MixRadio designated as RESTRICTED by SoundExchange
516	Nokia MixRadio Plus agreement information designated as RESTRICTED by SoundExchange
517	Record label agreement information designated as RESTRICTED by SoundExchange and quote from testimony contained in the RESTRICTED 5/6/15 Hearing Transcript (Rubinfeld)
520	Nokia MixRadio Plus agreement information designated as RESTRICTED by SoundExchange
521	Nokia MixRadio Plus agreement information designated as RESTRICTED by SoundExchange
522	Quotes from Professors Katz, Shapiro, and Fischel and Lichtman, characterizing RESTRICTED opinions of Professor Rubinfeld regarding Nokia MixRadio
525	Rhapsody Radio Service information designated as RESTRICTED by SoundExchange
527	Rhapsody Radio Service information designated as RESTRICTED by SoundExchange
528	Rhapsody Radio Service royalty payment information designated as RESTRICTED by SoundExchange
528, Table 14	Rhapsody Radio Service royalty payment information designated as RESTRICTED by SoundExchange
529	Rhapsody Radio Service royalty payment information designated as RESTRICTED by SoundExchange
530	Rhapsody Radio Service royalty payment information designated as RESTRICTED by SoundExchange
532	Spotify Free information designated as RESTRICTED by SoundExchange
533	Spotify Free information designated as RESTRICTED by SoundExchange
534	Spotify Free information designated as RESTRICTED by SoundExchange

534, Table 16	Spotify Free information designated as RESTRICTED by SoundExchange
535	Spotify Free royalty rate information designated as RESTRICTED by SoundExchange
536	Spotify Free information designated as RESTRICTED by SoundExchange
537	Spotify Free agreement and fee payment information designated as RESTRICTED by SoundExchange
538	Spotify Free agreement and fee payment information designated as RESTRICTED by SoundExchange
539	Spotify Free agreement and fee payment information designated as RESTRICTED by SoundExchange
539, Table 17	Spotify Free agreement and fee payment information designated as RESTRICTED by SoundExchange
540	Spotify Free agreement and fee payment information designated as RESTRICTED by SoundExchange
542	Characterizations of and quotes from testimony contained in the RESTRICTED 5/6/15 Hearing Transcript (Rubinfeld)
543	Characterizations of and quotes from testimony contained in the RESTRICTED 5/5/15 Hearing Transcript (Rubinfeld)
544	Characterizations of and quotes from testimony contained in the RESTRICTED 5/6/15 Hearing Transcript (Rubinfeld)
546	Characterizations of and quotes from testimony contained in the RESTRICTED 5/5/15 Hearing Transcript (Rubinfeld)
548	Characterizations of and quotes from testimony contained in the RESTRICTED 5/6/15 Hearing Transcript (Rubinfeld)
549	Characterizations of and quotes from testimony contained in the RESTRICTED 5/6/15 Hearing Transcript (Rubinfeld)
566	iHeart Media listener data designated as RESTRICTED by iHeart Media
567	Characterizations of testimony contained in the RESTRICTED 5/7/15 Hearing Transcript (Wilcox)

568	Characterizations of testimony contained in the RESTRICTED 5/7/15 Hearing Transcript (Wilcox); Record label service agreement information designated as RESTRICTED by SoundExchange and iHeartMedia
569	Characterizations of, and quotes from, testimony contained in the RESTRICTED 5/7/15 Hearing Transcript (Wilcox)
570	Characterizations of testimony from Mr. Pedersen's WRT, designated as RESTRICTED by iHeartMedia
572	Characterizations of and quotes from testimony contained in the RESTRICTED 5/7/15 Hearing Transcript (Wilcox)
575	Record label revenue allocation information designated as RESTRICTED by SoundExchange
581	Quotes from Mr. Pedersen's WRT, designated as RESTRICTED by iHeartMedia
583	Characterizations of testimony from restricted portions of Mr. Pedersen's WRT, designated as RESTRICTED by iHeartMedia
588	Characterizations of testimony from restricted portions of Mr. Pedersen's WRT, designated as RESTRICTED by iHeartMedia
590	Characterizations of and quotes from testimony contained in the RESTRICTED 5/7/15 Hearing Transcript (Wilcox)
591	Characterizations of and quotes from testimony contained in the RESTRICTED 5/7/15 Hearing Transcript (Wilcox)
603	Royalty structure agreement information regarding numerous marketplace deals, designated as RESTRICTED by various parties.
604	iHeartMedia / Warner agreement information designated as RESTRICTED by iHeartMedia and SoundExchange
605	Record label agreement information designated as RESTRICTED by iHeartMedia and SoundExchange
606	Record label agreement information designated as RESTRICTED by iHeartMedia and SoundExchange
622	Record label agreement information designated as RESTRICTED by SoundExchange

627	Characterizations of and quotes from testimony contained in the RESTRICTED Written Testimony of Mr. Pederson designated as RESTRICTED by iHeartMedia
650	Agreement information designated as RESTRICTED by various parties
666	Record label financial information designated as RESTRICTED by SoundExchange
734	Record label financial information designated as RESTRICTED by SoundExchange
750	Webcaster royalty rate structure information designated as RESTRICTED by SoundExchange