PUBLIC

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of **DETERMINATION OF ROYALTY RATES FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)**	**Docket No. 14-CRB-0001-WR (2016–2020)**

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF iHEARTMEDIA, INC.

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INTRODUCTION AND SUMMARY

Digital radio is an alluring technology that has not yet become a viable business for *any* firm. After more than 15 years of experience, and attempts by almost 200 different companies, the digital landscape is littered with failure — not because consumers do not want digital radio, nor because every entrant has been unwilling or incapable of generating a profit. Digital radio has been stymied by royalty rates that were set by reference to bad economic evidence, [redacted] and that make the business "unsustainable" for any firm attempting to run a profitable statutory service.[2] Many have tried, all have failed. The time has come for a serious reexamination — and indeed a reset — of the statutory rates.

The contrast between the economics of digital broadcasting for webcasters and record labels could not be starker. The record labels, represented here by their collective SoundExchange, presented *no* financial data to the Panel, and for good reason. They are highly profitable and expect continued high revenue and even higher profits in the years ahead. In particular, they have extremely high margins on their digital business — which are as high as 86 percent (and even 100 percent) — and as they grow that digital business they expect, and indeed have told their shareholders, that they will be more profitable than ever. Statutory services such as iHeartMedia and Pandora (the two largest webcasters and who participated directly in this proceeding) have money-losing webcasting businesses that they cannot afford to continue indefinitely. iHeartMedia loses money at the current high rates ($0.0025) and has never turned a profit on webcasting. Pandora loses money at the prevailing Pureplay rates ($0.0014) and

[redacted]

[2] Pakman WDT ¶ 34.

likewise has never reported an annual profit. The evidence at the hearing established that *no firm, ever* has made a profit on webcasting. The firms that continue in this field do so, as iHeartMedia CEO Bob Pittman explained, because they believe that [redacted] and that — through direct deals or statutory rates that reflect market rates, or both — the day will come when digital broadcasting becomes a [redacted] business that produces benefits for all rights holders: the services, the record labels, and also the artists and creators who actually make the music.[4]

In the past two proceedings, the Copyright Royalty Board ("CRB") Judges have had no option but to rely on "flawed" analogies to very different markets and services, and specifically the market for services that offer "on demand" or interactive listening.[5] These "lean forward" services are the functional equivalent of a vast personal record collection, which allow subscribers (who pay a monthly fee) to select precisely the song they want to hear when they want to hear it. For all of SoundExchange's rhetoric of "convergence," the evidence showed that these interactive services are and will remain very different from the "lean back" experience of digital radio, which draws its listeners into a curated, ad-supported experience selected for them by someone or something else — whether a traditional DJ also offering talk, sports, and news, or a computer algorithm. [redacted]

[redacted]

[redacted]

[5] *See Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2009-1 CRB (Webcasting III), Final Rule and Order, 76 Fed. Reg. 13026, 13032 (Mar. 9, 2011) ("*Webcasting III Initial Decision*").

[6] Tr. at 2138:1-9 (Rubinfeld); [redacted]

[redacted]

Gone is the need for resort to the "flawed" analogies of past proceedings. For the first time, the Judges have been presented with a full record from which a rate reflecting market reality, as required by the controlling statute, can be set. After 26 days of testimony from 47 witnesses, including leading industry executives and economists, the Judges have a full, "thick" record of the promotional benefits that digital radio provides to record label copyright holders, and the 29 market agreements between willing buyers and willing sellers that prove, finally, that sellers willingly accept rates far less than the current statutory and Pureplay rates in order to obtain additional market share and the promotional benefits that come with that additional exposure.

This first-ever complete record of market evidence proves, *first*, that digital radio is a powerful promotional tool that increases the sales of recorded music, just like traditional terrestrial radio. That evidence includes the testimony of the most knowledgeable industry insiders, the actions of the record labels themselves, the internal analyses and studies reported in the internal documents of the record labels, studies done by the services, and three different empirical analyses of extensive volumes of data by three different expert economists: All of that evidence proves that digital radio promotes sales, and does not substitute for sales. Indeed there is *no* evidence, aside from the self-interested say-so of record label lawyer-witnesses, of *any* substitution.

[redacted]

Second, the market evidence proves that, to obtain these promotional benefits, thousands of record labels have willingly entered into contracts with leading services such as iHeartMedia and Pandora, to *lower* per play rates in return for additional plays (or "spins") on the services. These agreements include iHeartMedia's agreement with Warner, iHeartMedia's agreements with 27 significant and successful independent record labels, and Pandora's agreement with Merlin, a consortium representing thousands of record labels (and whose members could only obtain the benefits of the agreement by voluntarily "opting in" to the agreement, which about 15,000 labels have done).

These agreements have striking similarities: In each, the label agreed to terms that were expected to lower per play rates in return for increased air-play and increased *total* revenues. In each, the labels and the services analyzed the expected *incremental* benefits of the deal and contracted on that basis. In each, those expectations reflected the commercial reality that radio — both terrestrial and digital — is the gateway to music discovery, and that labels must compete for those coveted spins or risk being marginalized.

Although this aspect of market economics may well reflect the very "race to the bottom" that Mr. Van Arman of Secretly Canadian Records disparaged in his testimony at the hearing,[8] such evidence of actual competition in the actual market at issue is precisely the evidence the statute requires. The rate agreed to by thousands of record labels for additional plays on digital radio services is the *best* evidence of the market rate: The rate that willing buyers and willing sellers would — and in fact *do* — agree to *outside* the shadow cast by the statutory rate, which the record shows is $0.0005 per performance.

[8] Tr. at 607:19-608:11 (Van Arman).

GLOSSARY OF PRE-FILED TESTIMONY CITED

Bender WDT	SX Ex. 02	Testimony of Jonathan Bender, COO, SoundExchange, Inc. (Oct. 6, 2015)
Bender WRT	SX Ex. 23	Testimony of Jonathan Bender, COO, SoundExchange, Inc. (Feb. 22, 2015)
Blackburn WDT	SX Ex. 03	Report of David Blackburn, Ph.D. on behalf of SoundExchange, Inc. (Oct. 6, 2014)
Blackburn WRT	SX Ex. 24	Written Rebuttal Testimony of David Blackburn, Ph.D. on behalf of SoundExchange, Inc. (Feb. 22, 2015)
Burruss WRT	SX Ex. 04	Testimony of Jim Burruss, SVP, Promotion Operations Columbia Records, Sony Music Entertainment (Feb. 22, 2015)
Butler WRT	SX Ex. 05	Expert Written Rebuttal Testimony Sarah Butler, M.S., VP, NERA Economic Consulting (Feb. 22, 2015)
Chiang WDT	NAB Ex. 4004	Written Direct Testimony of Johnny Chiang on Behalf of the NAB (Oct. 7, 2014)
Cutler WDT	IHM Ex. 3338	Testimony of Steven Cutler, EVP, Business Development and Corporate Strategy, iHeartMedia, Inc. (Oct. 7, 2015)
Downs WDT	NAB Ex. 4005	Written Direct Testimony of Ben Downs, Bryan Broadcasting on Behalf of the NAB (Oct. 6, 2014)
Fischel/Lichtman WDT	IHM Ex. 3034	Amended Testimony of Daniel R. Fischel & Douglas G. Lichtman (Jan. 12, 2015)
Fischel/Lichtman WRT	IHM Ex. 3054	Rebuttal Testimony of Daniel R. Fischel and Douglas G. Lichtman (Feb. 22, 2015)
Fischel/Lichtman SWRT	IHM Ex. 3371	Supplemental Rebuttal Testimony of Daniel R. Fischel and Douglas G. Lichtman (Apr. 20, 2015)
Fowler WRT	SX Ex. 07	Rebuttal Testimony of Jennifer Fowler, SVP, U.S. Marketing & Revenue Generation, Sony Music Entertainment (Feb. 22, 2015)
Harleston WDT	SX Ex. 09	Testimony of Jeffrey S. Harleston, General Counsel and EVP for Business and Legal Affairs for North America for Universal Music Group (Oct. 6, 2014)
Harrison WDT	SX Ex. 10	Testimony of Aaron Harrison, SVP, Business & Legal Affairs, Global Digital Business, UMG Recordings, Inc. (Oct. 6, 2015)
Hauser WRT	IHM Ex. 3124	Rebuttal Testimony of John R. Hauser, SC.D. (Feb. 23, 2015)

Herring WDT	PAN Ex. 5007	Written Direct Testimony of Michael Herring on Behalf of Pandora Media, Inc. (Oct. 6, 2014)
Herring WRT	PAN Ex. 5016	Amended Written Rebuttal Testimony of Michael Herring on Behalf of Pandora Media, Inc. (Feb. 20, 2015)
Katz WRT	NAB Ex. 4010	Amended Written Rebuttal Testimony of Michael L. Katz on Behalf of the NAB (Apr. 21, 2015)
Kendall WRT	IHM Ex. 3148	Rebuttal Testimony of Todd D. Kendall (Feb. 22, 2015)
Kocak WDT	NAB Ex. 4003	Written Direct Testimony of Robert Francis Kocak (Buzz Knight) on Behalf of the NAB (Oct. 3, 2014)
Kooker WDT	SX Ex. 12	Testimony of Dennis Kooker, President, Global Digital Business and U.S. Sales, Sony Music Entertainment (Oct. 6, 2014)
Kooker WRT	SX Ex. 27	Rebuttal Testimony of Dennis Kooker, President, Global Digital Business and U.S. Sales, Sony Music Entertainment (Feb. 22, 2015)
Lexton WRT	SX Ex. 13	Written Rebuttal Testimony of Charlie Lexton, Head of Business Affairs & General Counsel, Music and Entertainment Rights Licensing Independent Network ("Merlin") (Feb. 22, 2015)
Littlejohn WDT	IHM Ex. 3210	Testimony of Jeffrey L. Littlejohn, Executive Vice President for Engineering and Systems Integration, iHeartMedia, Inc. (Oct. 3, 2014)
Littlejohn WRT	IHM Ex. 3640	Rebuttal Testimony of Jeffrey L. Littlejohn, EVP for Engineering and Systems Integration, iHeartMedia, Inc. (Apr. 21, 2014)
Lys WDT	SX Ex.14	Corrected Testimony of Thomas Z. Lys, Ph.D. (Nov. 4, 2014)
Lys WRT	SX Ex. 28	Written Rebuttal Testimony of Thomas Z. Lys, Ph.D. (Feb. 22, 2014)
McBride WDT	PAN Ex. 5020	Written Direct Testimony of Stephen McBride on Behalf of Pandora Media, Inc.
McFadden WDT	SX Ex. 15	Testimony of Daniel L. McFadden (Oct. 6, 2014)
Morris WRT	IHM Ex. 3211	Rebuttal Testimony of Marissa Morris, VP, National Programming Platforms, iHeartMedia, Inc. (Feb. 23, 2015)
Newberry WDT	NAB Ex. 4001	Written Direct Testimony of Steven W. Newberry, Commonwealth Broadcasting Corp. on Behalf of NAB (Oct. 6, 2014)

Pakman WDT	IHM Ex. 3216	Testimony of David B. Pakman, Partner, Venrock (Oct. 7, 2014)
Pedersen WRT	IHM Ex. 3220	Rebuttal Testimony of Jon D. Pedersen, Sr., SVP and CFO, Radio Markets, iHeartMedia, Inc. (Feb. 22, 2015)
Peterson WRT	NAB Ex. 4013	Corrected Written Rebuttal Testimony of Steven R. Peterson, PH.D. on Behalf of NAB and Pandora Media, Inc. (Mar. 24, 2015)
Pittman WDT	IHM Ex. 3222	Testimony of Robert Pittman, Chief Executive Officer of iHeartMedia, Inc (Oct. 6, 2014)
Poleman WDT	IHM Ex. 3226	Testimony of Tom Poleman, President of National Programming Platforms, iHeartMedia, Inc. (Oct. 7, 2014)
Rosin WRT	PAN Ex. 5021	Written Rebuttal Testimony of Larry Rosin on Behalf of Pandora Media, Inc. (Feb. 23, 2014)
Rubinfeld WDT	SX Ex. 17	Corrected Testimony of Daniel L. Rubinfeld (filed Nov. 4, 2014)
Rubinfeld WRT	SX Ex. 29	Corrected Rebuttal Testimony of Daniel L. Rubinfeld (Feb. 25, 2015)
Shapiro WDT	PAN Ex. 5022	Written Direct Testimony of Carl Shapiro on Behalf of Pandora Media, Inc. (Oct. 6, 2014)
Shapiro WRT	PAN Ex. 5023	Written Rebuttal Testimony of Carl Shapiro on Behalf of Pandora Media, Inc. (Feb. 23, 2015)
Shapiro SWRT	PAN Ex. 5365	Supplemental Written Rebuttal Testimony of Carl Shapiro on Behalf of Pandora Media, Inc. (Apr. 21, 2015)
Talley WRT	SX Ex. 19	Written Rebuttal Testimony of Eric L. Talley, Ph.D. (Feb. 22, 2015)
Van Arman WDT	SX Ex. 20	Testimony of Darius Van Arman, Co-Founder and Co-Owner of Secretly Group (Oct. 6, 2014)
Weil WRT	NAB Ex. 4011	Written Rebuttal Testimony of Roman L. Weil (on Behalf of the NAB) (Feb. 22, 2015)
Wilcox WDT	SX Ex. 22	Testimony of Ron Wilcox, Executive Counsel, Business Affairs, Strategic and Digital Initiatives Warner Music Group (Oct. 6, 2014)

iHEARTMEDIA'S PROPOSED FINDINGS OF FACT

I. BACKGROUND

A. History of Prior Webcasting Proceedings

1. In the first Webcasting proceeding, the Librarian of Congress set a rate for the statutory license of $0.0007 per performance for that entire period from 1998-2002. *See Determination of Reasonable Rates and Terms for the Digital Performances of Sound Recordings and Ephemeral Recordings*, Final Rule and Order, 67 Fed. Reg. 45240, 45272 (July 8, 2002) ("*Webcasting I*"), *aff'd*, *Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939 (D.C. Cir. 2005). That rate was based on a negotiated agreement between Yahoo! and the Recording Industry Association of America ("RIAA") involving statutory services. *See id.* at 45251 ("The starting point for setting the rates for the webcasting license is the Yahoo! agreement.").

2. In the second Webcasting proceeding, however, no participant offered a benchmark based on a negotiated agreement for statutory services. The Judges instead relied on agreements involving the separate market for interactive webcasting. *See Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2005-1 CRB DTRA, Final Rule and Order, 72 Fed. Reg. 24084, 24092 (May 1, 2007) ("*Webcasting II*") ("[T]he most appropriate benchmark agreements are those reviewed by Dr. Pelcovits in the market for interactive webcasting covering the digital performance of sound recordings."), *aff'd*, *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748 (D.C. Cir. 2009). Using this interactive benchmark, however, produced rates that ultimately were **double** the rates produced by relying on a negotiated agreement for statutory services used in Webcasting I: $0.0008 for 2006; $0.0011 for 2007; $0.0014 for 2008; $0.0018 for 2009; and $0.0019 for 2010. *See id.* at 24104.

3. In 2008, Congress passed the Webcaster Settlement Act ("WSA") of 2008, which Congress and the President extended in 2009, to facilitate settlements of disputes over statutory webcasting rates. *See* Pub. L. No. 110-435, 122 Stat. 4974 (2008); Pub. L. No. 11-36, 123 Stat. 1926 (2009). These acts permitted webcasters and SoundExchange to negotiate settlements of ongoing disputes regarding the royalty rates that were set for 2006-2010, and also to negotiate royalty rates for 2011-2015. The Webcasting Settlement Acts also gave the parties the option to exclude those negotiated terms from evidence in a future proceeding before the Judges.

4. The third Webcasting proceeding covered the period from 2011-2015. Most of the parties that filed Petitions to Participate — accounting for "approximately 95 percent of webcasting royalties paid to SoundExchange in 2008 and 2009" — negotiated settlements prior to the hearing. *See Digital Performance Right in Sound Recordings and Ephemeral Recordings,* Docket No. 2009-1 CRB (Webcasting III), Final Rule and Order, 76 Fed. Reg. 13026, 13026 (Mar. 9, 2011) ("*Webcasting III Initial Decision*"). The two commercial webcasters that submitted written direct cases in that proceeding — Live365 and RealNetworks — accounted for "less than 3 percent of total webcasting royalties" for 2008 and 2009. RealNetworks withdrew from the proceedings after filing its written testimony, leaving Live365 as the only webcaster participant at the hearing. *See id.* at 13027 & n.4. As in Webcasting II, no party proposed a rate based on a negotiated agreement for statutory services, so the Judges again relied on the interactive benchmark. This produced rates that escalated even further from those set in Webcasting II: $0.0019 for 2011; $0.0021 for 2012; $0.0021 for 2013; $0.0023 for 2014; and $0.0023 for 2015. *See id.* at 13036.

5. On July 6, 2012, the D.C. Circuit remanded the *Webcasting III Initial Decision* on the ground that the Judges were acting as principal officers of the United States government in

violation of the Appointments Clause of the Constitution. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1342 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 2735 (2013). Although the Court cured the violation, having determined that the Judges were not validly appointed at the time the challenged decision, the Court vacated and remanded that decision, without addressing any substantive issue on appeal, so that a constitutionally appointed panel of Judges could render a new determination. *See id.* at 1334, 1342.

6. The newly appointed Judges conducted a de novo review of the existing record. *See Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 79 Fed. Reg. 23102, 23103 (Apr. 25, 2014) ("*Webcasting III Remand*"). Live365, the only webcaster participant, had not submitted "any benchmarks," and its economic expert "stated that he was 'not aware of comparable, voluntary license agreements that would serve as an appropriate benchmark for an industry-wide rate.'" *Id.* at 17. SoundExchange submitted two categories of benchmarks that the Judges ultimately used to establish a "zone of reasonableness": (1) the agreements reached pursuant to the 2009 WSA between Sound Exchange and "(i) the NAB, covering webcasting by over-the-air (terrestrial) radio stations; and (ii) Sirius XM, covering webcasting of the music channels broadcast on satellite radio," *id.* at 33; and (2) the interactive benchmark, "but only after making certain significant adjustments to that proposed benchmark," *id.* at 50.

7. Although the Judges relied on these benchmarks, they were "also mindful of the procedural context of this determination," including the fact that "[n]o participant sought a reahearing or appealed [the *Webcasting III Initial Decision*] rates to the DC Circuit," which the Judges concluded meant "that the contesting parties had accepted the rates." *Id.* at 66 (emphasis added). The Judges stated they were therefore "reluctant to upset settled expectations by

retroactively altering rates that have been established for several years, and that licensees have already paid in some years, provided that those rates fall within the zone of reasonableness that the Judges determine in this proceeding." *Id.* The Judges concluded that, although "[t]he present *de novo* determination is substantively distinct in a number of respects from the prior determination, but the analysis leads to an approximate 'zone of reasonableness'" consistent with the prior determination. *Id.* The Judges therefore adopted the same rates as the prior determination.

B. The *Webcasting IV* Proceeding

8. On January 3, 2014, the Judges published in the Federal Register a notice announcing the commencement of this proceeding, to set rates for the period from 2016-2020. *See* 79 Fed. Reg. 412 (Jan. 3, 2014). Twenty-nine timely petitions to participate were filed; three of these petitions were subsequently dismissed and ten were withdrawn.[9] CBI and NPR subsequently reached a partial settlement with SoundExchange and filed their motions to adopt settlement on October 7, 2014 and February 24, 2015, respectively.

9. On October 7, 2014, the following participants filed written direct statements in this proceeding: iHeartMedia, Pandora, NAB, Sirius XM, AccuRadio, CBI, Harvard, IBS, NPR,

[9] The 29 parties filing petitions were: 8tracks, AccuRadio, Amazon.com, Apple, Beats Music, College Broadcasters ("CBI"), Clear Channel Communications, CMN, CustomChannels.net, Digitally Imported, Digital Media Association, Educational Media Foundation ("EMF"), Feed Media, GEO Music Group, Harvard Radio, WHRB ("Harvard"), Intercollegiate Broadcasting System ("IBS"), idobi Network, Music Reports, National Association of Broadcasters ("NAB"), National Music Publishers Association, National Public Radio ("NPR"), National Religious Broadcasters Noncommercial Music License Committee ("NRBNMLC"), Pandora, Rhapsody, Sirius XM Radio, SomaFM.com, Spotify, USA, SoundExchange, and Triton Digital. The Judges dismissed the petitions of National Music Publishers Association on April 30, 2014; Music Reports on May 30, 2014; and Triton Digital on June 4, 2014. Spotify, CMN, 8tracks, Feed Media, Digitally Imported, Rhapsody, Amazon, CustomChannels.net, SomaFM, and idobi filed petitions to withdraw as participants.

NRBNMLC (which EMF joined), and SoundExchange. Four of these participants filed written rebuttal statements on February 23, 2015.[10] Several of these participants presented testimony at the hearing, which was conducted over 26 trial days from April 27, 2015 to June 3, 2015.

10. Thus, in stark contrast to *Webcasting III* and other prior proceedings, this proceeding involved participation by the largest providers of statutory webcasting services, accounting for the vast majority of SoundExchange's revenues for such services. In particular, iHeartMedia and Pandora are the two largest statutory webcasting providers, and together account for approximately [redacted] of SoundExchange's revenues for statutory webcasting. *See* [redacted]; *see also* SNL Kagan's Internet Music Report (2014) (SX Ex. 424 at 10) (ranking webcasters by monthly unique users and average active sessions); [redacted] Pandora alone accounts for approximately [redacted] of the royalties paid to SoundExchange in 2014, even though it pays for most content at the Pureplay rates, which are substantially lower than either the statutory rates or the NAB settlement rates that iHeartMedia currently pays where it is not operating under one of its direct deals [redacted]

[10] The Service participants were also permitted to file supplemental rebuttal testimony on April 20, 2015, to address the corrected rebuttal testimony of Professor Rubinfeld with respect to Apple's agreements with Sony and Warner and certain services that Professor Rubinfeld discussed in section III.E of his corrected testimony. *See* Order Denying Licensee Services' Motion To Strike SoundExchange's "Corrected" Written Rebuttal Testimony of Daniel Rubinfeld and Section III.E of the Written Rebuttal Testimony and Granting other Relief, Docket No. 14-CRB-0001-WR (Webcasting IV) (Apr. 2, 2015).

C. iHeartMedia

1. Overview of iHeartMedia and iHeartRadio

11. iHeartMedia is the largest terrestrial broadcaster in the United States, operating more than 850 broadcast stations in more than 150 markets across the United States. *See* Pittman WDT ¶ 8. Its stations and broadcast radio affiliates provide local news, weather, sports and music to approximately 250 million listeners each month in communities across the country. *See id.* Prior to September 16, 2014, iHeartMedia was known as Clear Channel.

12. In response to listener demand to make local radio programming available in more places and on more devices — at home, in cars, and on computers, smartphones, and tablets — iHeartMedia created iHeartRadio. *See id.* ¶ 9. iHeartRadio includes a digital simulcast radio service that lets users find more than 1,500 live terrestrial broadcast stations from iHeartMedia and its terrestrial broadcast partners. *See id.* iHeartRadio also includes a custom radio product, which builds playlists for listeners based on the songs and artists they like. *See id.*

13. iHeartRadio has not yet come close to achieving the same reach or success as iHeartMedia's terrestrial business. iHeartRadio has approximately 50 million registered users, which is one-fifth the number of terrestrial listeners. *See id.* ¶ 11. Tom Poleman, the President of National Programming Platforms for iHeartMedia, Inc., testified that iHeartMedia's digital audience (simulcast and custom) is [redacted] the size of iHeartMedia's terrestrial audience. [redacted]

14. Despite its success in terrestrial radio, iHeartMedia has consistently lost money on iHeartRadio, never once earning a profit on that line of business. iHeartMedia's CEO, Robert Pittman, testified [redacted]

[redacted] SoundExchange did not dispute this.

15. Because of the inability to earn a profit under the current rates, [redacted]

16. [redacted]

[redacted]

[redacted]; *see also generally* Littlejohn WDT (describing song replacement technology). [redacted]

17. Although iHeartMedia has been forced to restrain the growth of its business due to high royalty rates, it has stopped short of exiting the business [redacted] iHeartMedia remains in digital radio in hopes that it will be able through agreements and reduced CRB rates to build a sustainable business that is profitable for all music industry stakeholders:

[redacted]

[redacted]

2. iHeartMedia's Testimony and Rate Proposal

18. iHeartMedia's direct case included testimony from the following three expert witnesses: (i) Professor Daniel R. Fischel, President of the economic consulting firm Compass Lexecon, and the Lee and Brena Freeman Professor of Law and Business Emeritus at The University of Chicago Law School; (ii) Professor Douglas G. Lichtman, Senior Consultant at Compass Lexecon and Professor of Law at the University of California Los Angeles; and (iii) David B. Pakman, a partner at venture capital firm Venrock, and a former founder and investor of a digital music service, with more than 14 years of experience in digital music.

19. iHeartMedia's direct case also included testimony from the following four fact witnesses: (i) Robert Pittman, the Chief Executive Officer and Chairman of the Board of Directors of iHeartMedia; (ii) Steven Cutler, the Executive Vice President for Business Development and Corporate Strategy at iHeartMedia; (iii) Tom Poleman, the President of National Programming Platforms for iHeartMedia; and (iv) Jeffrey L. Littlejohn, the Executive Vice President for Engineering and Systems Integrations at iHeartMedia.

20. iHeartMedia's rebuttal case included expert testimony from Professors Fischel and Licthman plus two other expert witnesses: (i) John R. Hauser, Ph.D, the Kirin Professor of Marketing at the Massachusetts Institute of Technology Sloan School of Management and an expert in survey design and evaluation, and (ii) Dr. Todd Kendall, a Senior Vice President of Compass Lexecon, who has published numerous academic papers that employ statistical and econometric methods, including on the economic effects of the internet and other new media.

21. iHeartMedia's rebuttal case also included fact testimony from Messrs. Poleman and Littlejohn as well as three additional witnesses: (i) Marissa Morris, iHeartMedia's Vice President of National Programming Platforms; (ii) Jon D. Pedersen, Sr., Senior Vice President and Chief Financial Officer of the Radio Markets business at iHeartMedia; and (iii) Charlie Walk, the Executive Vice President of Republic Records (a label of Universal Music Group) who oversees marketing, media, and promotion.

22. Each of iHeartMedia's direct and rebuttal case witnesses testified live at the hearing, except for Mr. Walk, and each had their written testimony admitted into evidence. Mr. Walk was deposed on February 20, 2015, but SoundExchange did not make him available for the hearing. Mr. Walk's deposition was admitted into evidence as [redacted]

23. iHeartMedia submitted its Proposed Rates and Terms on October 7, 2014. For all statutory transmissions and related ephemeral recordings by commercial webcasters (as defined in 37 C.F.R. § 380.2), iHeartMedia proposed the following royalty rate per performance: $0.0005, for each year of the 2016-2020 rate period. These proposed rates are based on more than two dozen agreements between webcasters and record labels for statutory webcasting services — making this the first Webcasting proceeding in which this is the case. Specifically, iHeartMedia's rate proposal is based on agreements that it reached with 28 record labels (including one of the three majors, Warner, and many significant independent labels), and the negotiated agreement between Pandora and Merlin. *See* Part III, *infra.* Significant additional evidence further corroborates these proposed rates. *See* Part IV, *infra.* These proposed rates thus meet the willing buyer/willing seller standard of 17 U.S.C. § 114(f)(2)(B).

D. The Webcasting Industry

24. The webcasting industry has been in existence for well over a decade. It cannot be considered a "nascent" industry or one with a limited number of participants. *See* Tr. at

6219:12-6220:10 (Pakman) ("[W]ebcasting is not a[] nascent industry. It's an industry that's been around 14, 15, 16 years," and it is one where "*hundreds* of companies [] have become webcasters over the years") (emphasis added); Blackburn WDT ¶¶ 17-24 (discussing entry of hundreds of webcasters into the industry).

25. Firms entering the industry over the years have included well-financed webcasting services, including services backed by AOL, MTV, Yahoo!, and CBS. *See* Pakman WDT ¶ 20; [redacted] *see also* Pakman WDT ¶ 25 (discussing a number of other webcasters who have entered the industry, including entities backed by BellSouth, MSN, Virgin, and others). Many other companies also have tried to establish viable webcasting or digital music services. *See* Lys WRT ¶ 135 (noting entry of 175 companies into digital music in 17 years); Blackburn WDT ¶¶ 17-21 (discussing "consistent entry into music streaming in general and into statutory webcasting in particular").

1. Webcasting Has Many Appealing Features and Has Demonstrated Popularity with Consumers

26. Webcasting has many appealing features for consumers that are not available on, or improve upon, the features on terrestrial radio and other traditional methods of music listening. *See* Kooker WRT at 3-14; *see also* Burruss WRT ¶¶ 14-15 (describing features of custom and simulcast broadcasts that improve upon terrestrial broadcasts); [redacted]

[redacted] The Infinite Dial 2014 (PAN Ex. 5289 at SNDEX0002872) ("Majority of Online Radio Listeners Say Sound Quality is Better Than 'Over-the-Air' AM/FM Radio").

27. Statutory webcasting is an increasingly popular way for consumers to listen to music, reflecting many consumers' preference for a free-to-the-user, lean-back listening experience. *See* Herring WRT ¶ 11 ("[T]he size of the lean-back market is so much larger than the lean-in market that, in my opinion, the long-term revenue opportunity for record labels and recording artists is in the lean-back market."). Statutory webcasting has the potential to be a vital platform through which artists reach consumers of their music. *See*, *e.g.*, Tr. at 3565:1-10 (Morris) ("[W]e [iHeartRadio] want to play great music on our stations to keep our audiences engaged and be seen as a platform for music discovery.").

28. The record labels themselves recognize the broad appeal of noninteractive webcasting services. Demand for lean-back statutory services is different from, and far exceeds, the demand for "lean-forward" or "lean-in" interactive services that allow consumers to select and organize the specific music they wish to play, when they wish to play it. *See*, *e.g.*, Kooker WRT at 3 ("Many consumers like the flexibility to 'lean back' and have a programmed experience at some times."); Tr. at 380:11-16 (Kooker) ("Well, I do know from research . . . that lean-back experiences are very, very important to consumers."); Tr. at 1204:11-15 (Wheeler) ("[C]onsumers in the United States are, on the whole, experiencing a more laid-back — lean-back type of experience, you know, more of a give me a feed of the music I like type of experience."); *see also* Herring WRT ¶ 9 & Figure 2 ("[T]he vast majority of music consumers 'lean back' when listening to music."); Tr. at 1685:5-9 (Blackburn) ("Q. And you agree that, generally, drivers prefer a lean-back experience in the car as opposed to a lean-forward experience where they're picking each song, right? A. I should hope so, yes.").

29. Statutory webcasting can also lure consumers away from sources of music listening that do not generate royalty revenues, such as piracy and terrestrial radio. *See* [redacted]; Tr. at 1629:25-1630:3 (Blackburn) ("I don't take it as particularly controversial that there's some listening that's being drawn away from terrestrial radio."); [redacted]

30. Moreover, when consumers do switch to webcasting, they often listen to more music than they did previously, growing the pie of revenues for all industry participants. *See* Shapiro WRT at 60-61 ("Historically, advances in the technology by which music is delivered lead to increases in listening hours."); Blackburn WDT ¶ 12 ("[M]usic streaming services have created not just new distribution channels for traditional consumption of music but new products that create new forms of music consumption") [redacted] Rosin WRT at 12 & Figure 11 (46 percent of respondents to internal Pandora survey said their Pandora listening time is mostly new listening time); The Infinite Dial 2014 (PAN Ex. 5289 at SNDEX0002881) ("Four in Ten iTunes Radio Listeners Say the Time They Spend Listening is 'New Time'").

2. Given the Appeal of Webcasting,

31. In light of the recognized appeal of statutory webcasting services,

32.

3. *Despite the Appeal of Statutory Webcasting, Growth of Webcasting Has Been Stymied, and the Industry Has Not Thrived*

33. The expected migration from terrestrial radio has not actually occurred, and terrestrial radio still dwarfs digital radio in terms of audience size. *See, e.g.*, [redacted] The Infinite Dial 2014 (PAN Ex. 5289 at SNDEX0002888) ("AM/FM Radio Dominates In-Car Media" — AM/FM Radio at 86 percent usage, versus 14 percent for Online Radio); *id.* at SNDEX0002889 ("AM/FM Radio Has Far More Frequent Usage Than Other In-Car Audio Options" — showing approximately ten times more usage than Online Radio); *id.* at SNDEX0002919 ("AM/FM Radio is the leading source to keep up-to-date with music."); SNL Kagan's Internet Music Report (2014) (SX Ex. 424 at 23) ("Internet radio is still a small portion of listening compared to broadcast radio."); [redacted] Burruss WRT ¶ 12 ("[T]here is no comparison between terrestrial broadcasts and internet simulcasts in terms of the size of the audience.").

34. As detailed above, [redacted] *See supra* ¶¶ 15-16; [redacted]

35. Pandora's witnesses likewise testified that, even at the much lower Pureplay rates Pandora pays, it has been "repeatedly been forced to moderate the growth of its listener hours"

due to "its sound recording performance royalty burden." Herring WDT ¶ 7. Pandora's CFO further testified that if the rates were to remain high (or increase) Pandora would need to take even more "drastic measures" that would harm its growth, consumers, and the recorded music industry. *See id.* ¶ 4a.

36. Other webcasters testified that, if the rates continue to remain at or near the current high level, they would have to consider discontinuing their services altogether. *See, e.g.*, Downs WDT ¶ 2.

37. "[D]espite the undeniable popularity of their product, Internet radio companies are struggling to survive." Pittman WDT ¶ 11; *see also* SNL Kagan's Internet Music Report (2014) (SX Ex. 424 at 32) (Although "demand for digital music is at an all time high," even Pureplay webcasters face significant "fiscal woes.").

38. The two largest webcasters in the United States participated in this proceeding, and witnesses from both testified that they have never earned a profit, and do not believe they could ever do so at the current rates. iHeartMedia's CEO, Robert Pittman, [redacted] Mr. Pittman explained that, because "[t]he costs of digital music licensing are so high, there is no way — or incentive — for many Internet radio companies to grow to a scale that would allow them to continue providing music to consumers, and therefore to provide a reliable stream of payments to artists over time." Pittman WDT ¶ 11.

39. Pandora also has never earned an annual profit, despite much lower rates. *See* Tr. at 1663:13-16 (Blackburn); Herring WDT ¶¶ 4a, 5 (Pandora "has yet to see its first profitable year" and, since "launched in 2005, the Company has amassed a cumulative net loss of more than $209 million"). Although Pandora had its first quarterly profit in the final quarter of 2014, it was unprofitable for the year 2014, and Pandora reverted to red ink in the first quarter of 2015, with a "loss [of] 48 million dollars, four times the profit in Q4 of last year." Tr. at 6217:5-14 (Pakman). Analysts do not expect that Pandora will ***ever*** be profitable on an annual basis under current market conditions. *See* Tr. at 6217:15-18 (Pakman). If it were required to pay even higher rates than the Pureplay rates, it is even less likely the company will ever be profitable. *See* Herring WDT ¶ 4a.

40. Other webcasters testifying on behalf of the National Association of Broadcasters (which represents more than 14,000 radio stations, only a small fraction of which are engaged in simulcasting) also testified that they have been unable to earn a profit at the current rates. *See* Downs WDT ¶¶ 2, 20 (SoundExchange's "high royalties" exceed "the revenue we are able to generate from streaming advertisements"; therefore, "[i]f our audience grows, our losses will only increase unless those rates are reduced significantly from their current level").

41. Indeed, it is undisputed that *no* statutory webcaster has ever been able to earn an annual profit: witnesses from both sides agreed that there is no evidence that any statutory webcaster has ever been able to do so. *See* Tr. at 6215:13-18 (Pakman) ("Q: In your experience in the digital music industry or investment, are you aware of any profitable webcasters? A: No, I've never seen or met with or reviewed a single company in webcasting [that is] profitable."); Tr. at 1607:7-10 (Blackburn) [redacted]

[redacted]

42. High royalty rates are the main cost of webcasting and the principal reason for the inability of webcasters to earn a profit. *See* Tr. at 6216:3-9 (Pakman) ("Q: In your experience, what's the reason or the most significant reason for the lack of any profitable webcasters? A: Well, the highest cost, 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."); Tr. at 6235:23-6236:4 (Pakman) ("The royalty rates that webcasters and digital music companies pay don't allow them to become profitable."); Pakman WDT ¶ 18 ("The biggest cost faced by webcasters is the amount of royalties paid to sound recordings rights holders like the record labels.").

43. Other independent analysts confirm that high royalty rates are responsible for the inability of the webcasting industry to reach profitability. For example, SNL Kagan, in a report cited by SoundExchange's expert, Dr. Blackburn, opined that "[t]he most significant common factor for all [internet music and digital radio services] — new or old, free or subscription — is that a profitable business model has yet to be established, and music licensing fees continue to be a burden." SNL Kagan's Internet Music Report (2014) (SX Ex. 424 at 6); *see also* SNL Kagan's Mobile Music Report (2014) (SX Ex. 425 at 9) ("Digital music rights remain expensive, as content owners [record labels] try to use higher license fees to make up for lost physical sales.").

44. There are no profitable webcasters, even though [redacted] pay the CRB rates. [redacted] Instead, services like Pandora pay Pureplay rates, which are approximately half

the statutory rates. [redacted] Pandora and other firms paying Pureplay rates account for nearly 80 percent of the webcasting market. *See* Blackburn WRT ¶ 23 and Table 2

45. Webcasters cannot increase their revenues or achieve profitability by charging more for their services — either by imposing subscription costs, or by increasing the amount of advertising on ad-based services that are free to the consumer. *First*, only a small percentage of consumers are willing to pay for streaming music. [redacted]

46. *Second*, webcasters face intense competition that further constrains their pricing, not only among themselves, but against other free sources of music, such as terrestrial radio, YouTube, and piracy. *See*, *e.g.*, Shapiro WDT at 16; Tr. at 1628:22-1629:3 (Blackburn) (testifying that webcasting is "likely to take away from what people listen to in cars, and some of that is terrestrial radio"); McFadden WDT ¶ 45 & Figure 1 (showing that YouTube was the second most popular platform of music streaming services for respondents to McFadden's survey); Rosin WRT at Figure 10 (noting that, if Internet radio or audio-only music services no longer existed, 16 percent of consumers would watch videos or listen to music on YouTube or

Vevo); Talley WRT at 19-20 ("[A]s digital content has become a dominant medium of listenership, the credible threat of online piracy has become an important source of concern. The specter of piracy can often act as a significant constraint on pricing, particularly for sellers of differentiated products that are valued highly by the market. An attempt to extract too high a price (a price passed through to consumers by webcasters) can cause end users to substitute pirated content for legitimate sourced materials, placing significant constraints on supplier pricing.").

47. Contrary to SoundExchange's claims, *see* Lys WRT ¶ 128, there is no evidence that webcasters are intentionally sacrificing profits in the short term in order to pursue other goals, such as market-share growth. Webcasters have testified that, far from sacrificing short-term profits, they have been doing everything they can to maximize them, including trying to maximize advertising and their ability to reinvest in order to improve their services. For example, as the CFO of Pandora explained, "Pandora has consistently sought to maximize advertising revenue by expanding the types of advertisements that we offer, and expanding our sales and sales marketing staff to compete for advertising spending that would otherwise go elsewhere, including to traditional radio stations." Herring WDT ¶ 11. Similarly, Dr. Peterson, a witness for Pandora and the NAB, explained that "Pandora's financial performance is properly understood as a result of the need to compete for users and invest in the future of the business — that is, its financial performance is the result of its maximizing its profits, not the result of its deferring profits." Peterson WRT ¶ 76.

48. Given the maturity of the webcasting industry, and the large number of companies who have tried to create a viable business, "[o]ne would expect" after approximately 15 years that the industry "would see some evidence of profitability." *See* Tr. at 6219:12-6220:10

(Pakman). Yet there is no such evidence, even though many first have attempted different business models or strategies. *See* Tr. at 6220:11-6221:5 (Pakman).

49. In addition to the lack of profitability across the entire webcasting industry — even for the super-majority of webcasters paying rates that are half of the statutory rates — other economic indicia show that the webcasting industry is in poor financial health due to the high royalty rates. *First*, the webcasting industry has a high failure rate. *See* Pakman WDT ¶ 19. An empirical analysis comparing the high failure rates in webcasting to other Internet or eCommerce industries using the PitchBook Platform, a well-known "proprietary database" that "venture capitalists regularly use," *id.* ¶ 26, reveals that "digital music companies are twice as likely to fail than these other sectors," Tr. at 6227:1-5 (Pakman). Among the webcasters that have failed are "many of the digital music services that were relied on to set rates in prior webcasting proceedings." Pakman WDT ¶¶ 23-25. This includes Yahoo!, which only weeks after the rates were set in the CARP proceeding ceased its simulcasting business. *See id.* ¶ 24.[11] Similarly, other services backed by larger companies like AOL, CBS, and MTV have been shut down. *See id.* ¶¶ 20-21; [redacted]

50. *Second*, the webcasting industry also has a low rate of meaningful investment in relation to comparable industries. The webcasting industry does not attract investors or a significant number of entrepreneurs who are willing to start companies, again due to the royalty rates webcasters must pay. *See* Tr. at 6234:20-24 (Pakman) ("I don't believe [webcasting]

[11] Mr. Pakman's testimony about the reasons why Yahoo! exited the webcasting business, which were based on personal knowledge, *see* Tr. at 6233:19-6234:15 (Pakman), refute the testimony of SoundExchange expert Professor Lys (at WRT ¶ 149) that Yahoo! exited the webcasting business for reasons other than the rates it paid.

attracts significant amounts of venture capital . . . [or] a significant amount of entrepreneurs who are willing to start companies, build them, owing to high royalty rates."). As long as rates remain high, the industry will remain unattractive for investors. *See* Tr. at 6247:9-11 (Pakman) ("As long as rates are high, I think that makes this industry less attractive.").

51. Empirical analysis of the PitchBook database also shows that, over the last 17 years, there has been little investment in the webcasting industry relative to other comparable digital industries, such as mobile communications, eCommerce, and Software-as-a-Service industries. *See* Pakman WDT ¶ 26. Between 10 and 45 times the number of companies have been created in those other sectors as compared to digital music companies as a whole. *See* Tr. at 6226:18-6227:1 (Pakman). This lack of investment indicates that statutory webcasters are not "attractive candidates for investment" because they "are burdened by high royalty rates charged for performing sound recordings that result in unsustainable gross margins and unprofitable companies." Pakman WDT ¶ 29. In all events, any focus on the raw number of entrants misses the bigger picture, given that only a handful of webcasters account for the bulk of listening and corresponding royalties paid to SoundExchange. *See* Peterson WRT ¶ 31. And, as noted previously, those companies — primarily iHeartMedia and Pandora — are unprofitable.

52. The evidence from SoundExchange's expert, Professor Lys, also suggests a less-than-rosy investment picture for webcasting, despite his attempts to characterize the industry as thriving. *See* Lys WRT ¶ 135. Professor Lys states that approximately $2.4 billion has been invested in the music industry in recent years, but less than a fifth of that recent investment ($432 million) went into Internet radio, with more than 90 percent of that ($393 million) going to Pandora and most of the remainder going to non-statutory webcasters TuneIn and DeliRadio. *See* Tr. at 6231:3-6232:15 (Pakman). The investors who participated in Pandora's secondary

offering, which Professor Lys and Dr. Blackburn cited, and who have held their Pandora stock have seen their investment "decrease by nearly $10 per share (a 40% decline) since they made their investment." Peterson WRT ¶ 38.

53. The only significant entry into webcasting in recent years has been by large multi-business companies like Apple, Amazon, or Google, which cannot be considered a sign of industry health, but instead suggests the opposite. These companies have the ability to operate music services unprofitably only by subsidizing them with profits from other lines of businesses. It is a sign of an "unhealthy market" if the only digital music companies are those "owned by larger companies content to subsidize their music subsidiaries with unprofitable music services while only generating profit elsewhere in the businesses." Pakman WDT ¶ 28; *accord* Tr. at 6227:25-6228:10 (Pakman).

54. In sum, the evidence demonstrates that the webcasting "industry will continue to be hobbled until the CRB establishes royalty rates that better reflect economic reality." Pittman WDT ¶ 14.

4. The Webcasting IV Proceeding Is a Critical Inflection Point for the Webcasting and Music Industry More Generally.

55. Notwithstanding the financial difficulties plaguing the webcasting industry in the past, it is also clear that there is an opportunity for the future, as "lower royalties would mean higher gross margins and would offer a company a higher chance of being profitable." Tr. at 6216:3-16 (Pakman). As Mr. Pittman testified, [redacted]

[redacted]

56. The workable solution requires lower royalty rates for statutory webcasters, as "[f]or there to be a sustainable Internet radio industry — one that provides benefits to broadcasters, labels, artists, and the public — the per-play cost of digital music licensing must be reduced significantly." Pittman WDT ¶ 12. The only sustainable solution for the digital music industry is to find a solution where everyone — the services, the record labels, and the artists — can make money. [redacted] "[W]e don't want to drive the service out of business. That's not what it's about. We need them. They need us." Tr. at 1428:7-9 (Harleston).

57. Even with lower royalty rates, "[t]he overall money paid to record companies and artists can increase, as a lower rate causes volumes to increase — and total revenue paid to the music industry is equal to rates times volume — and that's a win-win for all parties." Pittman WDT ¶ 12; [redacted]. By lowering the rates to levels "that better reflect economic reality . .

. the incentives of Internet radio companies and labels will once again be aligned, and the industry will once again be positioned to promote growth and innovation, to provide more music choices for consumers, and to generate significant and sustainable revenue for artists and their labels." Pittman WDT ¶ 14.

58. *Webcasting IV* is a critical proceeding for iHeartMedia and the entire webcasting industry, and therefore for the entire music industry. *See* Tr. at 4795:3-10 (Pittman) ("Q. Could you tell us why you are here today? A. I am here because I think this is critically important to, not only to our business, but to the industry. And when I say the industry, I mean not only radio and digital, but I mean the music business including the record companies and the artists."). A viable webcasting industry is critical to ensuring that artists can reach consumers and that they will be fairly compensated when their music is heard. *See* Tr. at 4795:11-23 (Pittman) (explaining that industry participants need a solution for the future of webcasting to "build a sustainable marketplace so that everybody makes money from it and the consumer gets more and more of what they want).

59. Outside of CRB proceedings, [redacted]

E. The Recorded Music Industry

60. In stark contrast to the webcasting industry, the record industry is highly profitable. The three major labels — which account for 85 percent of the industry — are focused on their digital businesses, which have a much lower cost structure and correspondingly high margins. To the extent the major labels have suffered declines in other revenues, most of that

decline occurred prior to the advent of webcasting, and is due to unrelated factors, such as piracy, the rise of other free-to-the-consumer alternatives such as YouTube, disaggregating the album to permit purchases of single tracks on iTunes, and changes in consumer behavior. Far from continuing these trends, webcasting is helping to reverse them. The record label executives who are focused on the actual music business of discovering and promoting artists — as opposed to the "digital rights" lawyers who focus solely on extracting the highest possible royalties — have repeatedly acknowledged that fact.

1. The Recorded Music Industry Is Thriving

61. Three companies account for more than 85 percent of the market for recorded music in the United States. *See* Kooker WDT at 9-10 ("In 1998, there were six major record companies in the U.S. (BMG, EMI, MCA, PolyGram, Sony Music, and Warner Music Group). Today, there are only three (Sony Music, Universal Music Group and Warner Music Group), and the most recent consolidation (Universal Music Group's acquisition of EMI's recorded music business) took place only within the last two years."); Harrison WDT ¶ 4 (Universal's "share of the U.S. recorded music market is approximately 38%"); Kooker WDT at 3 (Sony's "year-to-date market share for CD albums in the U.S. is approximately 28.2% (including both owned and distributed repertoire), and its year-to-date U.S. digital market share for digital albums is approximately 26.5% (including both owned and distributed repertoire)."); [redacted]

62. SoundExchange presented testimony from each of the major labels claiming that the changes in the marketplace threatened their revenue streams and, as a consequence, their ability to continue to invest in musical talent. *See, e.g.*, Harrison WDT ¶ 12 ("Thus, revenues obtained from streaming services will need to increase to ensure Universal receives a fair return

on its investment in the creation of music."); Kooker WDT at 6 ("In order for [Sony] to continue finding and developing the musical talent that the public desires, we must earn a fair return on the exploitation of our content."); Wilcox WDT at 3 ("It is imperative, therefore, that WMG increases its digital revenues in order to compensate artists appropriately, discover new musical talent, produce the highest quality recordings, and market and promote artists to the widest possible public audience.").

63. Despite these vague and unsupported prophecies of doom, no record label witness provided financial data regarding his company's profits or overall financial health. For good reason: the companies' financial statements established that each of the major labels is in excellent financial condition, with increases expected in both revenues and, more importantly, profits for the coming years. The Cassandra stories were thus refuted by the financial information.

64. **Universal**. Universal provided testimony from two witnesses: Aaron Harrison, Senior Vice President, Business & Legal Affairs, Global Digital Business; and Jeffrey Harleston, General Counsel and Executive Vice President for Business and Legal Affairs for North America. Mr. Harrison testified that streaming revenue has become "much more important to Universal's overall revenue, growing from [redacted] to [redacted] of Universal's digital revenue over the last five years." Harrison WDT ¶ 16. Mr. Harleston discussed Universal's costs but not any other financial metrics, and neither he nor Mr. Harrison submitted testimony regarding Universal's profits.

65. On cross-examination, [redacted]

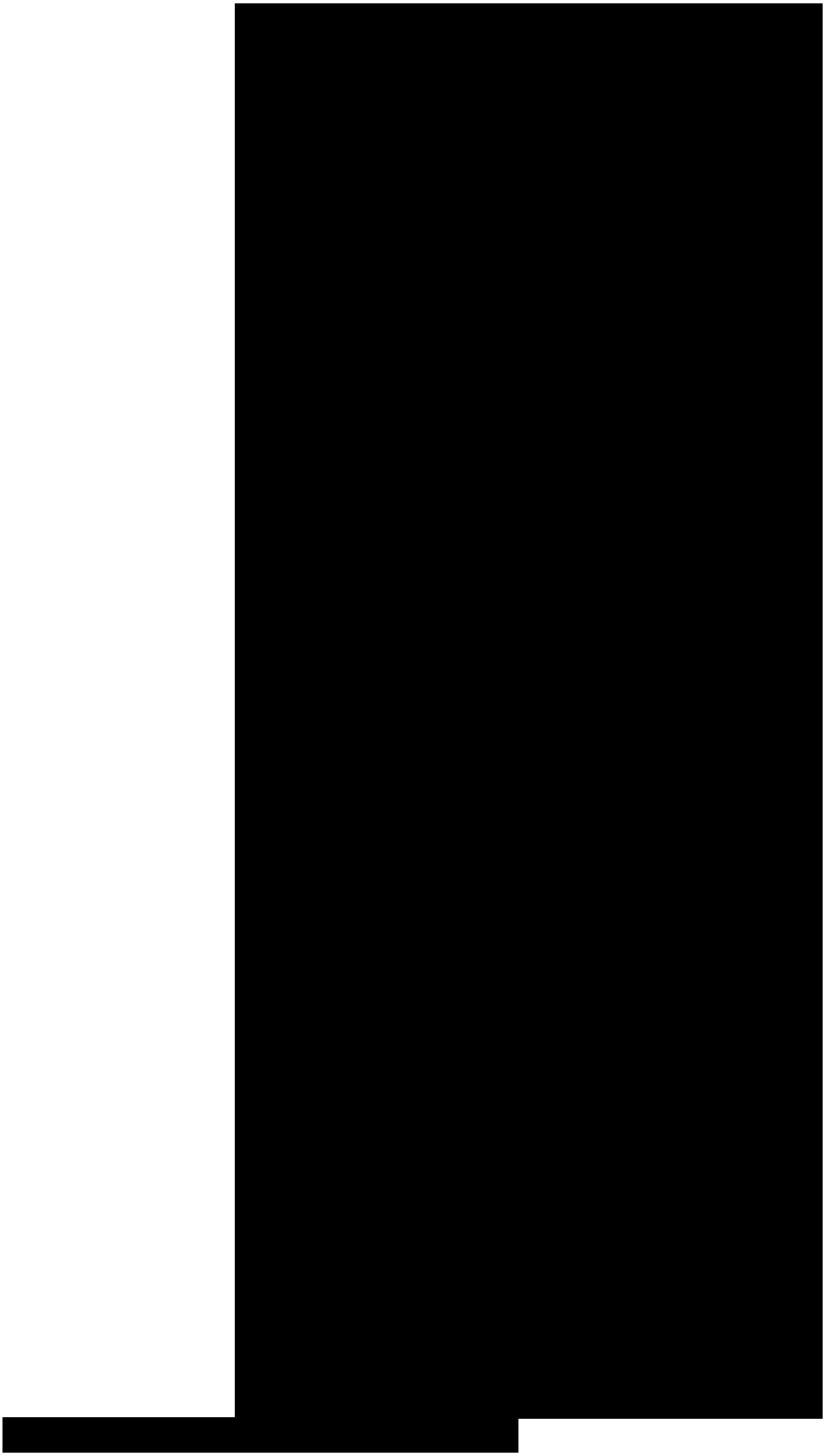
[redacted]

66. [redacted]

[redacted] Mr. Harrison testified that Universal's streaming revenues are growing fast enough to offset the decline in digital downloads. *See* Tr. at 1155:8-20 (Harrison).

67. **Sony**. Sony provided the testimony of one witness: Dennis Kooker, President, Global Digital Business and U.S. Sales. Mr. Kooker testified that Sony's "revenue from various streaming services has increased from around [redacted] in the fiscal year ending March 2009, to approximately [redacted] in the fiscal year ending March 2014." Kooker WDT at 12. Mr. Kooker did not submit testimony regarding Sony's profits.

68. On cross-examination, [redacted]



69. [redacted]

70. **Warner**. Warner provided a single witness: Ron Wilcox, Executive Counsel, Business Affairs, Strategic and Digital Initiatives. Mr. Wilcox testified that Warner's revenues from digital distribution — which includes webcasting as well as digital downloads — "have become a critical component of WMG's business," that such revenues were growing, and that "digital revenues will continue to comprise a greater and greater share of its total revenues in the coming years." Wilcox WDT at 3. Indeed, [redacted]

[redacted]

71. [redacted]

[redacted]

72. Mr. Wilcox also testified on cross-examination [redacted]

73. **Independents**. Besides the three majors, there are also thousands of "independent" record labels, which obviously vary greatly in terms of their size and resources. SoundExchange presented the testimony of witnesses from only three such labels: Simon Wheeler of Beggars Group, Darius Van Arman of Secretly Group, and Glen Barros of Concord Music Group. None of these witnesses provided any financial information about their own labels, or about independents more generally, and none testified that their business model was in financial jeopardy due to webcasting.

74. To the contrary, on cross-examination, Mr. Van Arman acknowledged not only that his label was profitable, but could remain so even at sharply reduced royalty rates:

> Judge Strickler: [I]f statutory royalties were cut in half, would your business still be profitable but less profitable?
>
> The Witness: Immediately, yes . . .

Tr. at 619:4-18 (Van Arman). Similarly, [redacted]

2. Webcasting Is Restoring the Health of the Record Industry, Not Exacerbating Its Decline

75. The reason that the record industry is enjoying strong profits is that new digital businesses have much lower costs than the old physical ones. Moreover, the decline in the record label's physical revenues is not due to webcasting, but to myriad other factors that affected physical sales long before webcasting.

76. Record labels have traditionally been engaged in the creation, distribution, and marketing of recorded music. *See* Kooker WDT at 3; Wilcox WDT at 3; Harleston WDT ¶ 8. With the decline in physical media such as CDs, however, the traditional role of the record label

has changed, and these companies no longer bear the high costs to manufacture, store, and transport music, among other things. [redacted]

Unlike with a CD, there is little or no marginal cost associated with producing each additional copy of a digital file, and the costs of distributing digital music are much lower than the costs of distributing CDs and other physical media. *See* Kooker WDT at 4, 8 (costs of distributing digital music approximately the same as cost of distributing CDs, even though digital music accounts for twice as much revenues).

77. Warner's most recent 10-K report touts its "minimal capital requirements . . . [d]ue to the absence of certain costs associated with physical products, such as manufacturing, distribution, inventory and returns" which has provided "higher margins on our digital product offerings than our physical product offerings." Warner's 2014 10-K (filed Dec. 11, 2014) (IHM Ex. 3637 at 4-5).

78. Mr. Kooker likewise testified [redacted]

79. For more than a decade, sales of physical media such as CDs — the industry's largest source of revenue since the early 1990s — have been declining. *See* [redacted] The biggest cause of this decline — particularly in the early years with the steepest fall-off — is piracy, which rose with the introduction of the file-sharing service Napster in 1999. *See* [redacted]

80. SoundExchange's record label and expert witnesses all conceded that piracy has reduced music industry revenues, and that much of the decline in revenues from physical sales occurred before webcasting. *See* Kooker WDT at 7 ("Over the last decade, sales of our physical products have fallen precipitously year-over-year" as a result of "numerous factors, including the massive online piracy unleashed starting in 1999, advances in technology, and changing consumer preferences."); Tr. at 1404:25-1405:17 (Harleston) (agreeing that the decline in recorded music sales began in 1999, before significant growth in webcasting services); Tr. at 1615:21-1616:1, 1632: 2-1636:13, 5933:20-5934:3 (Blackburn) (same); Tr. at 1766:19-25 (Rubinfeld) (same), [redacted]

81. Another key factor behind the declining sales of physical media was the rise of downloading music from Apple's iTunes store, which was first introduced in 2003. This gave consumers the ability to purchase single tracks, rather than entire albums, which drastically

reduced the amount that consumers spent on recorded music. [redacted]

[redacted] Tr. at 1636:14-1637:6 (Blackburn) (agreeing that disaggregation of album in favor of individual tracks precipitated by iTunes Store had a significant negative impact on industry revenues). [redacted]

82. Other changes in consumer listening habits also have contributed to the decline in consumer spending on recorded music. For example, YouTube, a video service that is free to the consumer, has become one of the principal ways by which consumers listen to music, particularly new music that typically constitutes the bulk of sales. *See* Tr. at 967:4-8 (Harrison) ("YouTube is the largest streaming service out there. Many people use YouTube as a primary consumption method of music, and even though it's a video-playing service, a lot of people do use it for audio purposes."); Tr. at 1637:23-1638:1, 1683:18-24 (Blackburn) (agreeing that there was significant growth in YouTube from 2005 to 2010, and that a significant number of consumers use YouTube to listen to music); [redacted] The Infinite Dial 2014 (PAN Ex. 5289 at

SNDEX0002885, SNDEX0002912) (55 percent of total population age 12+ has used YouTube to listen to music; YouTube is third largest way consumers keep up-to-date with music); [redacted]; Tr. at 5475:1-5 (Frear) (YouTube "is the largest source of online listening in the world."). [redacted]

83. Although there are numerous factors responsible for the decline in sales of recorded music, there is literally *no* evidence demonstrating that webcasting — much less statutory webcasting — is responsible for that decline. Witnesses from both Universal [redacted] testified that they had no such evidence. *See* Tr. at 1116:8-12 (Harrison) ("Q. But you've got no evidence that listening to statutory webcasting is actually the cause of the decline in sales of permanent downloads and CDs; is that right? A. Right. We don't have any –."); [redacted] Outside of this proceeding, Mr. Kooker has likewise acknowledged that there was no evidence of streaming "cannibalizing" industry revenues. *See* S. Dredge article, Sony Music: 'We don't see any evidence' of streaming significantly cannibalizing download sales (IHM Ex. 3294) ("At this point we don't see any evidence that any one area is significantly cannibalistic to any other."). [redacted]; *see also* Kooker WDT at 8; Sales

& Streaming Revenues, 2004-2013 (NAB Ex. 4236 at 1); Sales & SoundExchange Distributions, 2004-2013 (NAB Ex. 4237 at 1).

84. SoundExchange's principal expert on this subject, Dr. Blackburn, likewise conceded that he did not demonstrate *any* causal relationship between the decrease in physical sales and the rise in streaming. *See* Tr. at 1613:11-24 (Blackburn) ("Q. A little bit ago you talked about some of the limitations on the trend lines. But to be very clear, in your written direct testimony, you did not offer an opinion that there is any causal relationship between a decrease in physical sales and an increase in streaming revenues, correct? A. No, I think that's right. I mean, again, this is — this is not an all-else-equal analysis."); Tr. at 1617:3-8 (Blackburn) ("Q. You would concede, would you not, that factors other than the growth of streaming are decreasing sales? A. Absolutely. That's what we said before, if you look at this, it's not an all-else-equal picture."); Tr. at 1647:2-1648:9 (Blackburn) (acknowledging many factors that affect industry revenues, and conceding that he did not try to isolate the impact of any of these factors). Dr. Blackburn also conceded that the decline in recorded music industry revenues was due principally to factors other than webcasting, including piracy, the rise of Apple's iTunes store and the concomitant disaggregation of albums in favor of single tracks, YouTube, and other factors. *See* Tr. at 1633:21-1638:6, 1647:2-1648:9, 5933:20-5934:3 (Blackburn). SoundExchange's main economic witness, Professor Rubinfeld, [redacted]

85. The Services provided expert testimony that also demonstrated that webcasting was not the cause of the declines in music industry revenues. *See* Tr. at 2613:14-2614:4 (Shapiro) ("When you look at the data, the overwhelming share of the decline of record company revenues that's occurred since its peak, which was 1999, occurred — was due to piracy and occurred before webcasting really started to take off at all. So the timing just is a mismatch, if you will, in terms of what happened. . . . Since 2010, by the agreed-upon data, the industry revenues have actually stabilized. That's the period of time during which webcasting has really taken off and become popular."); Tr. at 4489:21-4490:12, 4495:9-4501:25 (Shapiro) (discussing factors that affected declining industry revenues); Shapiro WRT at 49-53 (same).

3. Outside of the Regulatory Context, Record Labels View Webcasting as Critical to Industry Growth

86. SoundExchange's attempt to portray webcasting as a threat to the record industry is not merely wrong but backwards. Basic economics suggest that the record industry should be encouraging webcasting to grow as fast as possible, because webcasting not only provides a way to reach new consumers, but also replaces other ways that consumers can access music that generate little or no revenue. *See* Part I.E. Moreover, each record label should seek not only to grow the entire webcasting industry, but also to increase its own share of that expanding pie at the expense of its rivals. *See id.* As Mr. Van Arman testified, and as economics would predict, in a competitive marketplace labels would eschew cartel behavior and engage in price competition for greater play and exposure for their artists. *See* Van Arman WDT at 14.

87. SoundExchange's contrary story reflects its founding mission: to ensure the highest possible rate. SoundExchange's President and CEO, Michael Huppe, candidly admitted this during his live testimony. *See* Tr. at 699:13-17 (Huppe) ("Judge Strickler: Subject to those

constraints or any others that exist, you want the highest price possible. [Mr. Huppe]: Absolutely. It's only fair.").

88. Not surprisingly, therefore, most of the record label witnesses that SoundExchange presented here — including all of the major label witnesses in its direct case — were selected from the label departments that, like SoundExchange itself, are charged with obtaining the maximum possible rate. Mr. Harrison and Mr. Harleston of Universal, Mr. Kooker of Sony, and Mr. Wilcox of Warner are all lawyers or negotiators who have primary responsibility for negotiating royalty rates. *See*, *e.g.*, Tr. at 1092:6-10 (Harrison) (acknowledging role as primarily legal); Tr. at 352:18-20 (Kooker) (describing responsibilities as including "completing every major deal that we do with a digital service"); Tr. at 2332:5-2333:3 (Wilcox) (describing responsibilities as overseeing direct deals with digital services); Harleston WDT ¶ 1 (describing responsibilities as overseeing "all of the legal functions for UMG in North America"). Mr. Harrison conceded that it is the objective of these negotiators to obtain the highest rate possible, either in private negotiations or through regulatory proceedings such as this one. *See*, *e.g.*, Tr. at 1099:15-17 (Harrison) ("Q. And that's because you always want to get the highest rate possible, correct? A. Correct.").

89. In extracting the highest possible rates, the record label lawyers are concerned, first and foremost, with ensuring that no deal is struck that would provide a rate lower than the statutory rate. [redacted]

[redacted]

90. These lawyers and negotiators admit that a key motivation in refusing to negotiate deals below the statutory rates is to prevent such deals from being used as precedent in regulatory proceedings such as this one. [redacted]

91. [redacted]

92. But the agenda of the lawyers and negotiators was not necessarily the controlling consideration. Label executives who oversee the core functions of discovering, producing, and

promoting artists had a markedly different view of webcasting and its role in the music industry.

93. iHeartMedia's deals with Warner and 27 other record labels are a testament to this win-win mentality. The deals, as discussed more fully in Part III.B-C, benefit both sides: iHeartRadio receives lower rates, but the labels receive more spins and concomitantly greater promotion, resulting in higher revenues overall.

94. Ultimately, during those negotiations, the new thinking won out despite opposition. Following the deal,

[redacted]

95. iHeartMedia and Warner [redacted]

II. RADIO PROMOTES: IT DRIVES SALES AND BREAKS ARTISTS

96. The business of a record label is to "create, produce, market and distribute high quality, popular record music." Kooker WDT at 3. As with virtually any good, the "difference between success and failure" for a label and its stable of artists turns on the ability to make the public aware of that music. Harleston WDT ¶ 28; *see also*, *e.g.*, Tr. at 596:12-597:17 (Van Arman) (bringing artists and music to public attention is one of the two primary functions of a record label along with developing albums).

97. But simply making consumers aware of a new song or album is typically not enough, particularly for a brand-new artist: Repeated exposure is typically necessary to influence consumer behavior. As Mr. Pittman explained:

[redacted]

[redacted]

98. Charlie Walk, Executive Vice President of Republic Records, who oversees promotion for one of the most successful record labels in the U.S. [redacted]

99. Because of the need for repeated exposure, record labels have, for decades, relied heavily on radio — which accounts for more music listening than any other medium by far — to promote their artists and music. The record labels devote enormous resources — including hundreds of employees and hundreds of millions of dollars annually — to getting their music on the radio. They do this by "working" radio programmers in-person, over the phone, and in emails. The airplay that the labels receive is tantamount to billions of dollars worth of free advertising. *See* Pittman WDT ¶ 10.

100. The importance of radio promotion does not diminish as music listening moves online. Record labels have increased their promotional efforts to include digital radio, including services like iHeartRadio and Pandora. Whether a song is heard on digital radio or terrestrial radio, the result is the same: greater exposure results in increased sales. This is confirmed not merely by extensive anecdotal evidence, but also rigorous empirical analysis. For example, Dr. Kendall performed a scientific analysis of a large and reliable data set that found that increased listening to digital radio services resulted in increased music sales. There is, by contrast, no

support for Professor Rubinfeld's claim that "the notion of promoting sales of music is quickly becoming an anachronism," Rubinfeld WDT ¶ 161, [redacted]

101. Because promotion is so valuable, the record labels should and increasingly do compete vigorously with one another to get it. *See, e.g.*, Tr. at 1262:10-13 (Wheeler); *see also* iHeartMedia Proposed Conclusions of Law ¶¶ 15-24. Literally thousands of labels have entered into contracts in which they agreed to reduced royalty rates in exchange for additional plays on digital radio. *See infra* Part III. As their internal documents show, the record labels struck these deals because they believe that greater radio exposure leads to greater revenues from the sale of music and other music-related activities such as concerts.

102. The evidence also shows that not all forms of music streaming services promote equally. Interactive "on-demand" services, unlike noninteractive digital radio services, cannot ensure the repeated exposure to new music that drives sales, because users there select the music they want to hear. The witness testimony, documentary evidence, and rigorous empirical analysis confirm that noninteractive services promote music sales significantly more than interactive services.

A. Record Labels Devote Enormous Resources to Promotion

103. The record labels spend [redacted] annually — a substantial portion of their overall budgets — on promotion. *See, e.g.*, Harleston WDT ¶¶ 11, 30 (Universal spent more than [redacted] on marketing and promotion in 2013-2014, as compared to [redacted] on A&R annually); Kooker WDT at 4-5 (Sony spends [redacted] on marketing and promotion, as compared to [redacted] on A&R annually); Tr. at 2381:1-4 (Wilcox) ("Q. But you would agree with me that Warner spends substantial amounts of money to promote its

artists? A. Yes.");

104. All of the major labels have in-house promotion departments, with, collectively, hundreds of employees. Universal has "hundreds" of current employees that have worked in the in-house promotion departments for its labels (such as Republic Records), and "substantially more" "independent contracts and interns" as well as "former employees" that work in or with those in-house promotion departments. Decl. of Rand Levin, SVP, Universal (NAB Ex. 4137 ¶ 8);

Warner has at least 110 employees in the in-house promotion departments at its labels, which include Warner Bros. Records, Atlantic Records, and Warner Music Nashville. *See* Decl. of Paul Robinson, EVP and General Counsel, Warner (NAB Ex. 4139 ¶ 14).

105. These promotion departments try to increase exposure of the label's artists and music with the goal of increasing music sales and other income from concerts, merchandise, and

"on-demand" streams on interactive services. *See, e.g.*, Decl. of Rand Levin, SVP, Universal (NAB Ex. 4137 ¶¶ 3, 7) ("People who work in promotion departments try to get their label's artists played on terrestrial radio, in the hope that increased plays could help lead to increased record sales."); Decl. of Paul Robinson, EVP and General Counsel, Warner (NAB Ex. 4139 ¶¶ 9, 13) (similar); Decl. of Julie Swidler, EVP and General Counsel, Sony (NAB Ex. 4138 ¶¶ 3, 7) (similar); Burruss WRT ¶ 8 (record labels "promote our most promising new music to terrestrial radio stations because we know . . . listeners who like our music may be incentivized to pay for that music"); Tr. at 7056:17-20, 7059:2-14 (Burruss) (agreeing that Columbia Records promotes music on terrestrial radio because it has promotional benefits and leads to music sales).

106. Among other things, promoters "work" radio programmers to encourage radio stations to play particular tracks and artists; they meet with programmers, often accompanied by the artist, give programmers copies of tracks and albums, and describe the "potential" of particular tracks to become hits. [redacted] Burruss WRT (SX Ex. 4 n.1). Promoters often sponsor [redacted] to encourage the disk jockey to spend more time discussing the album, concert, or artist on air. [redacted]

[redacted]

107. Numerous radio programmers — including Mr. Dimick, Mr. Kocak, Mr. Poleman, Ms. Morris, Mr. Chiang, and Mr. Downs — have described how employees from record labels' promotion departments are constantly "working" them; these employees visit radio stations, often with artists, and call and email radio programmers to ask them to play their music on the radio. *See, e.g.*, Tr. at 5817:15-23 (Dimick) (employees from record label's in-house promotion send "e-mails and MP3s through the mail and fliers and phone calls" and make "in-person visits to the station"); Kocak WDT ¶ 31 (employees from record labels' promotion departments will make "direct asks" of radio programmers to play their music and "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" "on a weekly basis" such that "some stations have to limit the hours in which these visits will be accepted."); Tr. at 5144:7-17, [redacted]; Chiang WDT ¶¶ 5-6 (radio stations are "inundated with requests from record labels to play music by their recording artists" and employees from the record labels' promotion departments reach out to programmers "through every means possible — such as in person sales calls, on the phone, and bringing artists by the radio station to meet program directors and convince them to play and promote their music"); [redacted]

108. iHeartMedia's Ms. Morris described how record labels compete to give elaborate presentations about the music they are releasing in the upcoming months to iHeartMedia's radio programmers at iHeartMedia's Music Summits. *See* Morris WRT ¶¶ 3-14; Tr. at 3563:1-6 (Morris). These presentations are given by top executives and the leaders of record label's in-house promotion departments and often include performances from artists and videos known as "sizzle reels," with clips of past collaborations, artist "thank you" messages, and profiles of emerging artists. *See* Morris WRT ¶¶ 4-6, 8; [redacted]

109. [redacted]

110. None of the record labels' witnesses agreed with Professor Rubinfeld's claim that promoting music sales is "an anachronism." Rubinfeld WDT ¶ 161. [redacted]

[redacted]

111. [redacted] Mr. Poleman agreed, explaining that he has "been doing this since 1983, and I see the same impact today that I saw back in 1983." Tr. at 5145:5-11 (Poleman).

112. The trends in label spending on promotion corroborate that, far from becoming an anachronism, promotion is increasing. In recent years, record labels have increased the resources they devote to promotion. [redacted]

B. There Is Extensive Promotion on Terrestrial Radio Because Increased Play Results in Increased Sales

113. Terrestrial radio is still the principal source of music for most Americans — ninety-two percent of Americans listen to broadcast radio every week. *See* Pittman WDT ¶ 10. Not surprisingly, therefore, the record labels still devote a considerable portion of their promotional dollars to terrestrial radio. This large investment would make little economic sense if the labels did not think that they would earn returns, and indeed the evidence conclusively demonstrates that terrestrial radio is key to promoting sales of music and breaking new artists. In fact, because record labels receive no royalty income from terrestrial radio airplay, the enormous

time, effort, and money record labels devote to convincing radio stations to play their music is only rational because terrestrial radio airplay functions as advertising for products and plays that do generate income for the record labels.

114. SoundExchange offered testimony from only a single promotion executive, Jim Burruss of Columbia Records (a Sony label). *See* Burruss WRT ¶ 1. Mr. Burruss confirmed the testimony of other witnesses, explaining that Columbia "promote[s] our most promising new music to terrestrial radio stations because we know that a large audience listens to terrestrial radio to hear our music; because that type of exposure helps to stoke awareness and interest in music; and because the nature of terrestrial offering means that listeners who like our music may be incentivized to pay for that music." *Id.* ¶ 8; *see* Tr. at 7059:2-14 (Burruss) (terrestrial radio has promotional benefits and leads to music sales).

115. Witnesses universally agreed that playing music on terrestrial radio produces a net gain for the record labels; it brings artists and tracks to public attention and promotes the sale of the products record labels sell (*e.g.*, CDs, downloads, vinyl, concert tickets, artist merchandise, and "on-demand" plays on interactive services). [redacted]

116. Witnesses from the record labels also agree that radio airplay is particularly essential for "breaking" new artists — that is, bringing them to the attention of the public. [redacted]

[redacted]

Testimony from the Services further confirmed that radio "breaks" new artists. *See*, *e.g.*, Poleman WDT ¶ 9 (describing radio's role in breaking Rihanna); Tr. at 3563:7-25 (Morris) (describing radio's role in breaking Fun's album); [redacted]

117. The record labels' conduct confirms the testimony of their witnesses. Record labels routinely track whether radio stations are playing their music and how many listeners have heard particular songs. *See* Tr. at 7046:6-20 (Burruss) (testifying that he uses MediaBase to "monitor [his record label's] songs on the various radio stations" on a "day-to-day" basis); [redacted]

[12] Mr. Harleston testified [redacted]

[redacted]

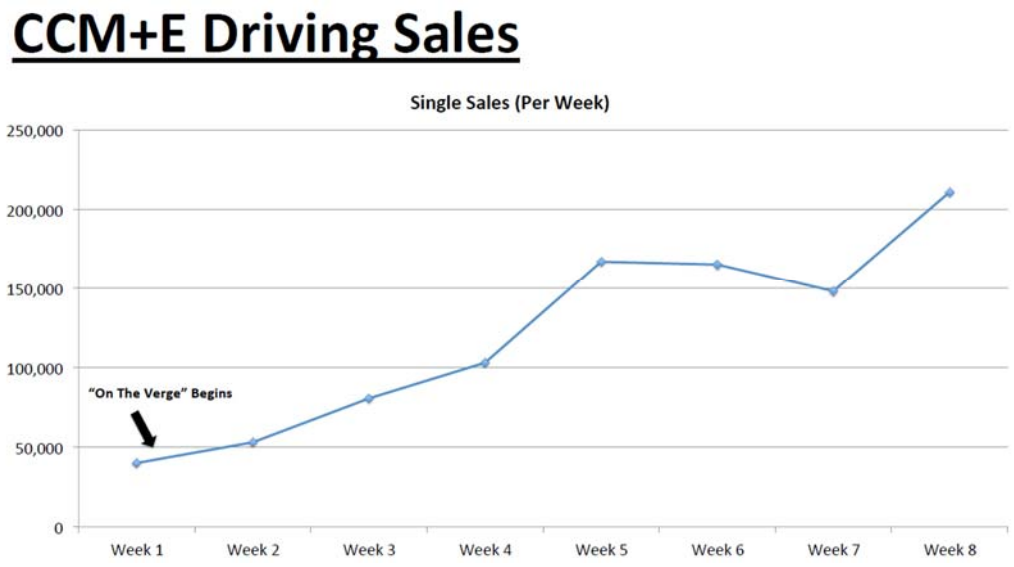
118. When radio stations play a record label's music, promoters regularly send "thank you" notes to radio programmers in which they attribute increased sales of the song to the radio station's airplay. [redacted]

119. Warner recently told investors in a public annual filing with the Securities and Exchange Commission that getting its artists and music played on the radio is a critical component of its overall strategy for selling music, and that Warner uses "radio airplay data" to evaluate the success or failure of its marketing and promotion strategy. Warner's filing states that its marketing and promotion strategy includes "helping the artist . . . choose radio singles," and "coordinating the promotion of albums to radio," and these activities are "carefully coordinated to create the greatest sales momentum." Warner's 2014 10-K (filed Dec. 11, 2014) (IHM Ex. 3637 at 10). Marketing and promotional plans for individual artists and releases are "regularly evaluated based on artist retail sales reports and radio airplay data" and are adjusted if sales and airplay targets are not met. *Id.* (IHM Ex. 3637 at 10).

[13] The record includes evidence of numerous instances where record labels have attributed music sales to radio airplay. [redacted]

120. Data from iHeartMedia's "On the Verge" program further confirms that radio airplay "breaks" new artists and results in increased music sales. Every month iHeartMedia's radio programmers select a song from a new artist to play 150 times over six to ten weeks on their terrestrial *and simulcast* stations as part of the "On the Verge" program. *See* Poleman WDT ¶ 14; [redacted] iHeartMedia's data show that, during that period, the artist's social media following increases, other radio stations start playing the song, the song moves up the MediaBase and Shazam charts, and sales of the song *always* increase. *See* Poleman WDT ¶¶ 14-17 (data for 12 songs that were "On the Verge"); "On the Verge" Campaign Recaps (IHM Ex. 3227) (same); "On the Verge" Summary Slide (IHM Ex. 3644); [redacted]

121. For example, during the eight weeks that Sam Smith's song "Stay with Me" was played as part of the "On the Verge" program on terrestrial and simulcast radio, weekly sales *more than quadrupled* from 39,928 to 210,731. *See* Poleman WDT ¶ 17.



"On the Verge" Campaign Recap for Sam Smith's "Stay with Me" (IHM Ex. 3227 at 188).

122. Consumer surveys also show that radio continues to be the main way that consumers discover new music and that repeatedly hearing song on the radio influences their decision to buy it. *See* The Infinite Dial 2014 (PAN Ex. 5289 at 60) ("AM/FM Radio is the leading source for keeping up-to-date with music."); *id*. (PAN Ex. 5289 at 53) (75 percent of those who consider it important to keep up to date with music use radio to discover new music);

[redacted]

C. Digital Radio Is Radio, and Promotes in the Same Way as Terrestrial Radio

123. Radio succeeds in promoting music not merely because of its reach, but also because it provides music that has been curated to suit listener tastes. Radio provides a "lean-back" experience, in which the listener hears songs that are carefully selected and played in a particular order. Thus, radio listeners can be targeted for particular types of music that are likely to appeal to them, based on the genre or format of station that they choose. This is true not only of terrestrial radio, but digital radio services as well.

124. With respect to simulcast radio services, the similarities to terrestrial radio are beyond serious dispute. The content on simulcast radio is identical (or nearly identical) to the terrestrial radio broadcasts they stream over the Internet. The listener hears the same DJ chatter, gets the same news and weather updates, and hears the same music, including the same new

tracks that record labels' promoters have successfully promoted to terrestrial radio stations. The experience, from the point of view of the consumer, is identical.

125. "Custom" radio also provides a "lean-back" experience, although the curation may be performed by a computerized algorithm rather than a live programmer. Custom radio thus also offers extensive opportunities to expose listeners to music they would not otherwise have known about or chosen.

126. SoundExchange's own President and CEO, Mr. Huppe, acknowledged these core similarities between terrestrial radio and digital radio. He testified that "the concept of things being provided to you on a lean-back experience, perhaps based on some of your input, *that's what I think of as radio*." Tr. at 770:19-22 (Huppe) (emphasis added). Mr. Huppe [redacted]; *see also* SoundExchange, Licensing 101 (IHM Ex. 3292) ("[n]oninteractive services . . . mimic[] a radio broadcast.").

D. Record Labels Compete on Price for Market Share on Noninteractive Services

127. The record labels have entered into 29 deals with noninteractive services in which they have reduced the per-play royalty in exchange for a larger share of plays on the noninteractive service. *See infra* Part III. The decision to trade a lower per-play royalty in exchange for a larger number of plays on a noninteractive service makes sense *only* if the additional plays increase the record label's overall income.

128. There is no doubt that record labels are motivated by the prospect of increasing their market share on noninteractive services. *See, e.g.*, Tr. at 648:20-649:4 (Van Arman) (Record labels are motivated by "increasing their market share, and that's why they enter into play share incentive deals."); Tr. at 780:12-19 (Huppe) (agreeing it would be "economically rational" for record labels to try to "get the biggest piece" of "the overall industry pie");

129. Record label witnesses testified that they have, in fact, been incentivized to agree to lower per-play royalty rates by the prospect of increasing their market share on a noninteractive service and reaping promotional benefits or preserving their current market share.

[redacted]

130. Mr. Van Arman testified that opting in to the Pandora-Merlin Agreement was in Secretly Group's "self-interest." Tr. at 611:5-8 (Van Arman). As he explained, doing so would make it "harder for bigger companies that normally are first movers to enter into play share incentive deals with that same digital service," which could lead to a reduction in Secretly Group's share. Tr. at 610:5-611:4 (Van Arman).[15] [redacted]

131. [redacted]

[14] [redacted]

[15] Mr. Van Arman admitted that losing market share on a noninteractive service "can be detrimental" for a record label. Tr. at 651:5 (Van Arman). Mr. Van Arman's label group, Secretly Group, monitors whether noninteractive services like Pandora and iHeartRadio are playing its music, in the same way that record labels monitor whether terrestrial radio stations are playing their music. *See* Tr. at 651:16-22 (Van Arman). [redacted]

[redacted]

132. Because plays on digital radio services have significant promotional benefits for record labels, there is no floor on the rate that a record label would be willing to agree in order to increase its market share on a digital radio service. Mr. Van Arman testified that deals with steering provisions lead to a "dynamic of driving down prices" and what he pejoratively called a "race to the bottom" — but which is more neutrally described as competition with other record labels on price to get additional plays. Tr. at 607:22-608:11 (Van Arman); *see* Tr. at 650:3-7 (Van Arman) ("When you say you're concerned about a race to the bottom, your concern is that record labels will compete with each [other] on price to get more plays, right? A. Yes."). Mr. Van Arman acknowledged that some record labels might decide to reduce their royalties all the way to zero to win this competition for additional plays. *See* Tr. at 650:8-21 (Van Arman) ("Q.

[16] [redacted]

How far would labels be willing to go to win this race; all the way to zero? A. . . . I can [imagine] some companies deciding to go to zero temporarily.").

133. [redacted]

134. [redacted]

135. [redacted]

[redacted]

136. [redacted]

[redacted]

137. [redacted]

[redacted]

E. The Record Labels' Other Conduct Also Shows Noninteractive Services Are Promotional

138. In addition to signing deals that provide increased promotion on digital radio, the record contains extensive evidence that the record labels have used their promotion departments to influence the songs that noninteractive services play on simulcast and "custom" radio. [redacted]

[redacted] Tr. at 7018:16-18, 7018:19-7019:12 (Fowler) (Sony has participated in Pandora's promotional "Pandora Presents" program, in which Pandora live streams artist performing tracks from their newest albums before they are released, on more than five occasions); [redacted]

139. [redacted]

140. The record labels regularly waive royalties in order to have their music played more on noninteractive services as part of promotional programs, such as iHeartMedia's Digital Artist Integration Program ("DAIP"). [redacted] When record labels submit a new track for the DAIP Program, they "explicitly waive their right to royalties." Poleman WDT ¶ 25; Morris WRT ¶ 22; AIP Terms (IHM Ex. 3214). iHeartRadio receives more than [redacted] *submissions for the DAIP program every month* from major and independent labels — a number that is *increasing* even though these are *royalty-free* plays. *See* Morris WRT ¶¶ 19, 23; [redacted]

[redacted] Songs that are selected for the DAIP program are played on simulcast stations during the unsold portions of commercial breaks. *See* Morris WRT ¶¶ 20-21; Poleman WDT ¶ 24.[17]

141. Record labels make submissions to the DAIP program because they understand that playing the song on iHeartRadio is promotional, just as playing the song on terrestrial radio is promotional. [redacted]

142. When iHeartMedia selects songs for the DAIP program, the record labels often send back the same type of "thank you" emails that they send when radio programmers play their music over terrestrial radio. *See* Morris WRT ¶ 24; Poleman WDT ¶¶ 26, 27; [redacted]

[17] DAIP spots are three minutes long, introduce the song, play the entire song or almost the entire song, and end with a message encouraging consumers to listen to the artist's custom station on iHeartRadio or to buy the song. *See* Morris WRT ¶¶ 20-21; Poleman WDT ¶ 24; Tr. at 3565:20-25, [redacted] Simulcast listeners hear the song several times per day for a month, but DAIP tracks have no impact on terrestrial airplay. *See, e.g.*, [redacted] DAIP, Queens of the Stone Age's "Smooth Sailing" (IHM Ex. 3622); Tr. at 1306:21-22 (Wheeler) (DAIP spot for Queens of the Stone Age's "Smooth Sailing" included "pretty much the whole song").

[redacted]

143. Moreover, record labels have credited the plays they received on iHeartRadio as part of the DAIP program with increasing music sales, just as they credit plays on terrestrial radio with increasing music sales. *See* Poleman WDT ¶ 27; [redacted]

144. As all of these actions demonstrate, the record labels have carefully considered the question whether noninteractive services add to or subtract from their revenues, and have concluded that digital radio services, like terrestrial radio, drive music discovery, music sales, and increase other revenues. [redacted]

[redacted]

F. Empirical Studies Prove Noninteractive Services Promote Music Sales

145. In contrast to prior proceedings, where the only evidence of the promotional effect of noninteractive services was anecdotal, in this proceeding the evidence includes three separate empirical studies showing that noninteractive services promote music sales, including one conducted by an expert for SoundExchange, Dr. Blackburn.

1. Dr. Kendall Concluded Noninteractive Services Promotes Music Purchasing

146. Dr. Kendall analyzed the effect of listening to online streaming music services on music purchases using a robust data set that included information from 10,000 computers over a period of six months. *See* Kendall WRT ¶ 8. Dr. Kendall had three categories of monthly data for each computer in the sample: (a) the amount of time spent listening to music; (b) the number of digital music purchases made on Amazon and iTunes; and (c) the amount of time spent visiting music interest cites, such as RollingStone.com. *Id*. ¶¶ 10, 12; [redacted]

147. Dr. Kendall compared the relative promotional effect of fourteen "on-demand" services, such as Spotify and Rhapsody, and nine digital radio services, such as iHeartRadio and Pandora, using a "fixed effects" model implemented with a least-squares regression analysis. *See* Kendall WRT ¶¶ 9, 15-17. By using a "fixed effects" model, Dr. Kendall controlled for all characteristics associated with a given user that is constant through the six-month period, such as gender, income, race, and education level. *See id.* ¶ 15.

148. Dr. Kendall found that a 10 percent increase in listening to digital radio is associated with a 0.070 percent increase in music purchasing, and that this effect is statistically significant at the 5 percent level. *See id.* ¶ 22; [redacted] Based on this finding, Dr. Kendall concluded "increased listening to an online music listening service is positively associated with increased music sales by the same individual, consistent with a conclusion that these services promote music purchases more than they substitute for them." Kendall WRT ¶ 5.

149. Dr. Kendall's study likely understates the promotional effect of listening to music streaming services for at least four reasons. *Id.* ¶ 14. *First*, Dr. Kendall's data set did not capture CD or vinyl sales; it is likely that some users purchased music on CDs or vinyl during the six-month period. *See id. Second*, Dr. Kendall's data did not capture digital music purchases from vendors other than Amazon and iTunes, or digital music purchases made on other devices; it is likely that some users purchased digital music from other vendors or on other devices. *See*

id. *Third*, Dr. Kendall's data did not capture purchases of concert tickets and merchandise; it is likely some users purchased tickets and merchandise during the six month period. *See id.* *Lastly*, Dr. Kendall's data set did not capture lagged promotional effects; it is possible that some users purchased songs after the six-month period that they discovered listening to a music streaming service.

2. Dr. McBride Concluded Pandora Promotes Music Purchasing

150. Dr. McBride's Music Sales Experiments ("MSE") provides further support for the conclusion that noninteractive streaming services promote music sales. Dr. McBride's MSE show that music sales are higher when that music plays on Pandora, and that the promotional effect on playing music increases when the music receives greater exposure on Pandora. *See* McBride WDT ¶ 49.

151. In the MSE, Dr. McBride prevented Pandora from playing two categories of songs to test groups in particular geographic locations for an eight-week period: (i) recordings new to Pandora, and (ii) catalog recordings that have been played on Pandora in the past. *See id.* ¶¶ 24-25. In total, Dr. McBride ran 1,215 experiments: 814 involved recordings new to Pandora and 401 involved catalogue recordings. *See id.* ¶ 26.

152. Dr. McBride found evidence of the promotional impact of Pandora that is statistically significant and applies to both new music and catalog music from the major record labels and the independents. *See id.* ¶¶ 42-43. Specifically, Dr. McBride found that playing new recordings on Pandora increases music sales by 2.31 percent and playing catalogue recordings on Pandora increases music sales by 2.66 percent. *See id.* ¶ 42. Because of the volume of experiments conducted, these results of the MSE are "generalizable" from the specific music sampled to other new music and catalog music that spins on Pandora. *Id.* ¶ 49.

153. Dr. McBride also found "that the promotional effect is greater for music with greater exposure on Pandora." *See id.* ¶¶ 44, 49. Dr. McBride found a greater promotional effect for new and catalogue recording that were played more often. *See id.* ¶¶ 44, 49 & n.32.

3. Dr. Blackburn's Analysis Shows that Noninteractive Services Promote

154. SoundExchange's expert, Dr. Blackburn, performed an analysis similar to Dr. Kendall's, using a different data set from the same source. Like Dr. Kendall's analysis, Dr. Blackburn's analysis shows that noninteractive music streaming services have a positive promotional impact. [redacted] Blackburn WRT ¶¶ 42-43 and Table 2 (showing that noninteractive users on-average purchased between 0.6 and 5.1 *additional* digital song downloads during the three-month period after they started using a noninteractive service).

155. Dr. Blackburn's data set, like Dr. Kendall's, included six months of data from computers reflecting: (a) time spent listening to music streaming services; (b) the number of music purchases; and (c) the number of visits the user made to music-related websites. Dr. Blackburn compared users who did not use a noninteractive service in the first three-month period, but used at least one such service during the second three-month period. Dr. Blackburn calculated the average change in the number of tracks purchased by users in the second period that began using a new type of service during the second period. *See* Blackburn WRT ¶ 40.

156. Dr. Blackburn conceded at the hearing that his analysis indicates that the best estimate of the impact on sales of a user starting to use a noninteractive service is that the new user purchases 5.123 more downloads in the three-month period after she starts using the service. *See* Tr. at 5980:3-16 (Blackburn) ("Q. So for that group of users [noninteractive users who adopt a streaming service in the second period], that means, according to your analysis, that those

noninteractive users presented in column B, on average, purchased 5.123 more downloads — more song downloads in period 2; is that correct? A. That's the interpretation, yes.").

VARIABLES (a)	Music Purchasers Only (b)
Period 2	-2.936
	(3.04)
Non-Interactive User * Period 2	5.123
	(4.02)

Blackburn WRT Table 2.

157. Dr. Blackburn conducted a second, alternative analysis, in which he expanded the user group to include users who did not purchase any music during either time period. Even on this alternative analysis, Dr. Blackburn's analysis indicates that the impact on sales of a user starting to use a noninteractive is positive.

VARIABLES (a)	Music Purchasers Only (b)	All Music Streamers (c)
Period 2	-2.936	-0.33
	(3.04)	(0.33)
Non-Interactive User * Period 2	5.123	0.624
	(4.02)	(0.45)

Id.

158. Dr. Blackburn found no evidence that noninteractive services substitute for music sales. Dr. Blackburn agreed that neither of his analyses showed users purchased less music after starting to use a noninteractive service. *See* Tr. at 5993:10-14 (Blackburn) ("Q. But [n]either of the analyses that you performed for B or C resulted in fewer song downloads after someone started the use of the noninteractive streaming service, correct? A. That's correct."). He also testified that he found no statistically significant evidence that noninteractive services substitute for digital sales. *See* Tr. at 5994:23-5995:2. (Blackburn) ("Q. You could not say there was any statistically significant evidence that noninteractive services substitute for digital sales, correct? A. That's correct.").

G. Empirical Studies Prove Digital Radio Promotes Music Sales More Than "On-Demand" Services

159. Dr. Kendall's and Dr. Blackburn's analyses also show that noninteractive services promote significantly more than interactive services.

160. As noted above, Dr. Kendall found that a 10 percent increase in listening to digital radio is associated with a 0.070 percent increase in music purchasing, and that this effect is statistically significant at the 5 percent level. In contrast, Dr. Kendall found that the promotional effect of listening to an interactive service is statistically indistinguishable from zero. *See* Kendall WRT ¶ 22 & Ex. D. Based on this finding, Dr. Kendall concluded that "the additional music sales associated with noninteractive listening are more than 15 times larger than the additional music sales associated with interactive listening." *Id.* ¶ 5.

161. Dr. Blackburn's analysis also shows that interactive services, in contrast to noninteractive services, substitute for music sales. According to Dr. Blackburn's own analysis, the best estimate of the impact on sales of using interactive services is that new users of interactive services, on average, purchased 3.383 *fewer* songs in the three-month period after they started using an interactive service. *See* Tr. at 5982:5-12 (Blackburn) ("Q. So the average change in the number of tracks purchased by an interactive user who adopted a streaming service in the second period is negative 3.383, correct? A. Again, restricting it inappropriately only to the people who actually purchase music and ignoring all the people who are not affected, you get negative 3.383."). Even when Dr. Blackburn expanded the user group to include users who did not purchase any music during either time period, the figure is still negative.

VARIABLES	Music Purchasers Only	All Music Streamers
(a)	(b)	(c)
Period 2	-2.936	-0.33
	(3.04)	(0.33)
Non-Interactive User * Period 2	5.123	0.624
	(4.02)	(0.45)
Interactive User * Period 2	-3.383	-0.493
	(6.41)	(1.10)

Blackburn WRT Table 2.

162. Dr. Blackburn's results, therefore, are entirely consistent with Dr. Kendall's. In each of the analyses Dr. Blackburn performed, on average noninteractive users increased their purchases of song downloads during the second three-month period and interactive users decreased their purchases of song downloads during the second three-month period. *See id.*

H. Noninteractive Services Do Not Substitute for Other Record Label Income Sources

163. SoundExchange has not presented any evidence that noninteractive services have caused a reduction in the record labels' other income sources. *See infra* Part V. Moreover, the record labels' behavior in the market, outside of this proceeding, is inconsistent with any claim that noninteractive services have such a substitutive effect. If noninteractive services had a net substitutive effect, the record labels would surely discourage noninteractive services from playing their music and consider those substitutive effects in entering into deals with noninteractive services that increase the use of their music on the service. The record shows that the labels do neither.

164. Record labels understand that the tracks that are played on simulcast are selected by the same local radio programmers that they "work" to play their music on terrestrial radio and that when they successfully promote a track to radio stations, those radio stations will play the track over both terrestrial radio and simulcast. [redacted]

[redacted]

165. Yet there is no evidence that any record label has ever asked a radio programmer not to play their music to avoid having it simulcast. Radio programmers testified that no record label has ever asked them not to play their music on simulcast. *See* Kocak WDT ¶ 29 ("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.' . . . [S]ince we started streaming, no record company representative or artist has ever indicated any aversion to being on our streams."); [redacted]

166. Similarly, with respect to custom radio, there is no evidence that record labels have attempted to discourage noninteractive services from featuring their music in their

algorithms. To the contrary, witnesses from the record labels have expressed frustration that they have no opportunities to influence the tracks that custom radio stations play. *See* Burruss WRT ¶ 16 (because "computer algorithms" drive the programming "there is little that our promotion staff can do to expose the service to new artists or releases that may be of interest to the listening audience"); Fowler WRT ¶ 9 (Sony "cannot promote our artists' releases through Pandora as we do on terrestrial radio" because "we have understood that the algorithm dictates the frequency with which consumers are exposed to and made aware of our artists and their music.").

167. Finally, in contemplating deals with noninteractive services designed to increase plays of their music on the service, record labels have not expressed any concerns that these additional plays will detract from their other income sources.

[redacted]

III. AGREEMENTS BETWEEN WILLING BUYERS AND WILLING SELLERS FOR STATUTORY SERVICES ESTABLISH A BENCHMARK RATE OF $0.0005.

A. The Direct Licensing Agreements in the Noninteractive Market Show that a Willing Buyer and a Willing Seller Would Agree to a Rate of $0.0005 Per Performance

168. The purpose of this proceeding is to determine "the rates and terms that would have been negotiated … between a willing buyer" — a noninteractive webcaster — and "a willing seller" — a record label — for a sound recording performance license in a market where the statutory license did not exist. 17 U.S.C. § 114(f)(2)(B); *see* iHeartMedia Proposed Conclusions of Law ¶¶ 1-24.

169. That task is greatly simplified here, in contrast to prior proceedings, because for the first time there is ample evidence of rates and terms that were *actually* negotiated by such parties, including iHeartMedia's agreement with a major record label, Warner; its agreements with 27 independent labels, including labels representing major artists like Taylor Swift; and Pandora's agreement with Merlin, which negotiates on behalf of thousands of labels, some 15,000 of which have voluntarily opted into the Pandora-Merlin Agreement. Those agreements fully and necessarily incorporate the parties' "economic, competitive, and programming" concerns, including their assessment of the promotional value of noninteractive webcasting on the labels' other sources of revenue and their relative creative and technological contributions. 17 U.S.C. § 117(f)(2)(B).

170. There is no dispute that the many direct licenses between noninteractive webcasters and labels would provide clear evidence of the appropriate statutory rate, were it not for the fact that they were negotiated in a market where the statutory rate *already* exists. *See, e.g.*, Fischel/Lichtman WDT ¶¶ 45-49; Rubinfeld WDT ¶ 184. That preexisting statutory rate

influences directly negotiated rates, because one party always has an incentive to resort to it (either the noninteractive webcaster or the label, depending on whether the statutory rate is below or above the market rate). As SoundExchange's expert witness explained, where the rate is set below the market rate, there will be no direct agreements. *See* Rubinfeld WDT ¶ 166. In contrast, where the rate is set above the market rate, both sides have an incentive to negotiate to a lower rate. *See id.* ¶ 90. The lower rate benefits the service by lowering its costs. The lower rate benefits the record label because it permits the service to stay in business and because it also gives the service the incentive to play the label's music more often, leading to promotional benefits, increased market share, and ultimately higher revenue overall. *See also supra* Part II.C -H.

171. Therefore, determining how low those rates *would have been* — if the statutory rate did not act as a default and a starting point for negotiation — is a slightly more complicated task. That task can be accomplished, however, by carefully examining the nature of the bargain the parties struck. Although the specific terms and structure of those agreements differ, in each case the negotiating parties — sophisticated record labels and major statutory services — took as a given the current number of performances under the statutory license and the statutory rate, and negotiated over the incremental benefits of additional plays.

172. That "incremental" analysis provides persuasive evidence of what the parties would agree to outside the "shadow" of the statutory rate, because it constitutes the portion of each direct deal that was not controlled by the statutory rate. Based on the record evidence of the parties' expectations at the time they struck these deals, these agreements show that willing buyers are willing to pay — and willing sellers are willing to accept — rates that are far lower

than either the current statutory rate or even the much lower Pureplay rate in order to gain the promotional and financial benefits of having their music played more on statutory services.

173. For example, [redacted]

174. Notably, [redacted]

175. As summarized in the table below, and explained in detail in this section, the negotiated agreements in the record demonstrate that a willing buyer and a willing seller in a market without the statutory license would agree to a rate of $0.0005 per performance.

[redacted]

B. iHeartMedia's Agreement with Warner Proves that Willing Buyers and Willing Sellers in This Market Would Agree to a Royalty Rate of $0.0005 Per Performance

176. The agreement between iHeartMedia and Warner provides compelling evidence of the rates and terms that would be negotiated between willing buyers and willing sellers in this market. *See* Fischel/Lichtman WDT ¶ 32. This agreement is of particular significance because of the standing of both parties: one of the largest noninteractive webcasters and one of the three "major" record labels. *See id.*

1. The Terms of the iHeartMedia-Warner Agreement

177. In the iHeartMedia-Warner agreement, in exchange for a license to perform Warner's sound recordings, iHeartMedia agreed to pay Warner [redacted]

[redacted]

178. Two other aspects of the iHeartMedia-Warner agreement are important in evaluating compensation under the agreement, and were the subject of significant testimony by both sides' experts. [redacted]

179. [redacted]

180. [redacted]

181. [redacted]

[redacted]

2. iHeartMedia Expected To Pay [redacted] For Additional Performances of Warner Music as a Result of the Agreement

182. [redacted]

183. Professor Fischel performed this calculation using the set of projections that iHeartMedia's Board of Directors used when evaluating and approving the deal. [redacted]

[redacted]

184. According to its projections, iHeartMedia expected to play [redacted] total performances of all labels' sound recordings over the [redacted] term of the agreement. *See* Fischel/Lichtman WDT ¶ 41 & Ex. A, [redacted]

185. [redacted]

186. [redacted]

187. As explained by Professor Fischel, however, because that average rate was negotiated by iHeartMedia and Warner in a world where the statutory rate *does* exist, it does not reflect the rate that would have been reached in a market "unconstrained by government regulation or interference." *Id.* ¶ 44. The agreement does, however, provide a basis by which an estimate of the "regulation-free rate" can be determined. "As an economic matter, the [iHeartMedia]-Warner agreement reflects a bundle of two distinct sets of rights. The first set provides a license for iHeartMedia to play the same number of Warner performances as it would have played absent the agreement. The second set of rights provides a license for iHeartMedia to

play additional Warner performances, above and beyond those it would have played absent the agreement." *Id.* ¶ 45.

188. As explained by Professor Fischel, compensation for the first "bundle" of rights is directly affected by the existing statutory rate, and therefore provides essentially no information about the rate willing buyers and sellers would negotiate in the absence of government regulation. *See id.* ¶ 48. To illustrate, suppose that iHeartMedia and Warner had negotiated a license for only the first bundle of rights — those performances that iHeartMedia would have played absent the agreement. Because the number of Warner performances would be unchanged, Warner would have an economic incentive to reject any agreement for such a license under which it received less compensation than it would absent the agreement. *See id.* ¶ 46. Warner would have no reason to agree to a deal in which it would receive less revenue for the same number of performances (and thus, the same costs) than it would receive under the statutory rate, thereby lowering its profit. *See id.*; *cf.* Tr. at 605:18-606:1 (Van Arman) ("And so, for us, you know, when we're thinking about those kinds of proposals, it's not hard for us to say, hey, it's actually better for us if we stuck with the statutory royalty rate, which is paying the higher rate."). [redacted] Likewise, iHeartMedia would have no incentive to pay Warner *more* than the existing statutory rate. "If, in private negotiations, Warner demanded a rate higher than the statutory rate, iHeartMedia would simply decline the offer and pay the statutory rate." *Id.* ¶ 47; *cf.* Tr. at 614:1-8 (Van Arman); Talley

WRT at 47 ("[N]o rational buyer would ever be willing to enter into a negotiated, consensual license calling for her to pay a price equal to or exceeding [the] statutory rate.").

189. By contrast, the second "bundle" of rights for which iHeartMedia and Warner contracted is highly relevant to what willing buyers and willing sellers would negotiate if unconstrained by government regulation. This part of the bundle involves a license for iHeartMedia to play *additional* Warner performances, above and beyond those it would have played absent the agreement. *See* Fischel/Lichtman WDT ¶ 49. The bargain for those additional performances is not directly influenced by the existing statutory rate, because absent the agreement, iHeartMedia would not play them and Warner would not receive any compensation for them. *See id.* The royalty rate negotiated for this second "bundle," therefore, is a more appropriate measure of what a willing buyer and a willing seller would negotiate if unconstrained by government regulation, and thus outside the "shadow" of the CRB. "Warner licensed the rights to those performances to iHeartMedia, and iHeartMedia compensated Warner for that license, at rates that were acceptably profitable for both parties." *Id.* That rate was not determined by government regulation, but by the give-and-take of private negotiation.

190. The royalty rate iHeartMedia and Warner agreed to for this second bundle of rights can be calculated by comparing the extra performances iHeartMedia played under the agreement — above and beyond what it would have played absent the agreement — with the extra compensation Warner received: [redacted] The effective price for these "extra" performances — often referred to in testimony as the "incremental" rate — is [redacted]. *See* Fischel/Lichtman WDT ¶ 51; [redacted] That is the rate iHeartMedia

expected to pay Warner for performances it would not have otherwise purchased under the statutory license, and — unlike the average [redacted] per-performance rate discussed above — it is not directly influenced by the statutory rate. It is therefore "a more appropriate reflection of what a willing buyer and willing seller would agree to if unconstrained by government regulation." Fischel/Lichtman WDT ¶ 51; [redacted]

3. Warner Expected To Receive [redacted] for Additional Performances of Warner Music as a Result of the Agreement

191. [redacted]

192. [redacted]

193. [redacted]

4. Professor Rubinfeld's Contrary Analysis of the iHeartMedia-Warner Agreement Is Unreliable and Unpersuasive

194. Despite testifying that his "interactive benchmark" provides the best evidence of the rates and terms that would be negotiated between noninteractive webcasters and record labels, Sound Exchange's expert, Professor Rubinfeld, offered an alternative analysis of the iHeartMedia-Warner agreement — which he characterized as "informative" (Rubinfeld WDT ¶¶ 22, 176,) — as well as several criticisms of Professor Fischel's analysis of that agreement. Professor Rubinfeld's alternative analysis, however, is fatally flawed, and his criticisms of Professor Fischel's model are misplaced.

195. The clearest indication that Professor Rubinfeld's analysis of the iHeartMedia-Warner agreement is fatally flawed is his conclusion: that iHeartMedia agreed to pay Warner [redacted], a rate significantly *higher* than the one available under the statute. *See* Rubinfeld's Analysis of iHeartMedia-Warner Agreement (SX Ex. 64). That analysis not only assumes that iHeartMedia — one of the largest webcasters in the industry — behaved irrationally when entering into the Warner agreement, but also contradicts Professor Rubinfeld's own, repeated assertions that no webcaster would ever agree to pay more than the statutory rate. *See, e.g.*, Rubinfeld WDT ¶ 166.

196. Professor Rubinfeld's obviously-flawed conclusion flows from his unjustifiable decision to assess the value of the iHeartMedia-Warner agreement based on actual performance data from after the contract was signed, in lieu of information about the parties' expectations at the time it was signed. *See* Rubinfeld WRT ¶¶ 26-27. From an economic perspective, 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 [redacted].

[redacted] Tr. at 6382:1-6383:5 (Rubinfeld) (describing application of willing-buyer-willing-seller standard in prior case); *see also* iHeartMedia Proposed Conclusions of Law ¶¶ 1-9.

197. The reason is that — as Professor Rubinfeld himself acknowledged — *ex post* outcomes are influenced by a number of factors that may not be anticipated by the parties at the time of the agreement. *See* Tr. at 6386:14-6387:6 (Rubinfeld) ("Do you recall testifying in your deposition in this case that looking at post-deal performance cannot tell you what a buyer was willing to pay or a seller was willing to accept for a licensed performance [of a] sound recording? A. I may well have said that . . . I certainly think it's something I might have said. Q. And just to be clear, you understand that to be the statutory standard here, correct? A. Just to be clear what? Are you saying . . . I believe it's a statutory standard, what a willing buyer and willing seller would be willing to — Q. Agree to? A. [A]gree to? Potentially — yes, I think it's a willing buyer/willing seller standard, yes."); Tr. at 6390:12-6391:5 (Rubinfeld) (stating that he "would absolutely disagree" that performance data provided information about what Apple agreed to pay); Tr. at 6392:1-17 (Rubinfeld) (testifying he "would doubt that Apple would be very happy about paying .3, .36" and "Apple, I'm pretty sure, had in mind a lot more plays which would have had a lower effective rate"). Accordingly, what happens *after* a contract is

signed is not necessarily informative of what the parties were willing to *agree* to — and that is the relevant statutory standard.

198. This major error in Professor Rubinfeld's analysis of the iHeartMedia-Warner agreement is compounded by other mistakes Professor Rubinfeld made, including his decision to treat [redacted]

199. [redacted]

[redacted]

200. Correcting this single error in Professor Rubinfeld's testimony — even while leaving intact all of his other errors, such as his reliance on performance data in lieu of expectations — [redacted]

[redacted]

201. Other errors in Professor Rubinfeld's analysis of the iHeartMedia-Warner benchmark simply cannot be corrected. Professor Rubinfeld acknowledges, for example, [redacted] Rubinfeld WDT ¶¶ 24, 184. Unlike Professor Fischel, however, Professor Rubinfeld makes no attempt to untangle the effects of that statutory shadow by identifying a rate the parties would have negotiated outside of it.

202. In addition to offering his own analysis of the iHeartMedia-Warner agreement, Professor Rubinfeld takes issue with a number of aspects of Professor Fischel's analysis. None of those criticisms is persuasive. *First*, he criticizes Professor Fischel's "incremental" methodology, analogizing it to a "buy-one, get-one-free deal." Rubinfeld WRT ¶ 24. He notes that if a retailer extends such an offer to a consumer, it is inappropriate to think of the market price of the good being offered as the price for only the second item — *i.e.*, zero. Instead, the market price is more appropriately considered as the average of the two items — *i.e.*, 50 percent of the price of the product. *Id.* As Professor Fischel explained, however, this analogy is flawed. Unlike the buy-one, get-one-free example, here the "consumer" (iHeartMedia) already has decided to purchase a fixed quantity of the goods (performances) being offered by the "retailer" (Warner). [redacted] The parties' negotiation concerned *only* the additional quantity of performances

covered by the second "bundle." To extend Professor Rubinfeld's analogy, if a consumer agreed to purchase one good at full price, and then — after securing that commitment — the retailer threw in a second item for free, it might well be appropriate to think of the "market price" of the second item as zero. [redacted]

203. *Second*, Professor Rubinfeld contends that Professor Fischel's analysis fails to recognize that [redacted] Rubinfeld WRT ¶ 58 ("Obviously, this cannot be replicated for all companies; otherwise [redacted] Professor Rubinfeld, however, fails to appreciate that, in the words of Charlie Lexton, a Merlin executive who testified for SoundExchange: "[s]teering is a particularly important benefit *because* it cannot be replicated across the market." Lexton WRT ¶ 36; [redacted]

204. "As a general matter, when sellers compete with each other, they do so by offering lower prices precisely because they hope to induce increased purchases, and through this

competition, market prices are set. [redacted] To the contrary, this process reflects the ordinary market behavior of willing buyers and willing sellers; it is therefore fully consistent with the statutory standard. *See id.*; iHeartMedia Proposed Conclusions of Law ¶¶ 15-24.

205. [redacted]. Moreover, Professor Rubinfeld himself declined to assign any value to them in his own analysis of the iHeartMedia-Warner deal. [redacted]

206. [redacted]

[redacted]

207. *Fourth*, Professor Rubinfeld also criticizes certain assumptions *internal* to [redacted] and on which Professor Fischel relied. Among other things, Professor Rubinfeld claims that [redacted] *see* Rubinfeld WRT ¶ 44; [redacted]

208. None of these criticisms is well-founded. [redacted]

209. More importantly, however, even if Professor Rubinfeld's criticisms of were well-founded, they would be irrelevant, because Professor Rubinfeld has no basis to claim that the model did not actually represent iHeartMedia's good-faith expectations at the time it entered into the agreement ; Tr. at 5484:7-22 (Fischel)

210. Moreover, any claim that those assumptions were so flawed as to undermine their value as evidence of the price a willing buyer would agree is belied by Warner's own expectations, which as shown above reflect that .

211. *Finally,* Professor Rubinfeld faults Professor Fischel for not proposing a percentage-of-revenue alternative to his per-performance rate, As Professor Fischel testified, however,

[redacted]; Tr. at 4016:14-4017:2 (Lichtman) ("[N]o one thought that provision would be binding. So they have a number that both parties looked at and said that number would never actually be used in the real world, so who cares what the number is, in essence, because it wasn't going to be binding."); [redacted]

212. Significant evidence indicates, in fact, that [redacted]

[redacted] In light of that evidence, it was reasonable for Professor Fischel to [redacted]

C. iHeartMedia's Agreements with 27 Independent Record Labels Provide Further Support for a Rate of $0.0005

213. In addition to its agreement with Warner, iHeartMedia also entered into agreements with 27 independent record labels, which, as of July 2014, accounted for approximately [redacted] of performances on its service. *See* Fischel/Lichtman WDT ¶ 57& Ex. C [redacted] Although Warner's market share is significantly larger than that of any of the independent labels, the 27 deals provide important additional evidence as to the rates negotiated by willing buyers and willing sellers in the noninteractive market, and further support the imposition of a $0.0005 per-performance rate. *See* Fischel/Lichtman WDT ¶ 57.

214. Each of the 27 agreements shares certain key provisions. Each has [redacted] and provides the label with the following cash compensation: [redacted]

[redacted]

215. [redacted]

[redacted]

216. [redacted]

[redacted]

[19] *See also* [redacted]

[redacted]

217. [redacted]

218. By examining documents describing iHeartMedia's pre-deal expectations for the agreements, as he did for the Warner contract, Professor Fischel determined that, absent the deal, iHeartMedia expected to play [redacted] performances of the labels' music, and to pay, in total, [redacted] for those performances. *See id.* ¶ 65; Fischel/Lichtman WDT, Ex. [redacted] Dividing the total expected compensation by the total expected performances indicates that iHeartMedia expected

to pay an average royalty of [redacted] per performance under the deals. *See* Fischel/Lichtman WDT ¶ 67; [redacted]

219. As with the Warner agreement, however, this royalty rate again reflects the average royalty across two distinct sets of performances: those that iHeartMedia would have made absent the deal; and the additional performances above and beyond this level. The rate for the latter category of performances — those that iHeartMedia would not have played absent the agreements — more appropriately indicates what a willing buyer and willing seller would negotiate if unconstrained by government regulation. Focusing on the latter category, iHeartMedia expected to play an additional [redacted] additional performances from these 27 labels as a result of the direct licenses, and expected to pay approximately [redacted] more in royalties. This yields an effective "incremental" rate of [redacted] per performance, slightly lower than the rate derived from the iHeartMedia-Warner agreement. *See id.* ¶ 68; [redacted]

220. As compared to the Warner agreement, Professor Rubinfeld levies few criticisms against Professor Fischel's analysis of iHeartMedia's agreements with the 27 independent labels. In fact, Professor Rubinfeld admitted on more than one occasion during the hearing that he was not sure he had reviewed *any* of the 27 agreements, despite the fact that they were directly negotiated agreements between a willing buyer (iHeartMedia) and willing sellers (record labels) in the noninteractive market. *See* Tr. at 2127:14-2128:12 (Rubinfeld) ("Q. Do you know anything about the individual circumstances of any of these 26 independent labels that contracted

with iHeart for statutory services prior to your written direct testimony? A. I know there were deals, but I didn't have access to information about them. Beyond that, I don't have any more detailed recollection."); [redacted] Tr. at 2112:20-2113:2 (Rubinfeld) (testifying he "didn't have access to" iHeart's deals with independents); Tr. at 2319:19-2321:25 (Rubinfeld) (testifying "there are a number of licenses I didn't have with independents . . . which I have not had a chance to study").

221. To the extent his written testimony addressed the independent agreements, Professor Rubinfeld reached a conclusion similar to Professor Fischel — using actual performance data, as opposed to the parties' pre-deal expectations, he concluded that the agreements supported an effective per-performance rate of [redacted] *See* Rubinfeld WRT ¶ 92; [redacted] Although that figure was [redacted] average rate calculated by Professor Fischel, the difference between the two experts' calculations of the average rate was [redacted]

222. Professor Rubinfeld offered only two criticisms of Professor Fischel's reliance on the independent deals, neither of which is persuasive. *First*, he argued that, "[g]iven their small size, these 27 independent licensors have unique incentives and business motivations that cannot be extrapolated to the entire industry." Rubinfeld WRT ¶ 85. Professor Rubinfeld did not, however, explain why agreements covering [redacted] of total performances on iHeartMedia's service — including agreements with labels like Big Machine, that represent artists such as Taylor Swift and Tim McGraw, and that Professor Rubinfeld himself conceded were "important" and "major" artists, *see* at Tr. at 2121:21-2122:24 (Rubinfeld) — were not valuable sources of information as to the rates and terms that would be negotiated by willing

buyers and willing sellers, including independent label sellers, in the market. *See* Tr. at 1251:22-1252:17 (Wheeler) (testifying that independent labels are sophisticated entities capable of striking deals in their self-interest); *cf.* Tr. at 2133:21-2138 (Rubinfeld) ("Q. Is it your opinion that only the big three constitute willing sellers for purposes of trying to analyze what a market would look like in this proceeding? A. No, that's not my opinion.").

223. [redacted] However, as described by Mr. Cutler, iHeartMedia's Head of Business Development and Corporate Strategy, [redacted] *See* Cutler WDT ¶ 8; Tr. at 7243:22-7244:6 (Cutler); [redacted] The agreements, moreover, were [redacted]

[redacted] Under these circumstances, iHeartMedia's assumption that it [redacted]

D. Pandora's Agreements with Thousands of Labels Represented By Merlin Provide Further Support for a Rate of $0.0005

224. The Pandora-Merlin Agreement provides further support for a significant reduction in rates. That agreement, negotiated by Merlin on behalf of the thousands of labels it represents, is an "opt in" agreement — and approximately 15,000 of the record labels Merlin represents found it advantageous to opt into that agreement. *See* Tr. at 4222:20-25, 4224:1-16 (Herring) (estimating that 15,000 of the labels Merlin represents opted into the agreement); [redacted]

225. Each such agreement covers an approximately [redacted] term, and specifies "headline" royalty rates equal [redacted]. *See* Fischel/Lichtman WDT ¶ 71. Specifically, the agreement requires Pandora to pay Merlin [redacted] *See* Fischel/Lichtman WDT ¶ 71; [redacted]

226. While the "headline" rates reflect [redacted], there are three ways by which payments made by Pandora to Merlin members under the agreements [redacted] *First*, [redacted] *See* Fischel/Lichtman WDT ¶ 74. Pandora has stated that approximately [redacted] of all performances fall into this [redacted] category. *See id. Second*, Pandora [redacted]. *See id.*; Lexton WRT ¶ 37; [redacted]

227. *Third*, and most importantly, Pandora pays [redacted]. *See* Fischel/Lichtman WDT ¶ 75. Pandora committed to [redacted] For example, [redacted] Fischel/Lichtman WDT ¶ 75.

228. This rate structure provides direct evidence in support of the "incremental" methodology used by Professor Fischel. As described by Charlie Lexton, Merlin's general counsel and a SoundExchange witness, Merlin was unwilling to consider a license that would have reduced its members' total compensation, and it specifically was unwilling to consider a deal that would have reduced the royalty rate its members received for performances they would

have received in the absence of a direct license — *i.e.*, the first "bundle" of plays in Professor Fischel's analysis. *See* Lexton WRT ¶¶ 26, 49, 51.

229. Accordingly, negotiations between Pandora and Merlin focused [redacted]; Lexton WRT ¶ 47 ("It is important to note that Pandora initially proposed [redacted]

[redacted] *cf.* Lexton WRT ¶ 38 ("[G]iven that the [redacted], this ensured [redacted]

230. [redacted]

231. Like iHeartMedia's agreements with Warner and the independent labels, these average rates are significantly [redacted] as well as the [redacted]. For instance, [redacted] *See* Fischel/Lichtman WDT ¶ 78. This provides further market evidence of willing buyers and willing sellers negotiating rates [redacted] *See id.*; [redacted]

232. The rate specified in the Merlin labels' contracts is also [redacted]

[redacted]. *See* Fischel/Lichtman WDT ¶ 79. The fact that Pandora's average rate is [redacted] is consistent with a conclusion that the statutory rates have a large influence over the average rates paid under direct licensing agreements. Because Pandora's Pureplay rate is [redacted] This fact supports Professor Fischel's effort to glean more information from the agreements by looking at the incremental rate, rather than average rate. The best evidence of what a willing buyer and willing seller would agree upon, if unconstrained by the statutory license, is not the average rate, but the rate paid for [redacted] *See id.* ¶ 80. As noted above, Merlin itself recognized that the negotiation over rates concerned [redacted]

233. Using Pandora's contemporaneous projections for the agreements and following the same approach for iHeartMedia's agreements with Warner and the independents, Professor Fischel calculated an incremental rate for Pandora's deals with the Merlin labels of between [redacted] and [redacted] per performance, depending on whether [redacted]

[redacted]

234. In conclusion, the available economic evidence from direct licenses in the noninteractive market indicates that, if unconstrained by government regulation, willing buyers (webcasters) and willing sellers (labels) would negotiate royalty rates of approximately $0.0005 per performance.

IV. OTHER ECONOMIC EVIDENCE SUPPORTS IHEARTMEDIA'S IN-MARKET BENCHMARKS

235. In addition to the "thick market"[20] of 29 licensing agreements between noninteractive services and record labels, additional economic evidence in the record supports iHeartMedia's rate proposal and demonstrates that the current statutory rate is too high. This additional evidence, persuasively set forth by iHeartMedia's experts Professors Fischel and Lichtman, includes a thought experiment in which webcasting is assumed to substitute heavily for other sources of record label revenue; an Economic Value Added ("EVA") analysis demonstrating the maximum amount a hypothetical simulcaster could pay in royalties; and an analogy to the SDARS royalty rate. *See* Fischel/Lichtman WDT ¶¶ 93-104, 105-110, 120-128.

[20] *See Order Denying, Without Prejudice, Motions for Issuance of Subpoenas Filed by Pandora Media, Inc. and the Nat'l Assn. of Broadcasters*, at 5, Docket No. 14-CRB-0001-WR (2016-2020) (Apr. 3, 2014); *see also Order Granting in Part Licensee Services' Motion for Expedited Issuance of Subpoenas to Apple, Inc.*, at 5, Docket No. 14-CRB-0001-WR (2016-2020) (Apr. 10, 2015) ("The Judges have held consistently in this proceeding that their efforts to meet the statutory obligation to set marketplace rates is furthered by a presentation of a 'thick' market of agreements . . . ."); *Order Denying Licensee Services' Motion to Strike SoundExchange's "Corrected" Written Rebuttal Testimony of Daniel Rubinfeld and Section III.E of the Written Rebuttal Testimony of Daniel Rubinfeld and Granting Other Relief*, at 11, Docket No. 14-CRB-0001-WR (2016-2020) (Apr. 2, 2015) (noting "the Judges' need for a comprehensive record that contains," *inter alia*, "evidence of a 'thick' market of agreements").

As set forth below, this additional economic evidence supports iHeartMedia's rate proposal, and SoundExchange's criticisms of that evidence are unpersuasive.

A. Professors Fischel and Lichtman's "Thought Experiment" Shows that iHeartMedia's Rate Proposal Is Reasonable and that the Current Statutory Rates Are Too High

236. As discussed in Part I, webcasting is not responsible for the decline in record company revenues from other sources such as CD sales, and if anything is helping to offset the revenue declines caused by other economic forces. Moreover, it is not the task of the Judges to set rates for statutory webcasting to restore record company revenues to any pre-existing or specific level. *See* iHeartMedia's Conclusions of Law ¶¶ 24-28. Nonetheless, Professors Fischel and Lichtman conducted a thought experiment to determine the rate that would be necessary to make the record companies whole, even assuming that webcasting substituted for all forms of music listening. This thought experiment further confirms that iHeartMedia's rate proposal is reasonable and that current rates for statutory services are too high. *See* Fischel/Lichtman WDT ¶¶ 120-128.

237. Professors Fischel and Lichtman assumed that all listening to recorded music that occurs today would migrate to noninteractive webcasting, *and* that this migration would eliminate all other sound-recording revenues to copyright holders. *See id.* ¶¶ 120-122. Based on these extreme assumptions, they calculated what per-performance royalty rate would be necessary to maintain copyright-holder revenue at current levels. *See id.* They determined this rate to be $0.0014, which is equal to the current Pureplay rate and well below the current statutory webcasting rate. *See id.* They also performed a variation of this analysis using the less extreme assumption that noninteractive webcasting would replace 25 percent of the typical listener's revenue-generating activity. *See id.* ¶ 127. Under this scenario, a per-performance

royalty of $0.0004 — a rate very close to the one proposed by iHeartMedia — would be sufficient to maintain copyright-holder revenue at current levels. *See id.*

238. To perform their thought experiment, Professors Fischel and Lichtman initially assumed that, "when an individual migrates from terrestrial radio to webcasting, he stops listening to purchased music, stops purchasing CDs, stops purchasing subscriptions to interactive webcasting services, and stops otherwise generating any revenue for the relevant copyright holders (except what revenue is generated through SoundExchange)." *Id.* ¶ 122.

239. This assumption of complete substitution was "intentionally extreme," *id.*, and runs contrary to the substantial evidence in this proceeding that webcasting promotes, rather than substitutes for, record labels' other streams of sound recording revenue. *See supra* Part II. Nevertheless, such a counterfactual assumption serves the useful purpose of obviating the promotion/substitution debate for purposes of the experiment. *See* Fischel/Lichtman WDT ¶ 125.

240. To calculate a hypothetical make-whole rate, Professors Fischel and Lichtman began with the total amount of non-SoundExchange revenue currently earned by the recorded music industry, which is about $25.12 per person, per year in the United States. *See id.* ¶ 123. Next, they calculated the number of musical performances to which the average person listens in a year — which would be approximately 18,000 = (1,204.5 hours x 15 performances/hour) — and assumed that all of those performances would migrate to noninteractive webcasting. *See id.* ¶¶ 124-126. The resulting figure is $0.0014 per performance, assuming that webcasting became copyright holders' *only* source of revenue. *See id.* ¶ 126. *See generally id.* Ex. F (IHM Ex. 3034 at 182) (detailing step-by-step calculations). That figure drops to $0.0004 if the migration to

webcasting were to eliminate "only" 25 percent of the typical listener's revenue-generating activity. *See id.* ¶ 127.

241. This substitution thought experiment, although not evidence of what a willing buyer and willing seller would negotiate, *see id.* ¶ 128, provides useful evidence about the relationship between the sound-recording royalty rates and current record label revenues. In particular, it shows that the existing statutory rate under the NAB/SoundExchange settlement ($0.0025) is more than 75 percent higher than the rate needed to maintain copyright-holder revenue *even if* migration to webcasting were entirely substitutional of all other sources of recorded music revenue. *See id.* This is persuasive evidence that the current statutory rates are likely too high.

242. The thought experiment further shows that iHeartMedia's proposed rate of $0.0005 per performance is reasonable because such a rate would be more than enough to maintain record-label revenues even if the migration to webcasting displaced 25 percent of such revenue, which itself is an unlikely scenario in light of the evidence that webcasting promotes, and the absence of evidence of any net substitution effect. *See id.* ¶ 127; *supra* Part II.C-H.

243. The general approach that Professors Fischel and Lichtman used for their thought experiment is one that the record labels have independently used to analyze the future of their business, which lends further credibility to this approach. [redacted]

[redacted] The fact that a major record label performed essentially the same thought experiment as Professors Fischel and Lichtman and reached the same conclusion confirms that the experiment is a probative and valid way to evaluate the economic significance of the statutory rate.

244. Professor Rubinfeld's criticisms of the substitution thought experiment are unpersuasive because they improperly assume that "radio listening habits remain unchanged," *i.e.*, that *no* terrestrial listening hours migrate to webcasting. Rubinfeld WRT ¶¶ 100-102 & Ex. 11 (SX Ex. 139). This view — for which Professor Rubinfeld offered no evidentiary support or explanation — is contrary to record evidence (discussed further in Part V.D) showing that terrestrial listeners are in fact migrating to noninteractive webcasting and are likely to continue to do so. [redacted]; Tr. at 1629:21-1630:3 (Blackburn) (It is not "particularly controversial" that webcast listening is "being drawn away from terrestrial radio."); [redacted]

B. Professors Fischel and Lichtman's Economic Value Added ("EVA") Analysis Also Shows That iHeartMedia's Rate Proposal Is Reasonable

245. Professors Fischel and Lichtman also performed an Economic Value Added ("EVA") analysis of a hypothetical simulcaster that provides additional economic evidence

corroborating the reasonableness of iHeartMedia's rate proposal. *See* Fischel/Lichtman WDT ¶¶ 93-104.

246. EVA analysis derives from the "basic tenet of financial economics that companies need to cover all expenditures to continue to conduct their business operations over the long term." *Id.* ¶ 94. EVA equates to a company's revenues in excess of operating expenditures, capital expenditures, and return to investors, and therefore a company can only remain in business in the long term if it has a non-negative EVA. *See id.*; *see also* Lys WRT ¶¶ 153-154 ("EVA measures a firm's profits after subtracting the amount the firm must pay for its capital" and "when there are no barriers to exit or entry, in equilibrium expected EVA will be zero.").

247. The Fischel/Lichtman EVA analysis modeled the financial structure of a "hypothetical simulcaster" to determine the maximum sound-recording royalty rate that such a simulcaster could pay while still breaking even in the long term. *See* Fischel/Lichtman WDT ¶ 104. They determined that this amount is between $0.0003 and $0.0005 per performance. *See id.* That range is a reasonable estimate of the upper bound on what a willing buyer and willing seller would actually negotiate, *see id.* ¶ 95, and it therefore informs the appropriate level for the statutory rate.

248. Professors Fischel and Lichtman used financial data from a sample of terrestrial radio firms in order to model the finances of a "hypothetical simulcaster," which "provides the same types of broadcasts as terrestrial radio stations do now" but, unlike a terrestrial radio broadcaster, must pay sound-recording royalties. *See id.* ¶¶ 95-96.

249. The ability of terrestrial radio firms to generate revenue is a reasonable approximation of the maximum revenue a hypothetical simulcaster could generate because simulcast and terrestrial broadcasters "offer similar content to listeners, and the bulk of their

revenue is generated by selling advertisements to the same type of buyers." *Id.* ¶ 99; *see also id.* ¶ 96 (noting terrestrial radio is "obviously related to webcasting in terms of the content and format"). Additionally, terrestrial radio "provides a reasonable and well-documented basis for modeling a hypothetical simulcaster" because it is "a mature industry in which there are many firms with publicly-available financial information." *Id.* ¶ 96.

250. Terrestrial broadcasters bear many expenses that a hypothetical simulcaster would not, such as costs related to FCC licenses and radio towers, and therefore Professors Fischel and Lichtman excluded terrestrial-specific expenses from their EVA model. *See id.* ¶ 97. Professors Fischel and Lichtman also excluded from their model webcaster-specific costs, such as computer servers. *See id.* This exclusion is conservative because, had such costs been added to the model, the estimated simulcaster EVA, and the corresponding maximum per-performance royalty rate, would be lower. *See id.*

251. Professors Fischel and Lichtman based their EVA analysis on 10 years (2004-2013) of financial data from 12 publicly-traded companies that own and/or operate terrestrial radio stations. *See id.* ¶¶ 96, 98. These 12 companies provide a reasonable sample, because they collectively accounted for 45 percent of total radio station revenues in 2004 and 33 percent of such revenues in 2013. *See* Fischel/Lichtman WDT App. D ¶ 2. Furthermore, the 10-year period from 2004-2013 is appropriate because it "covers a full macroeconomic business cycle." *Id.* ¶ 3.

252. To calculate the maximum per-performance royalty rate that would still allow a hypothetical simulcaster to break even in the long term, Professors Fischel and Lichtman first calculated the average pre-tax EVA of a hypothetical simulcaster, which is about 7.4 percent of revenues. *See* Fischel/Lichtman WDT ¶¶ 98, 100. *See generally id.* App. D and accompanying

exhibits (containing step-by-step calculations). They then applied that percentage to total 2013 terrestrial radio industry revenues ($17.6 billion), *see id.* ¶ 100, and divided the result ($1.302 billion) by total terrestrial radio performance equivalents (2.4 trillion), *see id.* ¶ 101, to arrive at the maximum per-performance royalty rate of $0.0005, *see id.* ¶ 102; *see also* Fischel/Lichtman WDT Ex. E-1 (IHM Ex. 3034 at 178) (containing more detailed calculations).

253. Professors Fischel and Lichtman performed numerous tests of the robustness of their model, which further support the reasonableness of their conclusions. *See* Fischel/Lichtman WDT ¶¶ 102-103.

254. SoundExchange's witness Professor Lys offered several criticisms of the Fischel/Lichtman EVA analysis, *see* Lys WRT ¶¶ 158-212, but those criticisms are unpersuasive. Most of Professor Lys's criticisms erroneously assume that the hypothetical simulcaster would have additional revenue and/or fewer costs from either offering custom webcasts, *see id.* ¶¶ 165-166, 171-175, 176-179, or owning terrestrial radio stations, *see id.* ¶¶ 183-189; Tr. at 6697:6-6698:1 (Lys) (testifying hypothetical simulcaster would have "already paid for" DJs and building space); Tr. at 6698:2-7 (Lys) (testifying "[i]t's not quite clear whether" the hypothetical simulcaster owns terrestrial radio stations). Professors Fischel and Lichtman's EVA analysis, however, correctly assumed that a hypothetical simulcaster would engage solely in simulcasting and would not separately own terrestrial radio stations.

255. Professor Lys's three theoretical criticisms, *see* Lys WRT ¶¶ 190-199, also misunderstand the EVA analysis because they assume that a hypothetical simulcaster actually earns a positive EVA, but then loses it. *See, e.g., id.* ¶ 198 (asserting EVA analysis "ignore[s] the industry's response to the new royalty rate" and "their starting point has a positive EVA"). Rather, the Fischel/Lichtman EVA analysis calculates a hypothetical simulcaster's *potential*

EVA. *See* Fischel/Lichtman WDT ¶ 98. This potential EVA would *otherwise* be positive EVA to a hypothetical simulcaster that need not pay sound-recording royalties (or a terrestrial broadcaster that did not need FCC licenses and radio towers), but the model assumes that the hypothetical simulcaster, which *does* need to pay sound-recording royalties, merely breaks even and never earns any positive EVA.

256. Additionally, Professor Lys criticizes Professors Fischel and Lichtman for failing to account for different competitive considerations applicable to terrestrial radio and simulcast. *See* Lys WRT ¶¶ 167-170, 180-182. Professors Fischel and Lichtman acknowledged these potential differences, but found that their net effect is "unclear." *See* Fischel/Lichtman WDT ¶ 99. Professor Lys does not demonstrate otherwise, *see* Lys WRT ¶¶ 167-170, and therefore provides no basis to reject Professors Fischel and Lichtman's analysis, *see* Fischel/Lichtman WDT ¶ 99.

257. Professor Lys's remaining criticisms cut against him. *See* Lys WRT ¶¶ 200-212. For example, he criticizes Professors Fischel and Lichtman for using data over a 10-year period, *see id.* ¶ 210, but concedes that using only more recent data would have resulted in an even lower EVA and thus a lower maximum royalty rate, *see* Tr. at 6699:20-6700:13 (Lys).

C. The SDARS Statutory Rate Further Corroborates iHeartMedia's Rate Proposal

258. The current statutory rate for satellite digital audio radio services ("SDARS") is yet another source of economic evidence that confirms the reasonableness of iHeartMedia's rate proposal. *See* Fischel/Lichtman WDT ¶ 105. Although the SDARS rate is set under a different standard, *see* 17 U.S.C. §§ 114(f)(1)(B), 801(b)(1), Professors Fischel and Lichtman explained that it nonetheless provides a reasonable proxy for the rates that would satisfy the willing-buyer willing-seller standard because it is set using market evidence. *See* Fischel/Lichtman WDT

¶ 105; *see also* Determination of Rules and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23054, 23055 (Apr. 17, 2013) ("*SDARS II*") (when setting SDARS rate, "the Judges begin with an analysis of proposed market benchmarks, if any, and voluntary license agreements"). Moreover, to the extent the satellite standard allows the Judges to depart from market evidence, the only such departure made in *SDARS II* was regarding a policy objective (weighing relative roles of copyright owners and licensees) that is virtually identical to a factor the Judges must also consider in setting rates for webcasters. *See SDARS II*, 78 Fed. Reg. at 23069. *Compare* 17 U.S.C. § 114(f)(2)(B)(ii), *with id.* § 801(b)(1)(C).

259. Professors Fischel and Lichtman calculated that the SDARS statutory rate of 11 percent of Gross Revenues translates into a per-performance royalty rate between [redacted] and [redacted] for noninteractive custom webcasting. *See* Fischel/Lichtman WDT ¶¶ 109-110. To calculate this range of rates, Professors Fischel and Lichtman doubled the current SDARS rate from 11 percent of gross revenue to 22 percent of gross revenue, to account for the fact that music accounts for 100 percent of custom webcasting revenue but only about 50 percent of satellite radio revenue. *See id.* ¶¶ 106-107. Professors Fischel and Lichtman then applied this figure to Pandora's 2013 revenue and performance data, because Pandora exclusively provides custom webcasting. This resulted in a per-performance royalty rate of [redacted] when Pandora's small base of paid subscribers is excluded from the totals, and [redacted] when those paid subscribers are included. *See id.* ¶ 109. Using Pandora's projections for 2015 revenues, the corresponding per-performance rate would be [redacted] *See id.* ¶ 110. Thus, this approach further corroborates the reasonableness of iHeartMedia's rate proposal of $0.0005. *See id.* ¶ 109.

260. Professor Rubinfeld's factual criticisms of the statutory SDARS rate are likewise unavailing. For example, he contends that the *SDARS II* rate was premised on Sirius XM's

unique fixed costs, and therefore cannot be analogized to webcasters. *See* Rubinfeld WRT ¶ 97. But even after the Judges accounted for Sirius XM's fixed costs, it resulted in only a slight downward adjustment of the SDARS rate, from a 12-13 percent range to 11 percent, *see SDARS II*, 78 Fed. Reg. at 23069, 23071. Similarly here, applying a 13 percent gross revenue figure to Pandora's revenues, would yield a per-performance rate between [redacted] and [redacted], which is still much more consistent with iHeartMedia's rate proposal than SoundExchange's. *Cf.* Fischel/Lichtman WDT ¶¶ 106-109.

V. THE JUDGES SHOULD REJECT SOUNDEXCHANGE'S RELIANCE ON INTERACTIVE AGREEMENTS AS BENCHMARKS TO SET THE ROYALTY RATES THAT WOULD BE NEGOTIATED BY WILLING BUYERS AND WILLING SELLERS IN THE NONINTERACTIVE MARKET.

261. Although, as described above, there are many licenses between noninteractive services and record labels to serve as benchmarks in this proceeding, Sound Exchange's chief expert, Professor Rubinfeld, argues that those agreements should be disregarded in favor of evidence from a different market — the market for sound recording performance licenses for *interactive* services. Rubinfeld WDT ¶¶ 18, 157. The Judges should decline to rely on Professor Rubinfeld's "interactive benchmark" for several reasons.

262. As previously discussed, direct deals from within the noninteractive market constitute the best available evidence of the rates and terms that would be negotiated by willing buyers and willing sellers in that market. *See also* iHeartMedia Proposed Conclusions of Law ¶¶ 10-14. Such agreements document actual rates and terms that were in fact negotiated by willing buyers and willing sellers for the same rights at issue in this proceeding. Fischel/Lichtman WDT ¶ 18.

263. Moreover, because those agreements were negotiated by the noninteractive services and the labels, they necessarily reflect the specific economic factors that the statute

indicates should be accounted for in setting the rate for such services, including "whether the use at issue might substitute for, promote, or otherwise affect the copyright owners' stream of revenues," and "the relative contributions of the owners and licensees in making the licensed work available to the public." Fischel/Lichtman WDT ¶¶ 18, 27, 31 (quoting *Webcasting III Remand,* 79 Fed. Reg. at 23104). As Professor Fischel testified:

> So while I, in the context of this case, agree with many of the criticisms that have been made of Professor Rubinfeld's analysis, and I think those criticisms have a lot of force, there's a much [more] fundamental point that if you have a choice between relying on comparable transactions on the one hand or direct evidence of what a willing buyer would pay a willing seller, if what — the answer you're trying to determine is what a willing buyer would pay a willing seller, you want to rely on the direct evidence as opposed to relying on comparable judgments, which inevitably require all kinds of subjective assessments, which are very hard to be made in a principled and accurate way.

Tr. at 5304:3-5306:23 (Fischel).

264. By contrast, as described below, there are many important differences between interactive and noninteractive services that would need to be accounted for before using evidence from the interactive market to set rates in the noninteractive market, and Professor Rubinfeld's analysis fails to account for those factors. *See* Tr. at 2138:1-9 (Rubinfeld) ("Q. And in order to use what you've used as your category A benchmarks . . . you said, 'I had to make a bunch of adjustments.' Do you recall that testimony? A. I'm sure I testified that I had to make a number of adjustments."); Fischel/Lichtman WRT ¶ 2. [redacted]

265. As demonstrated below, Professor Rubinfeld's analysis depends on core assumptions that are unsupported and contradicted by the evidence, and he relies on an improper and biased data set. Furthermore, Professor Rubinfeld's analysis relates *exclusively* to custom services, and therefore ignores a large part of the market — simulcast services — for which he acknowledges his rate proposal is inappropriate. *See* Tr. at 2021:9-21, 2022:5-8 (Rubinfeld). It is not possible to correct these deficiencies in Professor Rubinfeld's analysis. In light of the better evidence that can be drawn from direct deals in the noninteractive market, there is no reason to attempt to do so. *See* Fischel/Lichtman WRT ¶¶ 6, 50.

A. None of Professor Rubinfeld's Claimed Justifications for Using Interactive Agreements as Benchmarks Is Persuasive

266. Professor Rubinfeld's analysis hews closely to those performed by SoundExchange's experts in prior proceedings. *See* Rubinfeld WDT ¶ 207 n.124 ("In dividing interactive rates by the interactivity adjustment factor to remove the value of interactivity, I follow past practices."). Professor Rubinfeld acknowledges that the Judges have been critical of that analysis in the past, *see* Rubinfeld WDT ¶ 77, but claims that interactive agreements are nonetheless "appropriate benchmarks" in this proceeding, Rubinfeld WDT ¶ 159. Professor Rubinfeld's arguments in support of this claim are unpersuasive.

267. *First*, Professor Rubinfeld argues that his "interactive benchmark is especially informative because there have been a wide range of deals negotiated between the parties in recent years, [and] a 'thick market' is the best starting point for a determination of appropriate statutory royalties." Rubinfeld WRT ¶ 107; Tr. at 1783:2-1784:1 (Rubinfeld) ("I was looking for as broad a base of evidence as possible."). He criticizes the Services for relying "on a grand total of just 29 agreements." Rubinfeld WRT ¶ 6; *see also* Rubinfeld WDT ¶ 162 ("Overall, there are few directly licensed noninteractive services."); Rubinfeld WRT ¶ 8 (same).

268. The facts in the record refute this argument. In analyzing agreements between the labels and interactive services to identify the benchmark agreements for SoundExchange's rate proposal, Professor Rubinfeld excluded many deals that [redacted] *See* Rubinfeld WDT ¶ 205. As a result, he was forced to admit at the hearing his analysis was based on only 26 agreements between labels and services — fewer than the number of agreements on which iHeartMedia has based its rate proposal. *See* Tr. at 6314:25-6316:9 (Rubinfeld) ("How many data points did you draw from in that next to the last column? . . . A. Yeah. I was going to say it's hard to count exactly. I would say just under 30. So if you tell me it's 26, that could be right.").

269. *Second,* Professor Rubinfeld argues that the direct agreements between noninteractive services and record labels are less affected by the statutory shadow — *i.e.*, the default rate to which the parties may resort under the statutory license. *See* Rubinfeld WDT ¶ 18; Tr. at 1784:2-1785:1 (Rubinfeld) ("My second reason is that . . . I wanted to look for deals that were not . . . as [affected] by the shadow as [they] might otherwise be."). Although Professor Rubinfeld is correct that deals in the noninteractive market are influenced by the statutory shadow, he fails to recognize that the analysis performed by Professor Fischel accounts for this effect, as described above.

270. He also fails to acknowledge that, by his own admission, most of the deals in the noninteractive market suggest rates [redacted], *see* Rubinfeld WDT ¶ 166 — a fact that cannot be reconciled with Professor Rubinfeld's ultimate conclusion that the Judges should set rates here that are even higher than the current statutory license rates and substantially higher than the Pureplay rates that are overwhelmingly the rates paid by noninteractive service providers.

271. Moreover, Professor Rubinfeld acknowledges that the interactive market, too, is affected by the statutory shadow. Rubinfeld WDT ¶ 91 ("Given the shadow of the statutory license, it follows that statutory rates affect directly negotiated agreements for services which plan to offer more or different functionality than that which is provided by the statutory license . . . I note in this regard that interactive rates have also been affected to a certain degree by the statutory and pureplay settlement rates."). By his own analysis, royalty rates for interactive services should precisely track the statutory rate, and therefore be no more informative than noninteractive agreements of the rate that would be set in the absence of government intervention. *See* Rubinfeld WDT ¶ 85 ("[T]he willingness of services to pay in directly negotiated deals with record companies is determined by the incremental functionality the services can offer in a negotiated arrangement as opposed to the alternative of paying the CRB rate or the pureplay rate."); *id.* ¶ 92 ("Seen from this perspective, the directly licensed service's total willingness to pay will be (approximately) equal to the price of the statutory license, plus the value in the marketplace of the contracted-for incremental functionality."); *see also* Katz WRT ¶¶ 167-170 (describing circular relationship in Professor Rubinfeld's analysis of interactive and noninteractive royalty rates). Professor Rubinfeld acknowledges that he has made no attempt to correct for this shadow in his analysis of agreements between labels and interactive services. *See* Rubinfeld WDT ¶ 133 ("Ideally, one should adjust such agreements to remove the effects of the shadow before using them as the basis for a benchmark. . . . [H]owever, I do not make any such adjustment.").

272. *Third*, Professor Rubinfeld argues that "greater reliance" on information from the interactive market is appropriate in this proceeding because "the difference in rights between interactive and noninteractive services are less profound than in prior proceedings because there

has been a substantial convergence in functionality and the ways in which consumers engage with noninteractive and interactive services." Rubinfeld WDT ¶¶ 21; Tr. at 1785:11-22 (Rubinfeld) ("And, finally, I — of course, I ask myself what's different between today and 2009 when the last CRB considered this issue and felt that — reasonably uncomfortable with looking at the — at the interactive services, and my conclusion was that a lot has changed . . . and this leads me to feel much more comfortable relying on the interactive services as the starting point for doing my analysis.").

273. As described in Part V.D, however, Professor Rubinfeld's claim about "convergence" is not supported by the record. There is no reliable evidence that the functionality of interactive and noninteractive services has meaningfully converged since the last proceeding. *See* Tr. at 2003:9-22 (Rubinfeld) ("Q. First off, when you state that the 'difference in rights' between interactive services and noninteractive services are less profound now than in the past, are you meaning to suggest the scope of copyright rights conferred upon these respective categories of services has changed as a legal matter? A. No, I'm not.").

274. *Finally*, Professor Rubinfeld argues that "greater reliance" on his interactive benchmark is appropriate here than reliance on an interactive benchmark was in the past because the promotional benefits of noninteractive services have declined over time relative to those of the interactive services. Rubinfeld WDT ¶ 21; *see* Rubinfeld WDT ¶ 161 ("Any supposed 'promotional benefits' that statutory services provide today should not be expected to continue at the same level in the 2016-2020 rate period. . . . Simply put, the notion of promoting sales of music is quickly becoming an anachronism.").

275. As discussed in Part II.E, however, this assumption, too, is incorrect — record companies' behavior in seeking increased promotion on statutory services as shown in the record

is inconsistent with any claim that promotion is unimportant in the industry or an "anachronism." Moreover, even if Professor Rubinfeld were correct that the promotional or substitutional effects of interactive and noninteractive services were becoming more similar over time, that would not lend *more* credence to the interactive benchmark than in prior proceedings, given that prior decisions *assumed* there was no difference in promotion between the two types of services. *See Webcasting II*, 72 Fed. Reg. at 24095 ("Dr. Pelcovits . . . found no empirical evidence to suggest a net substitution/promotion difference between the interactive and noninteractive marketplaces. . . . Because only the relative difference between the benchmark market and the hypothetical target market would necessitate an adjustment, the absence of solid empirical evidence obviates the need for such further adjustment.").

B. Professor Rubinfeld's Analysis Relies on Key Assumptions That Are Unfounded in the Record and Demonstrably Incorrect

276. In relying on interactive services as a proxy for the noninteractive market, Professor Rubinfeld makes two key assumptions. *First*, he assumes that the ratio of average subscription price to royalty rates is the same in the interactive and noninteractive markets. *See* Rubinfeld WDT ¶ 169. *Second*, he assumes that subscription services (on which his analysis exclusively relies) are an appropriate proxy for ad-supported services (which, for example, comprise 96 percent of Pandora's customers). Rubinfeld WDT ¶ 70 & Ex. 7a; *see also* Tr. at 2322:21-2323:7 (Rubinfeld) ("JUDGE STRICKLER: Now, your methodology, sort of the meat, if you will, of your methodology is a ratio and an equivalence of ratios, correct? That is between subscription revenues and royalty rates per play after you make the necessary adjustments and the equivalence to the interactive market to the noninteractive market? THE WITNESS: Yeah. The ratio is crucial — one crucial step because that allows me to account for the differences between the interactive and noninteractive services."). Professor Rubinfeld offers no support,

either theoretical or evidentiary, for either of these critical assumptions, and they are contradicted by the record.

277. From an economic standpoint, there is no reason to believe that the ratio of subscription prices to royalty rates should be the same in the interactive and noninteractive markets. *See* Tr. at 2024:18-2026:11 (Rubinfeld) ("I don't have any formal economic analysis. I did not write down exact formulas that would show you how to relate the two. That's why I described it as an assumption. . . . It's an assumption because I have no quantitative analysis that I was able to do that was able to prove or find empirically exactly what that relationship was. So I was putting it out front as saying that is an important assumption. . . . Q. And that assumption is actually foundational to your entire analysis, isn't it? A. As I said, it's an important assumption, yes."); Tr. at 2138:25-2139:17 (Rubinfeld) ("I haven't done a specific calculation. That's why I did have to make an assumption.").

278. Furthermore, by Professor Rubinfeld's own admission, [redacted]

279. For example, the record shows that interactive services — such as Spotify, Beats, and Google Play — have identical subscription prices ($9.99 per month), *see* Rubinfeld's

Comparison of Services Pricing (SX Ex. 45), but pay wildly different royalty rates: According to Professor Rubinfeld's data, Google Play pays roughly [redacted] per play, which is about [redacted] Beats's effective per-play rate of [redacted], and over [redacted] Spotify's effective per-play rate of [redacted]. Other interactive services relied upon by Professor Rubinfeld, such as Sony Music Unlimited and Xbox Music Pass, [redacted]. In other words, Sony and Microsoft, whose interactive services charge identical subscription prices as Spotify, *see* Rubinfeld's Comparison of Services Pricing (SX Ex. 45), pay royalty rates roughly [redacted] than Spotify's.

280. Because this key relation does not hold among services in the *same* market, there is no apparent reason to expect it to hold among services in *different* markets. *Cf.* Fischel/Lichtman WRT ¶ 62 ("[T]he price range between different services of the same type is as large as, or larger than, the 2.0 ratio Prof[.] Rubinfeld calculates as a proper measure of the difference between the two types.").

281. The assumption that the ratio of subscription price to royalty rate is the same in the interactive and noninteractive markets is contradicted by Professor Rubinfeld's own data. In calculating the ratio of subscription prices for interactive and noninteractive services for his "interactivity adjustment," Professor Rubinfeld relies on prices for Rhapsody Premier (an interactive service) as well as Rhapsody unRadio (which he claims is noninteractive). *See* Rubinfeld's Comparison of Services Pricing (SX Ex. 45). Both services pay royalties under directly negotiated agreements with the labels. For Rhapsody's interactive service, the ratio of

subscription price to royalty rate is roughly $9.99/[redacted], or approximately [redacted] *See* Rubinfeld's Comparison of Services Pricing (SX Ex. 45); [redacted] For Rhapsody's allegedly "noninteractive" (but directly negotiated) service, the ratio is $4.99/[redacted], or approximately [redacted] *See* Rubinfeld's Comparison of Services Pricing (SX Ex. 45); Rubinfeld WRT ¶ 197. Put another way, while the ratio of subscription prices for the interactive and noninteractive services is 2:1, the ratio of royalty rates is [redacted]

282. Professor Rubinfeld's other key assumption — that royalty rates for subscription services are a reliable substitute for those that would be negotiated by ad-supported services, *see* Rubinfeld WDT ¶ 170 — is equally unsupported and unreliable. As Professor Lichtman noted in his rebuttal testimony, "certainly there is no basis to assume that subscribers are a reasonable proxy for all listeners to noninteractive services," given that subscribers constitute only four percent of Pandora's listenership and zero percent of iHeartMedia's. Fischel/Lichtman WRT ¶ 55; *see* Tr. at 3989:7-3990:11 (Lichtman); Tr. at 3891:7-17 (Peterson) (Professor McFadden's results "suggest[] . . . that there is price discrimination going on with regard to the pricing of the subscription on-demand services, in that they are targeted at a set of individuals with a willingness to pay, that is much higher than average."). "Because subscribers typically generate more revenue per listener than non-subscribers, [there is reason to believe that] this approach overstates the revenue-generating ability of noninteractive webcasters, and hence the royalty rates they would pay." Fischel/Lichtman WDT ¶ 115; Tr. at 3892:2-5 (Peterson) ("[I]t's less price discrimination than the — the price is set to maximize profits for a group of individuals that are at the top end of the distribution of willingness to pay.").

283. Although Professor Rubinfeld simply ignored this issue in his written direct testimony, *see* Rubinfeld WDT ¶ 170 ("In an ideal world, the determination of the value of interactivity would also include an examination of the ratio of the value of free services for interactive and noninteractive offerings."), in his written rebuttal testimony he "compared the average revenue per user ('ARPU') of interactive and noninteractive ad-supported services," and on that basis claimed that there was "no need to make further adjustments" to his interactive benchmark. Rubinfeld WRT ¶ 164.

284. In fact, Professor Rubinfeld determined that a comparison of the ARPU for ad-supported interactive and noninteractive services would support a lower interactivity adjustment of [redacted] (compared to the 2.0 he applied). *See* Rubinfeld WRT ¶¶ 168-169. That conclusion, however, is the first indication that Professor Rubinfeld's analysis is incomplete. By its logic, ad-supported services should pay [redacted] the rate that subscription services do, since (he claims) subscription noninteractive services have an adjustment factor [redacted] *See* Rubinfeld WRT ¶ 169 ("If one . . . separately used [redacted] to adjust rates from free offerings, the resulting weighted average benchmark rates would exceed the rates that I proposed."). That is a result no party or expert has endorsed, and it is inconsistent with the evidence from the noninteractive market described below. [redacted]

285. The correct comparison is not average revenue *per user*, but average revenue *per performance*. *See* Tr. at 3995:12-3996:17 (Lichtman) ("So when you're looking at ad revenue and hoping to figure out a per performance rate, . . . you have to look at revenue per performance and royalty per performance, which is to say, the ending phrase always [has] to be per performance. . . . The numbers come out totally different if you do per user versus doing per performance."); Fischel/Lichtman WRT ¶ 57 ("A broader and more accurate measure of consumer demand for webcasting is total revenue per performance, including revenue generated both from subscriptions and from advertising."). Comparing average revenue per performance for Spotify and Pandora (the same services Professor Rubinfeld used, *see* Rubinfeld WRT ¶¶ 168-169) would support an interactivity adjustment of [redacted]. *See* Fischel/Lichtman WRT ¶ 58.

286. Professor Rubinfeld, moreover, failed to appreciate that his interactive benchmark is affected in more than one way by the choice between subscription and ad-supported services. In calculating the effective royalty rates to which his interactivity ratio would be applied, Professor Rubinfeld lumped together data from both ad-supported and subscription interactive services, despite the fact that the balance between ad-supported and subscription services is very different in the interactive and noninteractive markets. *See* Rubinfeld WRT App. 1; Rubinfeld's Minimum Per Play Rates (SX Ex. 68); Fischel/Lichtman WRT ¶ 55; *cf.* Tr. at 6307:23-6308:6 (Rubinfeld) ("[C]alculations that cover all the revenues . . . are off base because they're mixing — they're mixing ad-supported and subscription services. They're mixing different models."); [redacted]

287. That would not be a problem if, as Professor Rubinfeld claimed, services and labels negotiated the same royalty rates for ad-supported and subscription services. *See* Rubinfeld WRT ¶ 204 ("[T]o segment [between ad-supported and subscription services] is entirely inconsistent with how rates would be negotiated by willing buyers and sellers in the market. It is unreasonable to suggest that sellers in the market would willingly subsidize a service's business decision to rely on advertising rather than subscription revenue."). The evidence, however, is to the contrary: Professor Rubinfeld's own data show that royalty rates for ad-supported services are [redacted] Likewise, a large majority of the agreements in the statutory market impose a [redacted]

[redacted]

288. Because the two fundamental assumptions underlying Professor Rubinfeld's analysis — that the ratio of subscription prices to royalties is the same in the noninteractive and interactive markets, and that subscription services are a reasonable proxy for ad-supported ones — are unsupported and, in fact, contradicted by the evidence, his analysis is unreliable and entitled to no weight.

C. Professor Rubinfeld's Analysis Fails To Account for Critical Differences Between the Interactive and Noninteractive Markets

289. Professor Rubinfeld acknowledges that some adjustments to the royalty rates he derives for interactive subscription services are necessary before they can be applied to noninteractive services — namely, an adjustment "for the value that consumers place on interactivity" and another adjustment for "the number of royalty-bearing plays in comparison to statutory services." Rubinfeld WDT ¶¶ 20, 135. Professor Rubinfeld, however, makes no adjustments for a number of equally important differences between interactive and noninteractive services. Those adjustments would be necessary if an interactive benchmark were to be used to set royalty rates in this proceeding.

290. One dimension in which interactive and noninteractive webcasters differ "is the degree to which copyright holders compete with each other for airplay." Fischel/Lichtman WRT ¶ 38. Noninteractive services have at least some ability to "induce competition between copyright holders by offering to perform a given [licensor's] songs more often than they would otherwise." Fischel/Lichtman WRT ¶ 40. This is precisely what happened in the case of iHeartMedia's agreements with Warner and the independent labels, and Pandora's agreement with the Merlin labels. [redacted]

[redacted] *See* Fischel/Lichtman WRT ¶ 40. iHeartMedia has been operating under these agreements for three years. *See* Cutler WDT ¶¶ 7-9. Similarly, Pandora has shifted performances in favor of its direct license partners with minimal or no effect on listenership. [redacted]; Fischel/Lichtman WRT ¶ 40.

291. Interactive services, by contrast, have a limited capacity to induce this type of competition because of the on-demand nature of their products. *See* Fischel/Lichtman WRT ¶ 39. A user who requests a particular song from an interactive service will typically not be satisfied with a different song. Thus, interactive webcasters have relatively little ability to increase listenership of a particular copyright holder's music in exchange for lower rates. *See* Fischel/Lichtman WRT ¶ 39. In its 2012 investigation of the Universal/EMI merger, the Federal Trade Commission came to a similar conclusion, stating:

> 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.

FTC, "Statement of Bureau of Competition Director Richard A. Feinstein, *In the Matter of Vivendi, S.A. and EMI Recorded Music* (Sept. 21, 2012) (NAB Ex. 4134 at 2); Fischel/Lichtman WRT ¶ 39.

292. [redacted]

[redacted]

293. The ASCAP rate court also has recognized the importance of this competitive effect, stating that "Pandora, in contrast, has the ability to substitute songs . . . As a theoretical matter, this flexibility in programming gives Pandora more flexibility in licensing negotiations." Fischel/Lichtman WRT ¶ 42 (quoting *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 365 (S.D.N.Y. 2014)). "Because noninteractive services can induce competition among copyright holders in ways that interactive services cannot, noninteractive services would" — in a market setting without a statutory license — "pay lower prices for sound recording copyrights than interactive services, all else equal." Fischel/Lichtman WRT ¶ 43; *see also* Rubinfeld WDT ¶ 109 ("[I]n actual markets, segmentation often occurs according to elasticities of demand, with the lower elasticity segments typically paying higher prices."); Tr. at 1768:8-1769:9: (Rubinfeld) ("[I]t's natural to think about setting higher prices for products or services that have more inelastic demand and lower prices for products that have more elastic demand."); Shapiro WRT at 26.

294. As discussed in Part II.F-H, available evidence also indicates that noninteractive services have greater promotional effects on music sales and other sources of copyright revenue than do interactive services. *See* Fischel/Lichtman WRT ¶ 59. For instance, testimony by

Dr. Todd Kendall in this proceeding estimated that noninteractive services generate much more promotional value than interactive services, indicating approximately [redacted] per performance in additional promotional value for noninteractive services, relative to interactive services. *See* Kendall WRT ¶¶ 27, 29; *see also* Fischel/Lichtman WRT ¶ 70; [redacted]; Blackburn WRT ¶ 41 & Table 2 (showing that users who start using a noninteractive service purchase more downloads after starting the service, while users who start using an interactive service purchase fewer downloads). The greater the promotional effect of a particular service, or the smaller the substitution effect, the lower the market royalty rate, because this effect essentially reduces the copyright holder's marginal cost of supplying music content to the service. Tr. at 2151:6-2152:10 (Rubinfeld) ("If you thought the effects were similar, then you wouldn't need to do an adjustment. But if there were a different effect between interactive and noninteractive, then you would have to consider how to adjust it — adjust for that."); Fischel/Lichtman WRT ¶ 59.

295. Professor Rubinfeld's 2.0 adjustment factor does not take into account differences in promotion and substitution effects between interactive and noninteractive services. Tr. at 2035:3-2036:10 (Rubinfeld) ("[Y]ou testified in your testimony that you were 'agnostic' about the relative substitution impact of the two? . . . A. Yes, I did say that. Q. And, in fact, you said you haven't studied the relative impact of possible substitution activities in the two frameworks, interactive and noninteractive, didn't you? A. Yes."); Tr. at 2151:24-2152:10 (Rubinfeld) ("I

personally have not seen evidence which convinces me that there are differences. It's not — I haven't been able to do any empirical study on my own, but I haven't seen evidence that convinces me that there's a clear difference between the two."); Tr. at 2152:16-2153:25 (Rubinfeld) ("Q. That's an open question, then, to your analysis, correct? A. From my point of view, it is an open question."); [redacted]

Fischel/Lichtman WRT ¶ 59.

296. Likewise, Professor Rubinfeld fails to account for any differences in the "relative creative contribution, technological contribution, capital investment, cost, [or] risk" by noninteractive services, as compared to interactive services. 17 U.S.C. § 114(f)(2)(B)(ii). Noninteractive services provide additional value, relative to interactive services, in a variety of ways, including through song selection expertise and technology and, in the case of simulcasters, DJ commentary, interviews, and news, weather, and traffic reports. *See* Fischel/Lichtman WDT ¶ 30. On the basis of the current record, it is difficult to *quantify* these additional valuable contributions by noninteractive webcasters — but that is not a point in favor of the reliability of Professor Rubinfeld's analysis. Rather, it is a reason to favor a benchmark that requires no adjustment (one based on actual deals between noninteractive services and labels) over one that requires an adjustment of uncertain magnitude (an interactive benchmark).

297. Finally, Professor Rubinfeld's analysis fails to account for differences in the intensity of listeners' usage between interactive and noninteractive services. *See* Fischel/Lichtman WRT ¶ 61; *see also* Rubinfeld WDT ¶ 212 ("[I]t is possible that listeners on 'interactive' services have different play habits compared to the listeners of statutory services."). If noninteractive subscribers hear more songs than interactive subscribers, then the ratio between subscription prices per performance for interactive and noninteractive subscribers will exceed 2.0. *See* Fischel/Lichtman WRT ¶ 61. For instance, "if (as Professor Rubinfeld alleges) interactive services charge monthly subscription fees that are twice as high as those charged by noninteractive services, but interactive services also provide half as many performances per subscriber, then the average price per performance is not two, but four, times that of interactive services." Fischel/Lichtman WRT ¶ 61.

298. While precise, industry-wide estimates of relative usage are not available, what evidence is available indicates that noninteractive subscribers do hear more songs per month. Usage data from Pandora indicate that its subscribers heard approximately [redacted] performances per month in 2013, on average, as compared to [redacted] for Spotify subscribers. *See* Fischel/Lichtman WRT ¶ 61. In previous proceedings, SoundExchange's expert proposed an adjustment to account for this disparity in intensity of usage — but Professor Rubinfeld has not done so here. *See* Fischel/Lichtman WRT ¶ 61 n.91 (quoting Dr. Pelcovits Webcasting III WDT at 31 (". . . since the interactivity adjustment described in the prior sections was calculated using the monthly subscription prices for interactive and noninteractive services, I must also adjust for any differences in the number of plays per subscriber between interactive, on-demand services and statutory services")).

D. The Supposed Convergence of Statutory and Interactive Services Cannot Support Use of the Interactive Agreements as Benchmarks for the Statutory Rate

299. As discussed above, SoundExchange concedes that the functionality of interactive and statutory services is sufficiently distinct today that interactive services cannot serve as a benchmark for statutory services without a significant downward adjustment to reflect these differences. SoundExchange argues that marketplace trends allow the Judges to predict that interactive and statutory services will "converge" in functionality during the next rate period. *See, e.g.*, Rubinfeld WDT ¶¶ 52-74. SoundExchange's proof for such a prediction is say-so of its lawyer witnesses, a supposed demonstration by Dennis Kooker, and a defective survey by Ms. Sarah Butler. The record instead demonstrates that, as at the time of prior Webcasting decisions, interactive services continue to occupy a "different but purportedly analogous market" from statutory services over the next rate period. *Webcasting III Remand*, 79 Fed. Reg. at 23106.

300. SoundExchange's witnesses do not say when "convergence" began. In the current market, "consumers do not treat noninteractive and interactive services as if they are close substitutes." Fischel/Lichtman WRT ¶ 16. Between March 2013 and August 2013, Pandora imposed a 40-hours-per-month cap on the users of its ad-supported service. *See id.* During those months, listeners did *not* flock to interactive services like Spotify after they were required to reduce their listening on Pandora, but instead to other *statutory* services. *See id.* ¶¶ 17-18 & Exs. A & B. This evidence is "consistent with a conclusion that consumers view different noninteractive services as substitutes for each other," and that "consumers do not view interactive and noninteractive services as close substitutes, and, therefore, consumers do not appear to view the services as having converged in a way that might make interactive royalty rates a reliable benchmark for noninteractive royalty rates." *Id.* ¶¶ 19, 20.

301. Other studies likewise demonstrate that consumers do not view statutory services and interactive services as substitutes. [redacted]

302. Consumer studies by Pandora confirm these independent findings. *See* Herring WRT ¶ 11 (describing consumer survey showing "that if free online music services were no longer available, most consumers would revert to broadcast radio, watch music videos or listen to music on YouTube or Vevo, or simply listen to less music, as opposed to subscribing to a lean-in service; and that time spent listening to online, noninteractive services is mostly replacing time spent listening to broadcast radio or is new time that would not have been spent listening to any music at all — almost none of it is taken from listening to lean-in services like Spotify"); Rosin WRT at Figures 11-12 (time that 46 percent of active users spend listening to noninteractive services is mostly new listening time not taken from other sources of audio listening; only 1-2 percent of active users report that time spent listening to noninteractive services is replacing time spent listening to on-demand services).

303. In sharp contrast to these studies, SoundExchange offered only the views of its digital license negotiators. *See*, *e.g.*, Harrison WDT ¶ 19 ("Notably, many services offer both on-demand and programmed or customized streaming."); Kooker WDT at 15 ("That fundamental distinction—between statutory services mirroring terrestrial radio and directly licensed services enabling customized music access—is rapidly disappearing."). SoundExchange has not offered any empirical data showing that consumers are using statutory services as a substitute for interactive services. *See* Tr. at 435:15-23 (Kooker) (admitting he has no empirical evidence on substitution or willingness to pay); Shapiro WRT at 43 ("Professor Rubinfeld has not offered even the most rudimentary analysis of the downstream market to provide music to listeners to support his conclusion about 'convergence.'"); Tr. at 2018:21-2019:1 (Rubinfeld) ("Q. And you've done no analysis to ascertain whether and to what degree consumers substitute between on-demand services and noninteractive radio services in reaction to price, have you? A. Again, I haven't done a statistical analysis."). Nor does SoundExchange offer any evidence that this supposed convergence is likely to continue in the future, as Professor Rubinfeld conceded:

[redacted]

304. SoundExchange's witness Sarah Butler performed a survey that did not purport to measure quantitatively the actual or likely future substitution between statutory and interactive services. *See* Tr. at 6779:25-1780:10 (Butler) ("Judge Strickler: One quick [question] before cross. Did you do any kind of statistical analysis to figure out what the level of confidence was in the results of your survey. The Witness: So that's an interesting question. So this is a non-probability sample. So doing a confidence interval on a non-probability sample is actually just not correct mathematically because you're making assumptions about the data that you shouldn't be making.").

305. Moreover, Ms. Butler's survey evidence, for what it is worth, is not reliable for two reasons. *First*, Ms. Butler — in contravention of standard survey procedure — failed to conduct a pre-test to determine whether the questions posed in her survey were understandable to respondents. *See* Tr. at 6782:18-21 (Butler) ("Q. And you did not do a separate pretest of your questions prior to fielding the survey, correct? A. That's correct."); McFadden WDT ¶¶ 40-41 (describing use of a pilot study because surveys "must be designed carefully to ensure that choices made by respondents in the study reflect choices that would be made in the market"); Hauser WRT ¶ 32 ("A carefully conducted pretest informs the researcher whether a survey is well-constructed and provides the basic elements to produce reliable data."); Tr. at 5566:1-9 (Hauser) (explaining that a pretest is done "in almost any study" because "[y]ou ultimately want to get a survey that very few consumers find confusing"). As a consequence, the survey was riddled with ambiguities, with no clear indication of how respondents interpreted them — such as failing to distinguish between paid and free versions of Spotify and Pandora, *see* Tr. at 6795:24-6800:25 (Butler), and conflating Vevo and YouTube by listing them on the same line as

if to imply there were a single service (and listing Vevo first, despite YouTube's greater popularity), *see* Tr. at 6803:2-13 (Butler).

306. *Second*, Ms. Butler's survey did not attempt to answer important questions that are critical to her ultimate conclusion that "statutory webcasting services are substitutes for on-demand services," rendering the survey disconnected from the real-world marketplace. Butler WRT ¶ 12. For example, Ms. Butler's survey ignored what consumers would be willing to pay for statutory and interactive services, which is the key factor influencing whether consumers view different services as substitutes. *See* Tr. at 6796:19-6797:8 (Butler) ("A. That's correct, I wasn't doing a willingness to pay or trying to figure out what people would pay. Q. So you don't know what percentage of persons would be willing to pay for Spotify? A. That's not a question I asked, that's correct. Q. And for those services that require payment, you didn't give any indication of what access to that service would cost, right? . . . A. That's correct."); Shapiro WRT at 43 ("[E]vidence that significant numbers of listeners substitute between these two ways of getting music in response to small changes in their relative price or quality" is "empirical evidence of the type that economists would normally rely on to show that interactive services and webcasters are 'reasonably close substitutes.'"). In presenting users with different services to choose among, Ms. Butler's survey presented respondents with services "that they themselves indicated they were aware of," and "didn't ask them about price or features or genres or any of those details" that characterize these services. Tr. at 6797:22-6798:6 (Butler).

307. The third-party survey research that Ms. Butler reviewed also does not support her claims of substitution between interactive and statutory services. Ms. Butler did not attempt to conduct a comprehensive review of available survey research, but instead considered only a

handful of studies, which she did not review to determine whether they used methodologies that rendered them reliable. *See* Butler WRT ¶ 24. Ms. Butler conceded at the hearing that she was not relying on any of these studies for "the truth of the matter," but only to make the point that "there are different examples of different facts that one could draw from this large pool of market research that exists." Tr. at 6827:16-20 (Butler). Thus, by Ms. Butler's own admission, these other surveys do not provide reliable evidence that consumers view interactive and statutory services as substitutes.

308. The evidence from Pandora's imposition of listening caps described above (*see supra* ¶ 300) showed that listeners do not view simulcasting as even a close substitute for custom webcasting such as Pandora's service. *See* Fischel/Lichtman WRT ¶ 48. After Pandora imposed 40-hour-per-month listenership caps on its ad-supported service, listenership at rival custom webcasting services increased, but there was no similarly large reaction in simulcast performances. *See id.* ¶ 48 & Ex. D. "This is consistent with a conclusion that consumers do not view simulcast and custom stations as close substitutes." *Id.* ¶ 48.

309. Mr. Kooker claimed in his written testimony that "[i]n practice, simulcast streaming services operate in such a way as to closely resemble the experience of on-demand listening." Kooker WRT at 3. On cross-examination, Mr. Kooker was asked to replicate the experiment he performed for his written rebuttal testimony, in which he used the search function of iHeartRadio for an artist in order to find the simulcast stations currently playing that artist's music. *See id.* at 4. Mr. Kooker was unable to search for and find individual songs, including the hit singles of Meghan Trainor that he previously had claimed to have found. *See* Tr. at 6629:3-6644:1 (Kooker). The simulcast feature that Mr. Kooker claimed "closely resembled" an interactive service fell far short in terms of providing comparable on-demand access, and Mr.

Kooker conceded that he was aware of no data indicating that consumers were actually using this search functionality, much less in the same way Mr. Kooker did for his pre-filed testimony. *See* Tr. at 6639:14-21 (Kooker) ("Q. While we're waiting for this to play, Mr. Kooker, I just want to ask you whether you have any basis to believe that there's any users in the real world that use iHeartRadio's simulcast service in the way that you describe in your written rebuttal testimony? A. I don't know whether they do or not, but I know they have the possibility to do it."). If iHeartRadio's free simulcast were a close substitute for on-demand services, it would be hard to explain why consumers continue to subscribe to the $10 per month on-demand services.

310. In sum, there is no evidence to suggest that the core differences between interactive and statutory services — differences that SoundExchange concedes are "significant" and highly valuable to consumers, Tr. at 2136:23-2137:4 (Rubinfeld) — are shrinking through so-called "convergence" or that these services are becoming increasingly interchangeable in the eyes of consumers.

E. Professor Rubinfeld's Analysis Is Compromised by an Improper and Unreliable Data Set

311. Even if the theoretical problems with Professor Rubinfeld's analysis could be overlooked, his analysis is uninformative for the additional reason that it relies, in several ways, on a data set that is unreliable and biased.

312. First, as he did for his analyses of the iHeartMedia-Warner and Apple agreements, Professor Rubinfeld relies on performance data, rather than information about the parties' expectations (*i.e.*, the royalty rates to which the parties actually *agreed*) in calculating the base royalty rates to which he then applies his interactivity adjustment. *See* Rubinfeld WDT ¶ 205 n.123 ("In this regard I have relied on monthly performance data rather than attempting to evaluate parties' expectations at the time they entered into various agreements."). For the

reasons explained in Parts III and V, the choice to use performance data instead of the parties' expectations renders Professor Rubinfeld's analysis uninformative as to the rate that would be negotiated between willing buyers and willing sellers, and therefore it is fundamentally unreliable.

313. This inherent unreliability is evident from Professor Rubinfeld's own analysis of the data. Like the iHeartMedia-Warner agreement and the Apple agreements, many of the interactive service agreements on which Professor Rubinfeld relies contain [redacted] that constitute a material portion of total compensation under the contracts. *See id.* ¶¶ 126, 129, 205. As Professor Rubinfeld notes, as a result of these [redacted] . . . being spread across increasing plays," total effective compensation per play for the interactive agreements has declined since the time of his original report. *Id.* ¶ 248; *see also id.* ¶ 245. Although Professor Rubinfeld does not indicate the size of this decline in his report — instead, he refers generically to a 120-page appendix to his rebuttal report containing granular performance data, *see id.* ¶ 245 & App. 1 — a different exhibit to his rebuttal report, supplied for a different purpose, *see id.* ¶ 237, gives some indication of the magnitude. [redacted]

314. Notably, Professor Rubinfeld does not suggest any revision to his rate proposal based on this precipitous drop in interactive royalty rates, or even provide a *current* average effective per-performance rate for interactive services to which his interactivity adjustment could be applied. At any rate, the larger point is not that Professor Rubinfeld selected the wrong point

in time to measure interactive royalty rates, but that his method for doing so — based on variable performance data — yields results that are fundamentally unreliable.

315. Second, Professor Rubinfeld's interactivity adjustment is itself the result of a flawed data set. To calculate his adjustment factor, Professor Rubinfeld compares the subscription prices for a set of interactive services with those for a set of purportedly "noninteractive" services. *See* Rubinfeld's Comparison of Services Pricing (SX Ex. 45). As explored in testimony at the hearing, however, many of the "noninteractive" services on which Professor Rubinfeld relies include functionality significantly beyond that permitted by the statute. *See* Tr. at 2042:4-2044:1 (Rubinfeld) (agreeing that Rhapsody unRadio allows unlimited skips, off-line caching, and on-demand playback); Tr. at 2047:25-2050:17 (Rubinfeld) (same, for Slacker Radio Plus); Tr. at 2050:18-2051:22 (Rubinfeld) (same, for Nokia MixRadio Plus). Because Professor Rubinfeld provided no evidence that — and apparently failed to investigate whether — the services that form the basis of his interactivity adjustment are actually representative of noninteractive services, the resulting interactivity adjustment is unreliable. *See* Tr. at 2047:16-24 (Rubinfeld) ("Q. So it's reasonable to assume, is it not, that the subscription price reflected in your Exhibit 5 includes at least some payment for extra statutory functionality? A. Yes, I think if I were to view this as a primary source of developing a numerical benchmark, I would want to adjust the subscription price to account for the functionality that went beyond the statutory license.").

316. Finally, it is far from clear that the only other adjustment Professor Rubinfeld performs — one to reflect the number of royalty-bearing plays on a statutory service — is proper. After deriving effective per-performance rates for the interactive services and reducing them by application of his interactivity ratio, Professor Rubinfeld divides the result by 1.1, a

figure that purportedly accounts for the fact that some performances that would be subject to compensation under the statute (*i.e.*, skips) are [redacted] *See* Rubinfeld WDT ¶¶ 216, 217. Professor Rubinfeld makes this adjustment, however, based on performance data from *Pandora*, rather than from the interactive services that form the basis for his royalty rate. *See id.* ¶ 216; [redacted] This difference matters because, as Professor Rubinfeld acknowledges, DMCA-compliant services like Pandora limit users to six skips per hour, whereas most interactive services typically provide unlimited skips, and moreover [redacted] *See* Rubinfeld WDT ¶ 214. Pandora's data would be a reasonable proxy for interactive services' data only if users of interactive services happen to skip six or fewer songs per hour — an unreasonable assumption, given that the interactive services are [redacted] *Cf.* Rubinfeld's Analysis of Buyers' Willingness to Pay (SX Ex. 56) (attributing $1.41 of average retail price of subscription interactive service to availability of unlimited skips).

F. Professor McFadden's Survey Provides No Support for Professor Rubinfeld's Analysis

317. Professor Rubinfeld claims that the 2.0 figure he selected to adjust for the value of interactivity is supported by a "conjoint" study conducted by another of SoundExchange's experts, Professor McFadden. Rubinfeld WDT ¶ 171. Professor McFadden's survey, however, provides no independent support for Professor Rubinfeld's rate proposal, for several reasons.

318. As a preliminary matter, Professor McFadden's survey is directed narrowly at the relative values consumers assign to various features of interactive and noninteractive services. Even if it were independently reliable and reasonably applied, therefore, at best it could serve to support Professor Rubinfeld's interactivity adjustment: the ratio he applies to adjust for the

"value of interactivity" that differs between interactive and noninteractive services. *See* Rubinfeld WDT ¶¶ 171, 209, 210. It could not address the many other errors that render Professor Rubinfeld's analysis unreliable — for example, the flawed, fundamental assumptions that underlie his decision to rely on the interactive market in the first place; the other critical differences between the interactive and noninteractive markets for which Professor Rubinfeld has not accounted; and the biased and unreliable royalty data to which Professor Rubinfeld applies his adjustment [redacted] Peterson WRT ¶ 110 ("There is no reason that replacing prices with estimates of the average willingness to pay in [Professor Rubinfeld's] 'interactivity adjustment' will preserve the ratios of subscription prices to license fees as he assumes should be done. . . . Thus, Dr. Rubinfeld's calculation using estimates of average willingness to pay from Dr. McFadden's survey are economically meaningless.").

319. Professor McFadden's analysis is also independently *un*reliable, and was *not* reasonably applied. For instance, Professor McFadden's survey omitted key features that contribute significant value to digital music service offerings, particularly those offered by subscription interactive services. *See*, *e.g.*, Tr. at 924:17-23, 926:3-22, [redacted] (streaming sound quality); [redacted] Tr. at 920:5-10 (McFadden) (only basis for evaluating completeness of feature set was interview of nine participants); Masters Thesis, *Willingness to Pay for Music Streaming Systems* (IHM Ex. 3647 at 3) (relied upon by Professor McFadden and

finding that exclusive content is found to have a "positive effect on consumers'" willingness to pay). Moreover, as demonstrated by the Services' witness, Dr. Hauser, confusing feature descriptions in Professor McFadden's survey, *see* Tr. at 5562:21-5563:19, 5572:20-5573:9, 5579:15-24, 5580:11-17, 5588:18-5589:10 (Hauser); significant changes to the study design after his initial pre-tests, *see* Tr. at 5566:22-5567:25, 5568:23-24, 5570:2-20 (Hauser); and a high attrition rate among study participants, *See* Tr. at 5570:21-5571:14 (Hauser); Tr. at 898:7-10, 898:24-13 (McFadden) significantly undermine the study's reliability. *See* Tr. at 5584:5-5587:16 (Hauser); Hauser WRT ¶¶ 149-155 ("Because the data upon which Professor McFadden relies are unreliable, the reported valuations of the music-streaming features are unreliable. Thus, any ratios calculated by Professor Rubinfeld based on Professor McFadden's analyses are themselves unreliable."); *see generally* Hauser WRT Appendices and Exhibits (IHM Exs. 3125-3145).

320. Professor Rubinfeld's application of Professor McFadden's results, was also flawed. Professor Rubinfeld used Professor McFadden's survey data to estimate consumers' willingness to pay for two services, an "On-Demand Premium Service" and a "Statutory Premium Service." Professor Rubinfeld defined these two services by sets of product characteristics, each of which has a specific value estimated in Professor McFadden's survey. By summing the values of each product characteristic included in each service, Professor Rubinfeld estimated the total value of each of the two services to consumers. In particular, Professor Rubinfeld estimated that consumers would be willing to pay $8.57 for the On-Demand Premium Service and $4.51 for the Statutory Premium Service. The interactivity ratio is 1.9, which Professor Rubinfeld claimed supports his application of a 2.0 adjustment factor to the royalty rate he calculated for interactive services. *See* Rubinfeld WDT ¶¶ 209, 210.

321. Professor Rubinfeld did not explain why he thought the two specific services modeled in his analysis were representative of interactive and noninteractive services generally, however, "and available evidence indicates they are not." Fischel/Lichtman WRT ¶ 74. For instance, the Statutory Premium Service considered by Professor Rubinfeld "differs in several respects from Pandora's premium service, which is the most popular subscription statutory service" (although subscribed to by only 4 percent of Pandora users). *Id.* In particular, Professor Rubinfeld's Statutory Premium Service "has a far larger catalog than Pandora's service (20 million songs, rather than approximately 1 million), and also has playlists from 'both [an] algorithm and tastemakers,' although Pandora is primarily known for its algorithmic song selection process (the 'Music Genome Project') . . . and does not use human 'tastemakers' in song selection." *Id.* "[M]aking these adjustments to Professor Rubinfeld's calculation alone reduces the value of the statutory service from $4.51 to $3.42, and consequently increases the value of the implied interactivity adjustment from 1.9 to 2.5." *Id.*; Fischel/Lichtman WRT Ex. E (IHM Ex. 3060).

322. Professor Rubinfeld's Statutory Premium Service is also unrepresentative in that only 4 percent of Pandora's users are subscribers. Tr. at 3552:10-14 (Herring). Updating Professor Rubinfeld's hypothetical statutory service to reflect the characteristics of Pandora's far more popular nonsubscription service (by eliminating Professor McFadden's estimated value for "no advertising" and adding his estimated value for having a "free plan") "reduces the noninteractive valuation further, down to $2.30, and consequently implies an interactivity factor of 3.7." Fischel/Lichtman WRT ¶ 75; Fischel/Lichtman WRT Ex. E (IHM Ex. 3060). If Professor Rubinfeld had used 3.7 as his adjustment factor instead of 2.0 — while making *no*

other changes to his model — his interactive benchmark would have resulted in a rate proposal of only $0.0013 per performance. *See* Fischel/Lichtman WRT ¶ 75.

323. Professor Rubinfeld's model can be further adjusted to reflect the characteristics of a simulcast service by removing the value of algorithmic song selection, so that songs are chosen only by "tastemakers" (such as DJs), as they are on simulcast stations. "This adjustment yields an ad-supported simulcast value of $1.44, which in turn yields an implied interactivity adjustment for ad-supported simulcasting of 6.0, and a rate of $0.0008 per performance" from Professor Rubinfeld's interactive benchmark. Fischel/Lichtman WRT ¶ 76.

G. Other Alternative Implementations of Professor Rubinfeld's Analysis Yield Much Lower Rates

324. One alternative implementation of Professor Rubinfeld's analysis — changes in his use of Professor McFadden's data — is described above, but others are equally plausible, and at least as reasonable as the adjustment methodology Professor Rubinfeld actually used. These alternative approaches indicate rates much lower than the one Professor Rubinfeld derived from his analysis of the interactive benchmark, and highlight the extent to which Professor Rubinfeld's approach is highly sensitive to particular adjustments and assumptions — and, hence, is unreliable.

325. One such approach is to adjust Professor Rubinfeld's model, which focuses exclusively on subscription revenue and does not account for the differential promotional effects of noninteractive services, to account for ad-supported revenue and differential promotional effects. The first step in this adjustment can be performed using average revenue data for Pandora and Spotify, which — as described above — support an interactivity adjustment of [redacted]. *See* Fischel/Lichtman WRT ¶ 69. Making this single adjustment — without

correcting any of the other flaws in Professor Rubinfeld's analysis — drops the royalty rate that results from Professor Rubinfeld's interactive benchmark to [redacted]. *See id.*

326. A second step can be accomplished using data from Dr. Kendall, who estimated that noninteractive services generate approximately [redacted] more in promotional value for copyright holders per performance than interactive services. *See* Kendall WRT ¶¶ 27, 29; Fischel/Lichtman WRT ¶ 70. Dr. Kendall concluded that this extra promotional value would reduce noninteractive royalty rates by between [redacted] per performance, relative to interactive royalty rates. *See id.* Making the corresponding adjustment to the figure calculated above yields a noninteractive royalty rate of between [redacted] per performance. *See id.* ¶ 71. This calculation takes as given all of Professor Rubinfeld's other assumptions and does not attempt to adjust for any of the other differences between interactive and noninteractive services discussed above. *See id.*

327. An alternative interactivity adjustment can be calculated by reference to the musical works royalties paid by interactive and noninteractive services. While the Judges have, in prior proceedings, indicated that the musical works royalty *rate* is not necessarily an appropriate benchmark for setting the sound recording performance royalty rate, it is still instructive to examine the *ratio* of rates that interactive and noninteractive services pay for those rights. *See id.* ¶ 79. An analysis of these rates by Professor Lichtman indicates that Spotify paid [redacted] per performance for musical works rights in 2013, as compared to [redacted] per performance for Pandora. *See id.* ¶ 80. Spotify therefore appears to pay a musical works royalty [redacted] times higher than Pandora. *See id.* ¶ 81. Altering Professor Rubinfeld's model to use [redacted] as an adjustment factor, instead of 2.0 — again, while holding all of his other assumptions constant — yields a noninteractive royalty rate of [redacted] per performance.

H. Professor Rubinfeld Provides No Support for his Percentage-of-Revenue Alternative Royalty Rate

328. Professor Rubinfeld's suggestion that a 55 percent-of-revenue royalty should be applied as a second prong in a "greater of" royalty calculation is essentially unsupported by any record evidence. Professor Rubinfeld's proposal was based on the percent-of-revenue rates indicated by interactive service agreements, which generally fall between [redacted]. *See* Rubinfeld WDT ¶ 206 & App. 1. Professor Rubinfeld simply picked a number [redacted] and asserts that it should be applied likewise to noninteractive services, without explanation. *Id.*; [redacted]

329. [redacted]

[redacted] Tr. at 2039:19-2030:11 (Rubinfeld) ("Q. So you're not saying that you would expect the percentage of revenue paid to the record companies in the two markets to be the same? A. No, I'm not saying that.").

330. There is no apparent economic justification for Professor Rubinfeld's decision to apply the same percent of revenue to noninteractive services as to interactive ones. To begin, the statute indicates that royalty rates in the noninteractive market should be set with the "economic, competitive, and programming" concerns of the parties in mind, including "the relative roles of the copyright owner and . . . the service . . . with respect to relative creative [and] technological contribution." 17 U.S.C. § 117(f)(2)(B). There is no reason to presume that the relative contributions of noninteractive and interactive services are the same in this regard, and there are many reasons (including, as described above, algorithmic and programming technology, DJ commentary, and non-music content) to suspect that the two differ. *See* Fischel/Lichtman WDT ¶ 30.

331. Moreover, to the extent Professor Rubinfeld's analysis indicates a conclusion that willing buyers and willing sellers in the noninteractive market would negotiate percent-of-revenue royalty rates of 55 percent, it is flatly contradicted by actual market evidence. Of the 29 agreements in the noninteractive market submitted in evidence by the services, [redacted] *See, e.g.*, [redacted] And, as described above (in Part

III.B), there is evidence that the one outlier [redacted] was not the result of bargaining but simply requested [redacted]

[redacted]

332. The percentage of revenue figure in the [redacted] is accordingly entitled to little weight.

333. [redacted]

[redacted]

I. Professor Rubinfeld's Interactive Benchmark Is a Particularly Unreliable Benchmark for Simulcast Services

334. Although Professor Rubinfeld's interactive benchmark is unreliable for *all* services, it bears noting that it is a particularly poor guide for the rates that should be set for simulcast services. *See* Tr. at 4001:6-4002:11 (Lichtman) ("Do you understand that Professor Rubinfeld has proposed the interactive benchmark as a basis for setting rates for the simulcast business? A. I don't think he has. Q. So let's just be clear. What has Professor Rubinfeld said about that, as you understand it? A. As I understand it in depositions, Professor Rubinfeld was asked about this, and I think he says that his analysis is really about custom. And I think that his view is that simulcast is different and he hopes that the parties will negotiate around whatever ends up happening in this proceeding and make special rules for simulcast, kind of, on their own.").

335. As an initial matter, the justifications Professor Rubinfeld presented for his interactive benchmark in the first place — the supposed "convergence" of interactive and noninteractive services, and the declining promotional value of noninteractive services — do not

apply to simulcast services. *See* Tr. at 2021:1-4 (Rubinfeld) ("Q. You would agree, would you not, that there is substantial differentiation among noninteractive services? A. Yes, I would."); Fischel/Lichtman WRT ¶ 45 ("Therefore, even on Professor Rubinfeld's own terms, there is no basis to conclude that interactive royalty rates are a reliable benchmark for simulcast."). For instance, Professor Rubinfeld pointed to the ability of Pandora to "learn[] about individual tastes when a listener has skipped a song, has provided a 'thumbs up' or 'thumbs down' or when Pandora determines that the user has stopped listening." Rubinfeld WDT ¶ 53. Simulcast services, however, are not individualized and do not offer this type of feedback. *See* Tr. at 4001:22-4002:11 (Lichtman) ("On simulcast there is no 'like' button. It's simulcast. We play what we want to play."); Fischel/Lichtman WRT ¶ 45 ("Regardless of whether interactive services are a reliable benchmark for custom services, there is no basis to conclude that they are a reliable benchmark for simulcast services.").

336. Similarly, Professor Rubinfeld claimed that "[c]onsumer pricing for both noninteractive and interactive services has become more similar over time," Rubinfeld WDT ¶ 66, but his analysis focused exclusively on subscription prices paid for custom services. *See* Fischel/Lichtman WRT ¶ 45. Simulcast services, by contrast, are typically supported by ad revenue. *See id.* ¶ 45. Professor Rubinfeld admitted that simulcasting had not experienced comparable changes and thus, even in his view, had not "converged" with interactive services. *See* Tr. at 2021:5-8 (Rubinfeld) ("Q. [Y]ou still think of simulcasting as being quite different than on-demand streaming? A. I do, yes."). Professor Rubinfeld likewise admitted that the competitive environment simulcasters face differs from that of custom webcasters, and gives simulcasters greater flexibility to induce price competition among record labels. *See* Rubinfeld WRT ¶ 225 ("Because they are not reliant on music streaming, [simulcasters] could credibly

threaten to cut back (or even eliminate) their use of the sellers' content."). Therefore, even on Professor Rubinfeld's own terms, there is no basis to conclude that interactive royalty rates are a reliable benchmark for simulcast. *See* Fischel/Lichtman WRT ¶ 45.

337. Moreover, the data on which Professor Rubinfeld's analysis is based (unlike the mixed custom and simulcast contracts on which the Services rely) come entirely from custom services. All of the subscription pricing data that informs his interactivity adjustment relates to custom services, *see* Tr. at 2021:9-21 (Rubinfeld); Rubinfeld's Comparison of Services Pricing (SX Ex. 45), and Professor McFadden's study, which serves as purported corroboration for the interactivity adjustment, likewise considered only custom services, *see* Tr. at 2022:5-8 (Rubinfeld). As described above, an adjustment to Professor Rubinfeld's implementation of Professor McFadden's study suggests it would support a much larger adjustment for simulcast services.

338. Professor Rubinfeld, in fact, has repeatedly recognized that simulcast and custom services are quite different. [redacted]; Rubinfeld WDT ¶ 149 ("Because they bridge programmed terrestrial radio and webcasting, simulcasters occupy a unique position in the marketplace.").

339. He likewise testified that "to impose a rate that is economically appropriate for one such willing buyer upon any or all other willing buyers might not necessarily satisfy the statutory requirement of replicating the marketplace, but rather might be inconsistent with the rate structure of an actual market for sound recordings." Rubinfeld WDT ¶ 107 (internal quotation marks omitted). He even went so far as to suggest that a lower rate might be appropriate for simulcasters than for custom webcasters — but that, if so, the parties could

privately negotiate a lower rate after a too-high rate was set by the judges. [redacted]; Rubinfeld WRT ¶ 206 ("If it turns out that there are distinct segments of the market for which this default rate is too high, it will be in the interest of both the services and the labels to negotiate a direct deal. In other words, if there is market demand for segmentation, the market will use the bargaining process to effectively achieve segmentation that is in the interest of both services and labels."); *id.* ¶ 214 ("If it were to turn out that the statutory rates set near current levels by the CRB were thought to be too high by the labels and/or the services, both would have the incentives and capabilities to once again negotiate lower rates.").

340. Professor Rubinfeld's suggestion that the Judges set an above-market rate for simulcast services, and leave it to the parties to work out more acceptable rates and terms, is inconsistent with the purpose of the statutory license, which is in part "to overcome the intractable transaction costs that would lead to market failure if licensors and licensees were required to negotiate the royalty for each performance of a sound recording." Order Dismissing Petition to Participate (Triton Digital, Inc.) at 3 (June 4, 2014). It is, moreover, inconsistent with the plain language of the statute, which requires the Judges to determine "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); *see also* Tr. at 4005:4-17 (Lichtman) ("I think that's punting on what all of us are here to do. This proceeding was about setting rates for these markets, and I don't think we said, ah, just set a rate that's too high and hope the parties will work it out.").

341. There is, in fact, substantial evidence that the rates and terms negotiated in the market by simulcast and custom services differ significantly, such that data derived *exclusively* from custom services (as in Professor Rubinfeld's analysis of interactive service agreements) cannot reasonably be used to set rates for simulcast services. *See* Tr. at 4002:23-4004:12 (Lichtman). For instance, while Professor Rubinfeld claims that a "greater of" rate structure is appropriate because contracts between custom services and labels demonstrate a "revealed preference" for one, *e.g.* Rubinfeld WDT ¶ 97, [redacted] Again, the important thing for me is simulcast is special, important, and different, so it can't be ignored.").

342. Additionally, "copyright holders consistently structure licensing agreements such that the marginal price [redacted] Fischel/Lichtman WDT ¶ 86; [redacted]

343. In other words, [redacted] Fischel/Lichtman WDT ¶ 86. This "marginal price is important because it impacts webcaster incentives. [redacted]

[redacted] *Id.* ¶ 86.

344. Under iHeartMedia's agreement with Warner, for example, [redacted] Similarly, under iHeartMedia's agreements with 27 independent labels, [redacted]

345. "By contrast, the [redacted] applicable to custom webcasts under these agreements consistently involve [redacted] . . . . Under iHeartMedia's agreement with Warner, for instance, the minimum per-performance fee — and hence marginal price — applicable to custom webcasts ranges from [redacted] per performance. . . . For iHeartMedia's agreements with 27 independent labels, the per-performance fee for custom webcasts is equal to [redacted] These agreements therefore are consistent in setting marginal prices [redacted] Fischel/Lichtman WRT ¶ 89; *see, e.g.*, [redacted]

346. Professor Rubinfeld's proposal to apply a 55-percent revenue share is particularly problematic in the context of simulcasters. Simulcasters "provide further value [to listeners] by providing complementary content, including DJ commentary, interviews . . . , information on local events, and news, weather, and traffic reports." Fischel/Lichtman WDT ¶ 30; Kocak WDT ¶ 2 ("Most successful radio stations, including most music-formatted stations, owe their success to elements other than music. . . . [I]n order to succeed at a high level, our stations must do much more than play music."); [redacted] Downs WDT ¶ 30 ("[Our] broadcast music stations feature local public service announcements every hour, provide morning local news updates, and traffic announcements.").

347. "Simulcast listeners presumably place substantial value [on] this complementary content, because otherwise they could instead just listen to custom webcasts, which essentially replace this content with additional music." Fischel/Lichtman WDT ¶ 30 n.22; [redacted] Tr. at 4002:23-4003:20 (Lichtman) ("[P]eople must recognize that because they're choosing to sometimes listen to simulcast or radio instead of custom. If they really just wanted music, go listen to custom. It's more music per hour."); Tr. at 4007:23-4008:10 (Lichtman) ("[I]f you look at simulcast and think about a percentage of revenue, we would have to acknowledge that some of the revenue is coming from talk, weather,

news, deejay personalities, other things."); Kocak WDT ¶ 2 ("[C]onsumers can turn to a wide variety of sources . . . when they want to hear nothing but music.").

348. Professor Rubinfeld acknowledged in his testimony at the hearing that this additional, valuable content supplied by simulcasters meant that his percent of revenue proposal could not be applied to all of a simulcaster's revenues. *See* Tr. at 2056:16-2057:2 (Rubinfeld) ("Q. Let me talk for a minute about your recommended percentage of revenue [rate]. 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 only to the music portion of the programming."); *cf.* Rubinfeld WDT ¶ 117 ("I agree that 'disproportionality' is a potential problem if rates were determined solely by a percentage of revenue. It is unlikely that services with relatively large revenues will have relatively small numbers of streams."); [redacted]

349. Professor Rubinfeld suggested that this problem could be addressed through a method of "allocating" revenues between the value of the music and non-music components of a single service. [redacted]

[redacted]; Rubinfeld WDT ¶ 114 ("Reasonable allocations of revenue will have to be made for webcasters that derive revenue from sources other than statutory webcasting.").

350. Professor Rubinfeld has not suggested a method of actually accomplishing this allocation of revenues within a single service, however; nor has any other SoundExchange witness. *See* Tr. at 2057:3-7 (Rubinfeld) ("Q. And you have not put forward any expert testimony as to how one should actually determine the attribution or allocation, have you? A. Beyond that broad concept, I have not put forward any specifics, that's correct."); [redacted] In contrast, iHeartMedia presented evidence that such an allocation is inherently arbitrary and would lead to intractable disputes. *See* Tr. at 3681:11-3682:11 (Pedersen) ("[I]t would be impossible for me to try to determine . . . the revenue that is generated during that program, how much of it is generated because Ryan Seacrest is on the air versus how much is dedicated to — toward the music that gets played on the channel."). Accordingly, by Professor Rubinfeld's own admission, the percent-of-revenue prong of his proposal cannot be applied to simulcasters.

VI. APPLE'S AGREEMENTS WITH WARNER AND SONY DO NOT SUPPORT PROFESSOR RUBINFELD'S INTERACTIVE BENCHMARK OR SOUNDEXCHANGE'S RATE PROPOSAL

351. Professor Rubinfeld attempts to support his "interactive benchmark" rate proposal with a belated analysis of Apple's agreements with Warner and Sony for its iTunes Radio service. According to Professor Rubinfeld, Apple has paid Warner approximately [redacted] per performance, *see* Rubinfeld WRT App. 2 ¶ 26 & App. 2b, and Sony [redacted] per performance, *see* Rubinfeld WRT App 2 ¶ 38 & App. 2c, through its iTunes Radio service, which Professor Rubinfeld claims is "similar" to a statutory service, Rubinfeld WRT App. 2 ¶ 2. Although Professor Rubinfeld repeatedly disclaimed any attempt to treat the Apple agreements as independent benchmarks, *see, e.g.*, Tr. at 2283:21-2284:14, Tr. at 2286:5-2287:2, [redacted] (Rubinfeld), he claimed that his calculation supports the reasonableness of the somewhat lower benchmark rates he derives from agreements for interactive services, *see* Rubinfeld WRT App. 2 ¶¶ 30, 42. Professor Rubinfeld's analysis of the Apple deals, however, is rife with errors that cannot be corrected using available information. Accordingly, it provides no support for his interactive benchmark. Instead, to the extent that Apple's agreements provide *any* useful information here, it is corroboration for the expectations analysis of Professors Fischel and Lichtman. The most reliable information — albeit limited — shows that Apple negotiated rates [redacted] for a service that exceeded statutory functionality, and that its counterparties negotiated on that basis as well.

A. Apple's iTunes Radio Service Is Not a Statutory Service and Professor Rubinfeld Made No Attempt To Adjust the Rates Apple Expected To Pay In Light of the [redacted] It Obtained

352. Apple's licenses with Warner and Sony provide for [redacted], as Professor Rubinfeld himself acknowledges. *See* Fischel/Lichtman SWRT ¶ 4; Rubinfeld WRT App. 2 ¶ 2 ("Apple's radio service [redacted]

[redacted] Fischel/Lichtman SWRT ¶ 10.

353. Apple and the labels appear to have contemporaneously recognized this [redacted] and adjusted the terms of their agreements to account for it. *See* Fischel/Lichtman SWRT ¶ 4; [redacted]

354. Professor Rubinfeld, however, ignored this [redacted] in describing the Apple agreements as corroborative evidence for his rate proposal. This error renders his Apple analysis essentially useless in light of his own recognition that a "directly

licensed service's total willingness to pay will be (approximately) equal to the price of the statutory license, plus the value in the marketplace of the contracted-for incremental functionality." Rubinfeld WDT ¶ 92; [redacted]

355. Moreover, there is no evidence from which the Judges could conclude that Apple's service is "close enough" to statutory service; its [redacted] and the value of [redacted] would have to be determined and excluded in order to rely on Apple's agreements in setting a rate for statutory services. However, no one has attempted to do so or presented evidence from which it could be done.

B. Professor Rubinfeld Failed To Account for the Shadow of the Statutory Rate

356. But even if Apple's service could be considered "close enough" to a statutory license to render its agreements potentially *informative* in setting the statutory rate, Professor Rubinfeld's methodology for analyzing the agreements would provide no corroborating evidence for the terms a willing buyer and willing seller would agree upon in the absence of the statutory license. As experts for virtually all parties agreed, licenses for statutory services were necessarily and strongly influenced by the statutory rate. This "shadow" of the statutory rate must be accounted for in offering an agreement as a benchmark in support of a rate proposal. *See* Fischel/Lichtman SWRT ¶ 20; [redacted] Katz WRT ¶ 191.

357. Professor Rubinfeld repeatedly recognized the importance of the shadow of the statutory rate, even noting in the context of the Apple agreements that "[w]hen a proposed benchmark license is directly impacted by the existence of the statutory license, this severely limits the value of that license as a comparable benchmark." Rubinfeld WRT ¶ 185. However,

in his analysis of the Apple agreements, he failed to account for the shadow of the existing statutory rates. *See* Fischel/Lichtman SWRT ¶ 23; [redacted]

358. To the contrary, Professor Rubinfeld suggested that the Apple agreements might be "less in the shadow of the statutory proceeding th[a]n the ones created and proposed by the Services," because they "were not contemplated to be the centerpiece of either party's case in the CRB." Rubinfeld WRT App. 2 ¶ 8. Professor Rubinfeld failed to offer any explanation, however, of why not being the "centerpiece" of a party's case in future regulatory proceedings meant that rational actors engaged in negotiations would not be under the shadow of the existing statutory license. *See* Fischel/Lichtman SWRT ¶ 24.

359. If, as Professor Rubinfeld claims, Apple's service was "similar" to a statutory service, the parties would be expected to negotiate with the knowledge that either party could effectively opt to fall back on the statutory license — Apple by invoking it, and the labels by withholding their music. *See* Shapiro SWRT at 2 ("[T]he otherwise applicable statutory license served as a magnet, pulling negotiated rates towards it, as that is the rate that would have prevailed in the event of a negotiating impasse."). In fact, [redacted]

[redacted]

360. [redacted]

361. [redacted]

362. [redacted]

C. Professor Rubinfeld Improperly Analyzed the Apple Agreements Based on Performance Data, Rather Than the Parties' Expectations

363. Consistent with the testimony of other experts, Professor Rubinfeld opined in his written direct testimony that a statutory service would not rationally agree to pay more than the statutory rate. *See* Rubinfeld WDT ¶ 166; *see also* Fischel/Lichtman SWRT ¶ 5; Talley WRT at 47 (noting "no rational buyer would ever be willing to enter into a negotiated, consensual license calling for her to pay a price equal to or exceeding that statutory rate"). Despite that, Professor Rubinfeld concluded that Apple was paying Warner and Sony [redacted] *See* Rubinfeld WRT App. 2 ¶ 26 & App. 2b (Warner paying [redacted] per performance); Rubinfeld WRT App. 2 ¶ 38 & App. 2c (Sony paying [redacted] per performance). As other experts persuasively testified, that conclusion is inherently not credible. [redacted] Shapiro SWRT at 8 ("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.").

364. This contradiction in Professor Rubinfeld's testimony stems from the fact that, as he did in analyzing the iHeartMedia-Warner agreement, Professor Rubinfeld relied on *actual*

performance data, rather than the parties' *expectations* at the time they entered the agreements. [redacted] Tr. at 6392:1-17 (Rubinfeld) (admitting that, at his deposition, he testified as follows: [redacted] Tr. at 4526:12-23 (Shapiro) ("[W]hen you dig in, you find out the primary driver that's off is the ex-post analysis he did, which he acknowledged in his deposition, these are not rates that the parties were agreeing to or expected would be paid at the time.").

365. As explained above, the use of *ex post* performance data in deriving a "benchmark" rate is fundamentally flawed from an economic perspective, because actual performance depends on a number of factors beyond the parties' control — and therefore does not indicate the price a buyer was *willing* to pay, or a seller was *willing* to accept for the rights being licensed. *See also* iHeartMedia Proposed Conclusions of Law ¶¶ 1-9. This problem is magnified in the context of the Apple agreements, which (as described further below) contain [redacted] *See* Fischel/Lichtman SWRT ¶ 41. Because of [redacted] the average effective royalty per performance actually paid under the agreements depends heavily on the *ex post* growth of listenership to the service. To the extent Apple's service grew more slowly than expected, Professor Rubinfeld's analysis of Apple's *ex post* performance overstates Apple's actual willingness to pay. *See id.* ¶ 4. Available evidence indicates that is exactly what happened: The number of royalty-bearing performances over the

period Professor Rubinfeld analyzed was [redacted] *See id.* ¶ 42. Apple's failure to grow as quickly as expected provides no economic basis to assume that a willing buyer and willing seller would agree upon a higher royalty rate, but this is exactly what Professor Rubinfeld's analysis of post-deal performance assumes. *See id*.

366. Professor Rubinfeld candidly admitted this flaw in his analysis in his testimony at the hearing — yet nonetheless relied on performance data to the exclusion of information about the parties' expectations in analyzing the Apple agreements. *See* Tr. at 6390:12-6391:5 (Rubinfeld) (admitting that, at his deposition, he testified as follows: [redacted]; *see also* Shapiro SWRT at 2 ("This is particularly egregious given Professor Rubinfeld's candid acknowledgment that neither party expected the service to perform as poorly as it did. Said differently, Professor Rubinfeld's ex post approach tells us nothing about the rates that willing buyers and willing sellers agreed to when they struck their bargain. Accordingly, his analysis is meaningless.") (footnote omitted).

367. Professor Rubinfeld's methodology, in fact, exacerbated the problem of relying on performance data, further skewing his results, because Professor Rubinfeld analyzed only the first 13 months of data from the Apple agreements, whereas the full term of the agreements is [redacted] *See* Rubinfeld WRT App. 2 ¶¶ 21, 33; Fischel/Lichtman SWRT ¶ 46. Although the agreements contain [redacted], Professor Rubinfeld simply pro-

rated [redacted] evenly across months. *See* Rubinfeld WRT App. 2 ¶¶ 22, 34; Fischel/Lichtman SWRT ¶ 46. Therefore, as Apple's service grows over the remaining term of the agreement, [redacted], and thus the average royalty rate over the full [redacted] will be *lower* than the royalty rate paid over the first 13 months. *See* Fischel/Lichtman SWRT ¶ 46. Professor Rubinfeld noted this effect in his written rebuttal testimony, but failed to make any adjustment to his Apple analysis to account for it. *See* Rubinfeld WRT ¶¶ 248-249 ("For the Category A set of interactive services . . . [redacted]

368. Further compounding the problems with his analysis, Professor Rubinfeld eschewed actual performance data in the one context where it would have resulted in a lower effective rate calculation: his treatment of [redacted]

Despite his claim that actual post-deal performance was the most appropriate way to analyze Apple's agreements, Professor Rubinfeld adjusted his Apple calculations for [redacted] by dividing his calculated royalty rate by a factor of [redacted] which is the equivalent of assuming that [redacted] under the Apple agreements were approximately [redacted] *See* Fischel/Lichtman SWRT ¶ 43; [redacted]. Professor Rubinfeld's [redacted] factor was based on performance data from Pandora, whose service permits a far lower number of [redacted] than does iTunes Radio. *See* Rubinfeld WRT App. 2 ¶¶ 28 & n.22, 40 & n.31; [redacted]

[redacted]

369. [redacted]

370. The Apple license agreements, moreover, [redacted] This, too, inflated his calculated royalty rate, despite the fact that the record labels themselves recognized that these [redacted] lowered the effective royalty rate. [redacted]

371. [redacted]

[redacted]

372. Professor Rubinfeld's conclusions are at odds with available information on the pre-agreement expectations of the parties, which is the more appropriate way to analyze the agreements from an economic perspective. *See* Fischel/Lichtman SWRT ¶ 49. Documents produced by Apple indicate that, in fact, Apple expected to pay rates [redacted] *See id.*; [redacted]

373. [redacted]

374. These calculations reflect Apple's projections. There is not, however, sufficient evidence in the record to determine what the record labels expected Apple to pay under the

agreements. *See* Fischel/Lichtman SWRT ¶ 3. Although a large number of different record label-generated projections were examined by the experts, none was identified by any record label *fact* witness as the most relevant or most reliable, which is necessary to perform a reliable expectations analysis. *See id.* ¶ 55; [redacted]

375. Nonetheless, these projections generally discuss rates [redacted]

[redacted]

[redacted] Tr. at 4517:23-4519:8 (Shapiro) ("I mean, just the best I can work with these is a much lower number that's in a range, actually closer to the Merlin type of numbers that we'll talk about later, but they're far from the numbers that — of the rate proposal, in particular, that Professor Rubinfeld has put forward.").

D. Professor Rubinfeld's Analysis Fails To Isolate Apple's Royalty Payments Properly Attributable to Webcasting From Payments Under Other Agreements

376. Professor Rubinfeld's analysis was also fundamentally flawed due to the fact that he analyzed the Apple agreements in isolation from other agreements negotiated between the same parties, and assumed without justification that all compensation discussed in the agreements was properly attributable to webcasting, as opposed to other, related products. *See* Fischel/Lichtman SWRT ¶ 29. In other testimony, Professor Rubinfeld noted that "valuing service contracts can be especially difficult when agreements provide labels with multiple sources of value, or when service operators have multiple service offerings," and therefore "only accounted for the subset of the consideration that was exchanged that could be reliably estimated." Rubinfeld WRT ¶ 109. By contrast, in the context of the Apple agreements, Professor Rubinfeld assumed that all payments not clearly attributable to another source should be attributed to the webcasting agreements. Given the absence of fact witness testimony from all parties to the agreements, it is difficult to fully evaluate the effect of that assumption. However, a range of evidence calls its validity into serious question. *See* Fischel/Lichtman SWRT ¶ 29; Tr. at 4517:23-4519:8 (Shapiro).

377. For instance, Apple has a number of different contractual relationships with the same record labels for products such as downloads and music "locker" services, and the Apple

agreements Professor Rubinfeld considered [redacted] *See* Fischel/Lichtman SWRT ¶ 30; *see also* Rubinfeld WRT App. 2 ¶ 1 [redacted]; Rubinfeld WDT ¶ 131(c) (same).

378. Simultaneous with the webcasting agreements Professor Rubinfeld considered, the same parties also negotiated amendments to agreements covering other services, and the amendments [redacted] in complex ways. *See* Fischel/Lichtman SWRT ¶ 32; [redacted]. For example, on the exact date Apple's webcasting agreement with Sony was signed, the parties also executed an amendment to Apple's "Digital Music and Video Download Agreement" with Sony. *See* Fischel/Lichtman SWRT ¶ 33; [redacted] Fischel/Lichtman SWRT ¶ 33. Likewise, on the exact date they executed their webcasting agreement, Apple and Warner signed an amendment to their "Sound Recording Cloud Service Agreement" that indicates that a [redacted] ¶ 34.

379. As Professor Rubinfeld himself acknowledged, from an economic perspective some portion of the compensation [redacted] in these agreements may,

therefore, be properly attributable to [redacted]. *See id.* ¶ 32; [redacted] That issue cannot be resolved on the basis of the current record, and Professor Rubinfeld made no attempt to resolve it. *See* Rubinfeld WRT App. 2 ¶ 7; [redacted]; Tr. at 2271:13-2272:18 (Rubinfeld) ("[I]f you wanted to know whether payments that were made under the cloud and radio agreements were really intended to pay for the radio service or cloud service, who would you want to hear from? A. . . . The folks at Apple and Sony who were involved in negotiating the amendment."); Shapiro SWRT at 4 ("Given the incomplete and complex evidentiary record, it is impossible to ascertain with certainty how to appropriately treat the significant payments that are included in the iTunes Radio Agreements yet clearly relate to the Cloud Service.").

380. A similar question arises with respect to the [redacted] payments included in the Apple agreements. Sony and Warner received [redacted] from Apple in the context of their webcasting agreements, and these [redacted] form a very substantial share of the total compensation Professor Rubinfeld included as having been paid to the labels in his analysis. *See* Fischel/Lichtman SWRT ¶ 36. Absent the [redacted] Professor Rubinfeld's calculations indicate royalty rates of less than [redacted] per performance, even without other necessary adjustments discussed above. *See id.*

381. No [redacted] appears in the Apple-Universal webcasting agreement that was omitted from Professor Rubinfeld's analysis, [redacted]

[redacted] *Id*. In the Warner and Sony agreements, [redacted]. *See id*. In any case, [redacted] again raises substantial questions about the relationship between [redacted]. *See id*.

382. These questions are heightened by Professor Rubinfeld's limited analysis of Apple's webcasting agreements with independent record labels. According to Professor Rubinfeld, these labels received the same per-play rates as Sony and Warner, but did not receive any [redacted] compensation. *See* Rubinfeld WRT App. 2 ¶ 29. Accordingly, Professor Rubinfeld calculates an effective per-performance rate for independent labels of [redacted] (Warner analysis) and [redacted] (Sony analysis). *See* Rubinfeld WRT Exs. 2b & 2c. [redacted]

383. [redacted]

[redacted]

384. [redacted]

[redacted]

E. Professor Rubinfeld Fails To Consider the Impact of Apple's Other Services on Royalty Rates

385. Professor Rubinfeld's analysis also fails to account for another important factor: besides operating a streaming music service, Apple is also the largest music retailer in the U.S.

[redacted]

386.

387. More generally, because Apple is a major seller of music, would give it an incentive to accept a royalty rate (and the labels leverage to demand a royalty rate) higher than any conventional webcaster would pay. *See id.* ¶ 54; Shapiro SWRT at 5 ("These related

businesses make it impossible to isolate the rates willing buyers and willing sellers would agree to solely for the iTunes Radio service and very likely increased Apple's willingness to pay for the rights to stream recorded music on the iTunes Radio service."); [redacted] Apple's willingness to operate at a loss is a poor indication of what a true willing buyer would pay.

388. Moreover, Apple has other interrelated lines of business that Professor Rubinfeld failed to consider, but that the parties [redacted] In his original testimony, Professor Rubinfeld treated these additional lines of business as a reason to assign less weight to Apple's agreements — but he makes no mention of them in his separate analysis of the Apple deals. *See* Rubinfeld WDT ¶ 152 (testifying, about Apple and other licensees: "To sum up, certain licensees . . . obtain substantial complementary benefits from their agreements with recording companies. And these licensees offer unique benefits to rights holders. None of these benefits would be expected from the statutory license/licensees. Agreements between recording companies and these entities are therefore less appropriate as benchmarks compared to the set of 'Category A' interactive agreements from which I have derived my rate proposal.").

F. Professor Rubinfeld's Analysis of the Apple Deals Provides No Support for His Percent-Of-Revenue Proposal

389. Professor Rubinfeld concluded that the percent-of-revenue alternative royalty rate in the Apple deals — [redacted] — supported his proposal of a 55 percent of revenue rate. *See* Rubinfeld WRT App. 2 ¶¶ 27, 39. By Professor Rubinfeld's analysis, Apple is currently paying [redacted] its revenues on a pro-rata basis to Warner, and [redacted] Sony. *See* Fischel/Lichtman SWRT ¶ 60. Therefore, according to Professor Rubinfeld, "it is reasonable to use a revenue share [redacted] the contractually specified percentage," and the actual percent of revenue Apple is currently paying — hence, in his view, this supports his 55 percent rate proposal. Rubinfeld WRT ¶ 39; *see* Rubinfeld WRT App. 2 ¶ 27.

390. This analysis is not persuasive. Apple's agreements, like Professor Rubinfeld's proposal, [redacted] *See* Fischel/Lichtman SWRT ¶ 61. In any contract with multiple compensation prongs, one of the prongs will always be greater. *See id*.

391. Moreover, available evidence indicates that the percentage-of-revenue prong in the Apple agreements is *not* a reliable measure of what willing buyers and willing sellers would agree upon for a statutory service, absent the statutory rate. *See id*. ¶ 58. Indeed, the record labels [redacted]

G. The Limited Evidence Suggests the Parties Expected To Pay at [redacted]

392. Despite all those obstacles to relying on the Apple agreements — including the additional functionality, the shadow of the statutory rate, the interlocking and contemporaneously signed agreements, Apple's unique position in the marketplace, and evidence of deliberate obfuscation of the true per-play rates — what facts can be discerned support iHeartMedia's rate proposal, not SoundExchange's.

393. Based on the limited information the parties were able to obtain after the late introduction of the Apple agreements into the proceeding, Apple expected to pay [redacted] per performance. [redacted]

394. Adjusting for those other confounding factors that the record is too thin to quantify would require lowering the rate even further. *See* Fischel/Lichtman SWRT ¶ 54; [redacted]

395. Evidence from the record label side broadly corroborates these numbers. [redacted]

[redacted]

396. Additionally, Apple executive Eddy Cue offered to a Sony executive to pay per-play rates between [redacted] and [redacted] that, according to Sony's interpretation, would be [redacted] Sony's offers to Apple were broadly consistent with those figures. [redacted] Universal documents are also consistent with these figures. *See* [redacted] Indeed, there is evidence that Apple's proposed rates were [redacted] *See* [redacted]

397. In sum, this evidence demonstrates that, despite efforts to obscure the effective per-play rates, Apple's negotiations with the major labels centered around [redacted] That is consistent with Apple's internal projections, which, once

adjusted, yield per-play rates of [redacted]. However, given the scant evidence in the record, it is impossible to determine how much [redacted] record labels were actually willing to accept, even without correcting for the shadow of the CRB royalty rates.

VII. SECTION III.E SERVICES[22]

398. As discussed in Part V, the agreements for interactive services do not provide a reliable benchmark for the rates to which a willing buyer and willing seller would agree for statutory services. It is unnecessary to consider the proposed interactive benchmark because, unlike in prior proceedings, there is a thick record of evidence from the market for statutory services. *See also* iHeartMedia's Proposed Conclusions of Law ¶¶ 10-14. It is similarly unnecessary to consider the four belatedly offered interactive services — Spotify's Shuffle, Nokia's MixRadio, Rhapsody's unRadio, and Beats's The Sentence — that SoundExchange claims "corroborate" the rates suggested by its proposed interactive benchmark. *See* Rubinfeld WRT ¶ 178.

399. That these "Section III.E services"[23] have not been offered as an independent benchmark in this proceeding — but merely as corroborative evidence of the interactive benchmark — is significant in and of itself. *See* Tr. at 2083:18-21 (Rubinfeld) ("Q. Now, you're not offering those agreements as benchmarks in their own right, are you? A. No, I view that as just corroborative."). That fact reflects the limited evidence that has been made available regarding these services. For example, although it is undisputed that the Section III.E services

[22] iHeartMedia supports the pending renewed motion to strike SoundExchange's belated submission of testimony about these agreements as untimely and improper rebuttal. If that motion is granted, the Judges may disregard these proposed findings of fact.

[23] These four services have been referred to as the "Section III.E services" based on the numbered section of Professor Rubinfeld's rebuttal testimony in which he discussed these services. *See id.*

are non-statutory, SoundExchange has not even attempted to adjust the rates it claims were negotiated for these services to account for this extra-statutory functionality, as it did for the interactive services it has offered as a benchmark. *See, e.g.*, Tr. at 2084:8-16 (Rubinfeld) ("[Y]ou didn't make any adjustments in the rate that you cite in your discussion of Rhapsody unRadio to account for the extra statutory functionality, did you? A. No, I didn't, because I was just looking at this to generally corroborate any work. If I was going to actually use it to create a[n] alternative suggested rate, I would have done some functionality adjustments."); Tr. at 2086:3-6 (Rubinfeld) (stating that he made no adjustment for Spotify's non-statutory features); Tr. at 2096:9-15 (Rubinfeld) (regarding Beats's The Sentence: "I tried as best to describe the differences [between what Beats is able to do and what the statutory license would allow], but I did not do any calculations that would make an adjustment"); Tr. at 2088:4-8 (Rubinfeld) ("And [MixRadio] is not DMCA compliant, that is correct."). In the absence of such adjustments, the agreements between the record labels and the Section III.E services provide neither benchmarks nor corroboration for statutory service rates.

400. The Section III.E services also suffer from other problems that render them unhelpful. Each of these services is offered as an adjunct to another fully interactive service, and the agreements for the Section III.E services and their counterparts appear to have been negotiated together. But no evidence has been provided as to how these unified agreements can be disentangled to determine the rates that would have been negotiated for the Section III.E services alone, independent of the other economic considerations that drove these bargains. Nor is there evidence indicating how to adjust these agreements to correct for the influence of the statutory rate.

A. The Section III.E Services Offer Interactivity and Other Non-Statutory Functionality

401. The Section III.E services all offer functionality not granted under the statutory license. SoundExchange's expert, Professor Rubinfeld, concedes this. *See* Rubinfeld WRT ¶ 179 (describing Beats's The Sentence as offering "comparable functionality" to statutory services); *id.* ¶ 195 (noting that Spotify's Shuffle service "offers functionality generally similar to" that offered by statutory webcasters); *id.* ¶ 196 (describing Rhapsody unRadio as "very similar to customizable services like Pandora"); *id.* ¶ 199 (characterizing Nokia's MixRadio as "near-DMCA compliant, except that it permits users to play cached radio stations via Nokia devices while offline"); [redacted]; Tr. at 2088:4-8 (Rubinfeld) ("And [MixRadio] is not DMCA compliant, that is correct."); Tr. at 2086:8-12 (Rubinfeld) ("[Y]ou would agree, would you not, that even the mobile access on the Spotify free tier exceeds the functionality allowed under the statutory license, correct? A. I would agree to that.").

402. iHeartMedia's Executive Vice President for Engineering and Systems Integration, Jeffrey L. Littlejohn, described the extra-statutory functionality of each of the four Section III.E services based on tests he personally conducted. *See generally* Littlejohn WRT; [redacted]

403. Although it is undisputed that the Section III.E services differ from statutory services, SoundExchange claims that the differences are minor, and that the evidence regarding these services is therefore still informative. *See* Rubinfeld WRT ¶¶ 179, 192-93, 196, 199, 201. The evidence indicates that the functional differences are significant enough that they cannot simply be brushed aside.

1. Beats's The Sentence

404. Beats is one of the interactive services used in SoundExchange's interactive benchmark. *See* Rubinfeld WDT ¶ 16. It is a full-fledged interactive service that is available only with a paid monthly subscription. *See id.* ¶ 37. The agreement for Beats also includes terms [redacted]. *See* Rubinfeld WRT ¶ 179.

405. The version of The Sentence described in the Beats agreements — which is the version on which SoundExchange relies — is no longer offered. Professor Rubinfeld acknowledged that this offering was terminated. *See* Tr. at 2094:9-14 (Rubinfeld) ("So that does suggest that the limited free service was shut down."). Even at the time it was offered, The Sentence was a relatively insignificant part of the greater Beats product, accounting for "just [redacted] percent of all streaming royalty payments made by Beats to the majors and representing just [redacted] percent of major label plays." Katz WRT ¶ 240 & Table 12.

406. Because the version of The Sentence contained in the Beats agreements no longer exists, no witness was able to testify regarding the functionality of this service as it was actually deployed. Mr. Littlejohn tested the current version of The Sentence, which offers far greater interactivity (including unlimited skips, offline caching and playback, rewind, and on-demand playback of individual songs) than allowed by the statutory license. *See* Littlejohn WRT ¶ 12. Professor Katz testified that, after the introductory trial period ends, the free version allows the listener to hear only partial songs, [redacted] *See* Katz WRT ¶ 241 & n.324 (quoting Beats website: "'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.'").

407. Professor Rubinfeld was unable to describe the actual functionality of the version of The Sentence contained in the Beats agreement, and his testimony highlights the confusion about this issue. For example, although Professor Rubinfeld testified that either he or his staff had visited the Beats website at various times, he was unable to remember whether it was free, when it had been shut down, or even whether he had played any songs on The Sentence. *See* Tr. at 2090:18-22 (Rubinfeld) ("Q. Did you actually use The Sentence feature for free and receive full track play of songs? A. No, I'm not sure I did. So I would have to double-check that."); Tr. at 2091:25-2092:5 (Rubinfeld) ("Q. Did you actually use the service? A. I didn't actually play any songs. One of the things I've done — actually, several times — is just go to various websites and look at the features of the service. I don't think I actually played a song."). Professor Rubinfeld testified that The Sentence [redacted] (Rubinfeld), without clarifying this apparent contradiction.

408. The Beats agreements themselves also do not provide evidence of the functionality of The Sentence as it was actually deployed. The evidence does indicate, however, that the parties to these agreements [redacted]. Neither Professor Rubinfeld nor any other witness made adjustments for [redacted]. *See* Tr. at 2096:9-15 (Rubinfeld) ("I did not do any calculations that would make an adjustment."). The Sentence is, accordingly, proof of nothing and not informative in any respect.

2. Spotify's Shuffle

409. Spotify is another interactive services used in SoundExchange's interactive benchmark. *See* Rubinfeld WDT ¶ 16. Spotify offers a full-fledged version of its service — which allows unlimited on-demand access on both desktop and mobile devices — for a paid subscription. *See id.* ¶ 37. Spotify also offers free versions of its service with more limited capabilities. *See* Littlejohn WRT ¶ 6. Shuffle is the name of the free version of the service available for use on mobile devices. *See* Rubinfeld WRT ¶ 192.

410. Spotify Shuffle contains numerous features that go beyond a statutory service. Mr. Littlejohn's testimony indicates that Spotify Shuffle allows users to create playlists with twenty or more songs entirely of their choosing and then play *only* those songs back in a random order. *See* Littlejohn WRT ¶ 7. It further allows users to play entire albums or artist discographies in a random order. *See id.* Because many users *choose* to listen to playlists or artist discographies in a random order, the restriction requiring random playback is a minor difference from fully on-demand services. *See id.* ¶ 10 ("In my experience, however, users of downloaded music and on-demand services often *choose* to shuffle their playlists. For those users, Spotify Shuffle is as good as an on-demand service.").

411. SoundExchange does not dispute these differences. Professor Rubinfeld instead conceded that Spotify's Shuffle "provides elements of interactivity." Rubinfeld WDT ¶ 50 n.22. Although he also testified that "[c]ommentators have described the [Shuffle] service as similar to that offered by noninteractive customizable services such as Pandora," Rubinfeld WRT ¶ 192, such vague claims of "similarity" are an insufficient basis on which to rely on this service. It is clear that these extra-statutory features are not superficial, but instead have considerable value both to consumers and, in turn, to Spotify. As Professors Fischel and Lichtman testified, internal Spotify documents [redacted]

[redacted] *See* Fischel/Lichtman SWRT ¶ 15 & Ex. A. [redacted] *See id.* ¶ 15.

3. Nokia MixRadio

412. MixRadio is a service formerly offered by Nokia exclusively to consumers who purchased Nokia mobile devices. *See* Rubinfeld WRT ¶ 199. Based on that limitation alone, MixRadio cannot be deciphered without unbundling the bundle, because the bundling is critical to the economics of this service. *See id.* ¶ 200 (describing per-device fees).

413. In addition to this threshold problem, MixRadio also offers considerable extra-statutory functionality. Mr. Littlejohn's testimony demonstrated that MixRadio offers offline playlists up to four hours in length and highly personalized individual radio stations shaped by a user's listening habits. It also permits users to share individual songs on social media or via text message for on-demand listening by friends. *See* Littlejohn WRT ¶¶ 24-25.

414. Professor Rubinfeld acknowledged that MixRadio offered extra-statutory functionality, including offline playback of cached radio stations and, in its subscription offering, unlimited skips, offline playlists, and higher-quality audio. *See* Rubinfeld WRT ¶ 199. Professor Rubinfeld did not adjust for any of these additional features.

4. Rhapsody unRadio

415. Rhapsody is another of the interactive services used in SoundExchange's interactive benchmark. *See* Rubinfeld WDT ¶ 16. Rhapsody offers a full-fledged interactive service that is available only with a paid monthly subscription. *See* Rubinfeld WRT ¶ 160. Rhapsody also offers a slightly less expensive product, unRadio, which involves a subset of the capabilities available on the full Rhapsody service. Rubinfeld WDT ¶ 60 ("Rhapsody introduced

'unRadio' in 2014, which is an entirely separate product with its own subscription plan which offers curated radio playlists as well as unlimited skips, no advertisements, and caching of the selected songs.").

416. Rhapsody unRadio — as its name implies — is unlike the radio services that qualify for the statutory license. Mr. Littlejohn's testimony demonstrates that unRadio offers unlimited skips and fast-forward and rewind functionality. *See* Littlejohn WRT ¶ 17. unRadio also announces up to five songs before they are played, and allows users to delete *any* of those songs to prevent them from being played. *See id.* ¶ 18. unRadio also permits listeners to customize individual artist stations by increasing the "popularity" of songs played or decreasing the "variety" of songs played. *See id.* unRadio permits caching in support of offline playback and even allows individual songs to be played on demand. *See id*. ¶¶ 20-21. Professor Rubinfeld did not adjust for any of these differences.

B. The Section III.E Services Agreements Are Heavily Influenced by the Interactive Services They Were Bundled With and the Shadow of the Statutory Rate

1. The Section III.E Services Agreements Were Inextricably Bundled and Blended with Interactive Offerings

417. Even beyond the unaccounted-for extra functionality offered by the Section III.E services, there are additional issues with these services that render them unhelpful for determining appropriate royalties in the noninteractive market. In particular, each of these agreements was entered into by services with multiple product offerings, and it is not clear how to allocate payments, performances, and headline per-play rates between these various offerings. *See, e.g.*, Fischel/Lichtman SWRT ¶¶ 29-31 ("From an economic perspective, it is inappropriate to interpret the contracts that Professor Rubinfeld relies upon without considering this broader context."); Katz WRT ¶ 265 ("Such blended rates are economically rational and may economize

on transaction and monitoring costs, but they do not necessarily reflect the rate that Spotify would be willing to pay for each product on a standalone basis.").

418. Spotify provides a clear example of this problem. In its agreements with record labels, Spotify agreed [redacted] The headline rate is therefore best considered a "blended" rate that incorporates on-demand plays. Shapiro SWRT at 17 ("Professor Rubinfeld has taken as corroborative evidence what is basically a blended rate for performances with a range of functionality (including on-demand functionality) and applied that rate fully to performances with the least functionality. This does not make economic sense."); Katz WRT ¶ 265 ("[Blended rates] do not provide a reliable basis on which to corroborate Dr. Rubinfeld's proposed benchmark rates."). The fact that Professor Rubinfeld did not attempt to disentangle the rates for the different product offerings is especially problematic because Professor Katz, who did attempt such an adjustment, concluded that performances on Spotify's Shuffle service bore an effective per-play rate approximately [redacted] that of the headline rate. *See* Katz WRT ¶ 269 & Table 17 [redacted]

419. The problem is not limited to Spotify. For example, Nokia's agreements governing MixRadio [redacted] Fischel/Lichtman SWRT ¶ 13. Those agreements also [redacted] *See id.* ¶ 27 & n.27. Professor Rubinfeld accounted for neither fact in his analysis, and both have the effect of lowering the effective per-play rate under the agreements. Neither Professor Rubinfeld nor any SoundExchange fact witness offered testimony about the broader economic context for these agreements.

420. Beats, too, agreed to rates [redacted] *See id.* ¶ 30. Because, as noted, royalties for The Sentence amounted to only [redacted] percent of royalties that Beats paid, the headline rates for The Sentence could be set arbitrarily, with little economic impact. Similarly, unRadio represents a small percentage of royalties paid by Rhapsody to the major record labels, raising the same concern. *See* Katz WRT ¶ 259 & Table 14 (calculating that unRadio comprises [redacted] Rhapsody's total royalties to Warner and Universal). And Nokia's offering of MixRadio bundled with its handsets — a much bigger line of business for Nokia than streaming — meant that Nokia was willing to pay more in royalties in order to sell more devices. *See id.* ¶ 249.

421. What evidence there *is* in the record regarding Beats and the other Section III.E services agreements suggests that the headline rates were negotiated strategically and [redacted] *See id.* ¶ 266 (describing strategic motivations for blended rate structures and citing evidence suggesting record labels [redacted]

2. The Section III.E Services Agreements Are in the Shadow of the Statutory Rate

422. Finally, Professor Rubinfeld fails to adjust for the shadow of the statutory rate, a problem whose importance increases the closer the functionality comes to the statutory license. Assuming for the sake of argument that the Section III.E services offer functionality comparable in some undefined way to that permitted under the statutory license (though as explained above, they do not), Professor Rubinfeld's failure to adjust for the statutory shadow would only loom larger. *See* Fischel/Lichtman SWRT ¶ 20.

VIII. MODIFICATIONS TO THE TERMS OF THE STATUTORY LICENSE

423. The Judges are directed to establish not only rates, but also "terms for transmissions" by noninteractive services that "most clearly represent the . . . 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). The Judges are further "obligated to 'adopt royalty payment and distribution terms that are practical and efficient.'" *Webcasting III*, 76 Fed. Reg. at 13042 (quoting *Webcasting II*, 72 Fed. Reg. at 24102). A party proposing a change to existing terms in the regulations bears the burden of providing record support for its proposals. *See id.*; *see also* iHeartMedia Proposed Conclusions of Law ¶¶ 31-35.

424. As set forth below, iHeartMedia has satisfied its burden with respect to two of its proposed changes: to adopt provisions that waive certain statutory terms to permit simulcasters to transmit terrestrial radio stations over the Internet without having to modify terrestrial radio programming or practices; and to reduce the late payment charge to a more commercially reasonable level. SoundExchange, however, has not satisfied its burden with respect to two of its proposed changes: to add a one-size-fits-all revenue definition; and to reduce the period for licensees to make payments and provide statements of account.

A. The Record Shows that Willing Buyers and Willing Sellers Agree To Waivers of the Background Terms of the Statutory License

425. Terrestrial broadcasters regularly air special programming that — if played over the Internet — would violate the performance complement, such as when classical or jazz stations play an entire album by a single artist, uninterrupted. [redacted]

[redacted]

426. [redacted]

[redacted]

B. The Record Supports Reducing the Late Payment Charge

427. The record shows that the current late-payment charge of 1.5 percent per month, or 18 percent per year, is excessive and unsupported by economic evidence. As the testimony of Professors Fischel and Lichtman establishes, economic principles support a late-payment charge

[redacted]

[25] *See* note 24, *supra*.

analogous to the prejudgment interest on damages, which is calculated based on *actual borrowing costs* in the marketplace. *See* Fischel/Lichtman WRT ¶¶ 119-20. Pandora's borrowing rates are approximately 2 to 2.5 percent *per year*, and "[t]he current risk-free rates are even lower: the current annual yield on a three-month U.S. Treasury bill is 0.02 percent and on a 5-year U.S. Treasury is 1.5 percent." *Id.* ¶ 120 (citing U.S. Federal Reserve data).

428. Furthermore, the direct licensing agreements between iHeartMedia and independent record labels [redacted] while the iHeartMedia-Warner agreement includes [redacted]

429. iHeartMedia's proposal to adopt the IRS underpayment interest rate which is based on market rates plus a penalty amount (of either 3 or 5 percentage points depending on the amount due) is consistent with both economic theory and the evidence from iHeartMedia's direct licenses and [redacted] than SoundExchange's proposal to preserve the 1.5 percent per month late payment fee. *See* Fischel/Lichtman WRT ¶ 121.

430. SoundExchange's testimony does not support retaining that above-market rate. Although Professor Lys identified a number of agreements between record labels and interactive services that [redacted], he had no information about *why*

that rate appeared in those agreements, including whether those agreements [redacted] *See* Tr. at 1479:1-1480:10 (Lys). In addition, the agreements Professor Lys reviewed did not uniformly contain [redacted] *See* Lys WDT ¶ 39 & Figure 5.

431. Mr. Bender claimed that the existing rate is necessary to cover SoundExchange's administrative costs and properly to incentivize timely submission of payments and statements of account. *See* Bender WRT at 3-5. But Mr. Bender offered no empirical evidence to support either assertion. In particular, he offered no evidence of SoundExchange's actual administrative costs when a licensee pays late or submits a late statement of account, or any comparison of those costs to the revenue SoundExchange receives through the current 1.5 percent per month late payment fee. *See* Tr. at 7319:17-7140:19 (Bender). Similarly, Mr. Bender had no empirical basis to support his claim that the 3- and 5-percentage point penalty included in the IRS rate would be insufficient to induce timely payment and submission of statements of account. *See* Tr. at 7141:13-22 (Bender). And [redacted] undermines Mr. Bender's assertion that such a high rate is necessary to provide the correct incentives.

C. Services Should Be Allowed To Recoup Overpayments

432. iHeartMedia has proposed allowing services to recoup overpayments made to SoundExchange in the regular course of payments, as well as during the audit process. *See* Proposed Rates and Terms of iHeartMedia, Inc. ¶ 6. These provisions would give licensees and broadcasters the ability to recover overpayments of royalties due, and ensure that copyright owners receive only the royalties to which they are due. Pandora proposed a similar procedure. *See* Pandora Proposed Terms at 5.

433. In rebuttal, Mr. Bender asserted that this proposal is too "operationally difficult." Bender WRT at 5. However, Mr. Bender also admitted that SoundExchange already has a procedure by that it uses to recoup its own overpayments to copyright owners. *See* Tr. at 7144:4-9 (Bender) ("Q. So if SoundExchange makes a mistake[] and distributes too much money to a particular copyright owner in a month, it will fix that by reducing payments to that copyright owner in the future, won't it? A. On a track-by-track basis."). By contrast, SoundExchange proposes that licensees are out of luck if they overpay, and that SoundExchange, the record labels, and the copyright owners can keep the windfall. *See* Tr. at 7144:10-14 (Bender) ("Q. But if a service makes a mistake, the artists just keep the money? A. Yes.").

434. The juxtaposition is telling. SoundExchange has a ready-made procedure for recouping inadvertent overpayments, but seeks to deny licensees access to that same procedure. SoundExchange offers no reason why it could not do so, nor any reason why copyright holders should be permitted to keep windfalls they are not rightly owed. The same logic applies to audits, where licensees should be permitted to offset overpayments against underpayments, resulting in an equitable outcome for both parties.

D. SoundExchange's Proposed Revenue Definition Is Neither Practical Nor Efficient

435. In addition to the flaws with SoundExchange's proposal to include in the statutory license a "greater of" rate that includes a percentage of revenue prong, *see supra* Part V.H, SoundExchange's proposed definition of revenue for use in that prong is equally flawed. The record shows that SoundExchange's proposal is overbroad, insensitive to the webcasters' varied lines of business, and difficult to administer. Indeed, there is no evidence that would support adopting an industry-wide definition of revenue that would apply to all statutory licensees. *See* Pedersen WRT ¶ 6 ("[C]onsistent 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.").

436. SoundExchange's proposed revenue definition is particularly ill-suited for simulcasters, because SoundExchange proposes no reliable and uniform method of accounting for the non-music content featured prominently on many simulcast radio stations. Non-music content is a big driver of revenue for simulcasters, and many predominantly talk-formatted shows, like morning drivetime shows, generate more revenue than do music-formatted shows on the same stations. *See id*. ¶¶ 16-17. Moreover, broadcasters invest heavily in DJ and talk personalities. *See id*. ¶ 16. The record shows that there is no principled way to identify, for example, what proportion of the revenue generated by the morning drivetime show is attributable to the DJ and personalities, rather than to the few songs typically played during morning drivetime. *See* Tr. at 3680:10-3682:11 (Pedersen).

437. SoundExchange's proposal seeks to avoid these and other difficult issues in identifying revenues attributable to music subject to the statutory license and all of the other means of generating revenue available to simulcasters by reference to a "Fair Method of Allocation" found in generally accepted accounting principles ("GAAP"). Amended Proposed Rates & Terms of SoundExchange, Inc., Attachment *Proposed Regulations* § 380.3(d)(v)-(vi) (Feb. 24, 2015); *see* Pedersen WRT ¶¶ 9-10. But there is no such GAAP rule. *See* Pedersen WRT ¶ 9; Tr. at 3680:16-24 (Pedersen) ("SoundExchange's fair method of allocation proposal allows for wide interpretation of how to actually allocate revenue between sources."); Weil WRT at 4 ("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."); Tr. at 3958:20-3960:9 (Weil) ("I think it is unworkable because Generally Accepted Accounting

Principles say you can use numbers you made up yourself."). SoundExchange's proposal would therefore lead to intractable and costly disputes about how properly to allocate the revenues to which a percentage of revenue test could be applied.

438. As iHeartMedia's witness, Jon Pedersen, testified, [redacted]. By contrast, SoundExchange proposes to use a 55 percent revenue share, making the composition of the underlying pool of revenue far more salient and magnifying the likelihood of costly disputes. *See* Pedersen WDT ¶¶ 10-11; Tr. at 3680:25-3681:8 (Pedersen); *see also* Weil WRT at 4; Tr. at 3927:18-3931:15 (Weil).

439. SoundExchange's proposal is also inconsistent with the terms of iHeartMedia's agreements and, therefore, inconsistent with what the record shows a willing buyer and a willing seller in this market would agree to when they agree to include a percentage of revenue term in an agreement. [redacted] Similarly, SoundExchange's proposal calls for sharing of all revenue generated by non-audio advertisements, including those served to customers who listen to no music on a particular visit. *See* SoundExchange Prop. Reg. § 380.3(d)(1)(ii)(B) (defining "Gross Revenue"). [redacted]

[redacted]

440. SoundExchange offered the testimony from Professor Lys, who reviewed agreements between the record labels and interactive services. But as Professor Lys testified, "the individual nature of the agreements (along with their short-term horizon) allow[s] for a tailor-made definition of revenue that is particularly relevant to the streaming service and its business model." Lys WDT ¶ 61. None of that is true of the statutory license, which operates on a one-size-fits-all basis over a five-year term.

E. The Record Supports Retaining the Existing 45-Day Period To Make Payments and Provide Statements of Account

441. The existing payment schedule, which gives the Services 45 days to provide SoundExchange with the payment and statement of accounts due under the statutory license is reasonable and should not be changed. iHeartMedia submitted the only evidence in the record about the steps that are necessary to prepare the statement of accounts and determine the amounts due under the statutory license, [redacted] Tr. at 3683:10-3685:9 (Pedersen) (same). That testimony shows that a 30-day period is unreasonably short given the amount of work that must be done — and done correctly — to generate accurate statements of accounts and accurately to calculate the payment due. [redacted]

442. SoundExchange presented the testimony of Mr. Bender on this issue, who asserted that "[t]hirty days would give the services more than enough time to submit accurate accounting statements." Bender WRT at 6; *see also* Bender WDT at 20-21 (describing the change as a "modest revision"). But Mr. Bender offered no facts to support that assertion. In particular, Mr. Bender offered no explanation of how the various steps that Mr. Pedersen identified could consistently and reliably be performed within 30 days.

CONCLUSION

As set forth above, and in iHeartMedia's Proposed Conclusions of Law, the Judges should adopt iHeartMedia's Proposed Findings of Fact, its proposed rate of $0.0005 per performance, and its proposed modifications to the terms of the statutory license discussed above.

Dated: June 24, 2015

Respectfully submitted,

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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of **DETERMINATION OF ROYALTY RATES FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)**	**Docket No. 14-CRB-0001-WR (2016–2020)**

PROPOSED CONCLUSIONS OF LAW
OF IHEARTMEDIA, INC.

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I. IN EVALUATING BENCHMARK AGREEMENTS, THE JUDGES MUST LOOK TO THE PARTIES' EXPECTATIONS AT THE TIME OF AGREEMENT, NOT TO POST-AGREEMENT PERFORMANCE

1. The parties have taken very different approaches to analyzing the agreements offered as benchmarks in support of their respective rate proposals. Consistent with the prevailing law applied in prior Webcasting proceedings and in many other analogous valuation contexts, iHeartMedia has valued the benchmark agreements based on information available at the time the agreements were entered, including the parties' contemporaneous expectations. SoundExchange, by contrast, has valued the agreements based solely on after-the-fact performance. iHeartMedia's approach is correct; SoundExchange's is not. In evaluating agreements as benchmarks to determine the rate to which a willing buyer and willing seller would agree in a hypothetical negotiation, the Judges are required to look at the parties' expectations at the time those agreements were reached, and should not rely on the parties' actual performance under those agreements.

2. The Copyright Act itself places the focus on expectations, rather than actual results, by requiring the 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). This approach "reflects Congressional intent for the Judges to attempt to replicate rates and terms that 'would have been negotiated' in a hypothetical marketplace"[1] in which the "buyers and sellers operate in a free market"[2] and "no statutory

[1] Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24084, 24087 (May 1, 2007) ("*Webcasting II*").

[2] Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 13026, 13028 (Mar. 9, 2011) ("*Webcasting III*").

license exists."[3] Under this widely used hypothetical willing-buyer-willing-seller framework, valuation occurs at the time of the hypothetical negotiation, and therefore is focused on the information known to the parties at that time. This approach has been consistently applied throughout the prior Webcasting proceedings, and also in numerous other contexts where courts use this framework to assess the fair market value of property or to measure damages, such as in copyright and patent law to determine a reasonable royalty.[4]

3. Since the first *Webcasting* proceeding, the Register of Copyright has recognized that relying on the parties' expectations at the time they entered into a benchmark agreement, rather than subsequent results, is the proper approach. In the *Webcasting I Remand* decision, the Register relied on the webcasting agreement between Yahoo! and the RIAA as a benchmark for establishing webcasting rates. The Yahoo!-RIAA agreement, however, contained different rates for "radio retransmission" services and "internet-only" services. To compute a blended rate from the Yahoo!-RIAA agreement that could be applied to all webcasting services, the Register determined the "relative proportion of Internet-only transmissions to radio retransmissions" "based upon Yahoo!'s *expectation* that 90% of its transmissions would continue to be radio retransmissions with the remaining 10% being Internet-only transmissions."[5]

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[3] *Webcasting II*, 72 Fed. Reg. at 24087.

[4] *See*, *e.g.*, *Gaylord v. United States*, 678 F.3d 1339, 1343 (Fed. Cir. 2012) (copyrights); *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324-25 (Fed. Cir. 2009) (patents); *McShain v. Commissioner*, 71 T.C. 998, 1004 (1979) (real property); *Shoels v. Klebold*, 375 F.3d 1054, 1067-68 (10th Cir. 2004) (goal of contract law is not to compensate for the actual loss that may have occurred, but instead to compensate the party for its expected gain, measured at the time of contracting, from anticipated full performance).

[5] Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45240, 45255 (July 8, 2002) ("*Webcasting I Remand*") (emphasis added).

4. The Judges in this proceeding have likewise recognized that it is critical to consider the parties' expectations in evaluating benchmark agreements. As noted at the outset, SoundExchange's rate proposal in this proceeding depends entirely on the opinion of Professor Daniel Rubinfeld, who not only avoided consideration of the parties' expectations in his analysis, but also argued that it would have been "inappropriate" to consider those expectations.[6] Because Prof. Rubinfeld chose not to examine the parties' expectations, SoundExchange initially refused to produce documents regarding these expectations, but the Judges compelled SoundExchange to do so, finding that "the internal valuations of the licensor (or licensee) may reflect a 'willingness to accept' (WTA) (or a 'willingness to pay' (WTP)) that may be relevant in establishing the structure and level of statutory royalty rates."[7]

5. After Professor Rubinfeld later submitted "corrected" testimony analyzing the agreements between Sony and Warner with Apple — again eschewing consideration of the parties' expectations — the Judges granted iHeartMedia's and NAB's motion to subpoena Apple. That subpoena included expectations documents, which the Judges found were critical to assess the "value of the bargain" between the parties:

> The aim of this discovery is not to assess the success of Apple's ventures with Sony and Warner; rather the Licensee Services seek to delve into the value of the bargain. That value, as measured against Apple's *expectations* and as measured in the context of the bundles of benefits the parties exchanged, is necessary when analyzing benchmark rates. SoundExchange (or Warner and Sony) could easily

[6] Rubinfeld WRT at 6 ("Professors Fischel/Lichtman inappropriately rely on projections associated with the iHeartMedia-Warner agreement rather than its performance."); *id.* ¶ 26 ("In my view, reliance on one party's subjective expectations as to how the deal would perform is inappropriate. My analysis of the iHeartMedia-Warner agreement was instead based on actual performance, which I believe is the better approach.").

[7] Discovery Order 1: Order on iHeartMedia's Motion To Compel SoundExchange to Produce documents in Response to Discovery Requests and on Issues Common to Multiple Motions, at 7 (Jan. 15, 2015).

> provide actual accountings, but none of them could provide the measure of the bargain to Apple at the time it executed the Agreements.[8]

Undeterred by these rulings and the black-letter law, SoundExchange moved to strike the testimony of iHeartMedia's economic experts, Professors Fischel and Lichtman, on the grounds that their reliance on the parties' expectations was "inappropriate."[9] The Judges denied that motion.[10]

6. Outside of this proceeding, the hypothetical willing-buyer-willing-seller framework is used widely to value property and calculate damages, and in these contexts the Courts have likewise found that "expectations govern, not actual results."[11] For example, in the

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[8] Order Granting in Part Licensee Services' Motion for Expedited Issuance of Supboenas to Apple, Inc., at 7 (Apr. 10, 2015) (emphasis added).

[9] SoundExchange's Motion To Strike the Testimony of Professors Fischel and Lichtman Regarding the iHeartMedia-Warner Agreement, at 6 (Apr. 1, 2015).

[10] *See* Order Denying SoundExchange's Motion To Strike Testimony of Professors Fischel and Lichtman (Apr. 21, 2015).

[11] *Aqua Shield v. Inter Pool Cover Team*, 774 F.3d 766, 772 (Fed. Cir. 2014) (citing *Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371, 1385 (Fed. Cir. 2001)); *see also*, *e.g.*, *Applied Med. Res. Corp. v. U.S. Surgical Corp.*, 435 F.3d 1356, 1363-64 (Fed. Cir. 2006); *Integra Lifesciences I, Ltd. v. Merck KGaA*, 331 F.3d 860, 870-71 (Fed. Cir. 2003); *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1164 (6th Cir. 1978) (citing *Georgia-Pac. Corp. v. U.S. Plywood-Champion Papers*, 318 F. Supp. 1116, 1127 (S.D.N.Y. 1970), *aff'd*, 446 F.2d 295 (2d Cir. 1971), *cert. denied*, 404 U.S. 870 (1970)); *Mattel, Inc. v. MGA Entm't, Inc.*, No. CV-04-9049, 2011 U.S. Dist. LEXIS 26995, at *21 (C.D. Cal. Mar. 4, 2011) (determining fair market value "is an *ex ante* determination that considers the objective market value of the copyrighted work, as opposed to the *Georgia Pacific* 'book of wisdom' framework, that employs a modified *ex post* examination of what the specific copyright plaintiff and defendant would have agreed to in a hypothetical bilateral negotiation") (citing *Georgia-Pac.*, 318 F. Supp. 1116); *Avocent Huntsville Corp. v. Clearcube Tech., Inc.*, No. CV-03-S-2875-NE, 2006 U.S. Dist. LEXIS 55307, at *33, *82-83 (N.D. Ala. July 28, 2006); Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition*, at 166 (Mar. 2011) ("in setting a reasonable royalty rate, considerations such as the infringer's expected profit and available alternatives 'are to be determined not on the basis of a hindsight evaluation of what actually happened, but on the basis of what the parties to the hypothetical license negotiations would have considered at the time of the negotiations'" (quoting *Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075, 1081 (Fed. Cir. 1983)).

context of attempting to determine the rate a willing buyer would pay a willing seller for the use of a patent, the Federal Circuit has explained "[t]he hypothetical negotiation tries, as best as possible, to recreate the *ex ante* licensing negotiation scenario and to describe the resulting agreement."[12] It would therefore be "incorrect[]" to "replace[] the hypothetical inquiry into what the parties would have anticipated, looking forward when negotiating, with a backward-looking inquiry into what turned out to have happened."[13]

7. Although some courts have permitted the admission of *ex post* evidence to help inform valuation under the so-called "book of wisdom" approach, such evidence is irrelevant (or at a minimum due little weight) where, as here, there is clear evidence of the parties' expectations under the agreements. In the Supreme Court case that first referenced the "book of wisdom" approach, the Court noted that often there is *no* evidence as to the parties' actual expectations, but instead "the only evidence available may be that supplied by testimony of experts" as to the factors that would affect the parties' expectations.[14] But that is not the case here, where the Judges have access to, for example, the expectations of both iHeartMedia and Warner for their direct license.[15] Similarly, where the Federal Circuit has relied on *ex post* evidence, it is typically where "information that the parties would frequently have estimated during the negotiation,"[16] is likely to be flawed, or where the relevant facts "could not have been known to or predicted by the hypothesized negotiators."[17] Again, that is not the case here,

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[12] *Lucent Techs*, 580 F.3d at 1325.

[13] *Aqua Shield*, 774 F.3d at 772.

[14] *Sinclair Ref. Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 697-98 (1933).

[15] *See* iHeartMedia Proposed Findings of Fact ¶¶ 182-193.

[16] *Lucent Techs.*, 580 F.3d at 1333-34.

[17] *Fromson v. Western Litho Plate and Supply Co.*, 853 F.2d 1568, 1575 (Fed. Cir. 1988).

because there is extensive evidence of the parties' expectations, including testimony and contemporaneous documents.[18]

8. In all events, even where such *ex post* information may be considered, "the focus of the . . . analysis must remain on the positions of the hypothetical negotiators at the time of [the hypothetical negotiation]."[19] That is particularly true where, as here, there are factors that may cause actual performance under the contract to diverge significantly from the parties' expectations at the time they entered the contract.[20] The mere fact that one party agreed to a contract that, based on unanticipated or unforeseen circumstances, resulted in a bad deal, does not mean that those results reflect the deal to which a willing buyer or seller would agree. In the case of the Warner-iHeartMedia agreement, for example, the parties agreed to a lump sum payment based on certain expectations regarding how much Warner music iHeartMedia would play over the term of the agreement. The extent to which iHeartMedia actually played more or less of Warner's music is of little relevance in determining how much Warner music the parties thought iHeartMedia would be playing, which was what drove the parties' bargain.[21]

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[18] *See* iHeartMedia Proposed Findings of Fact ¶¶ 182-193.

[19] *Avocent Huntsville Corp.*, 2006 U.S. Dist. LEXIS 55307, at n.136.

[20] *See*, *e.g.*, *Interactive Pictures Corp.*, 274 F.3d at 1384-85 (affirming reasonable royalty damages award of $1 million based on projections at time of hypothetical negotiation, even though (according to the parties' briefs) actual sales of product were only $66,500, noting plaintiff's subsequent failure to meet its projections was "irrelevant" and "may simply illustrate the 'element of approximation and uncertainty' inherent in future projections"); *Farley v. Chiappetta*, 163 B.R. 999, 1007 n.18 (Bankr. N.D. Ill. 1994) (in context of "complex corporate takeover[]," concluding "[it] makes no difference" that shares in target company became available due to "the fluke of the acquisition's collapse" and other ex-post events, where "the parties intended ex ante" that 100% of company's stock would be acquired).

[21] *See* iHeartMedia Proposed Findings of Fact ¶¶ 184, 190, 192. In fact, within a year, iHeartMedia was playing Warner music at the expected rate. *See id.* ¶ 137. Professor Rubinfeld's "actuals" analysis, which assessed performance after only a few months, thus gives a misleading account of this benchmark agreement even on its own terms, which is further

9. For these reasons, when using benchmark agreements to determine the rate to which a willing buyer and willing seller would agree in a hypothetical negotiation, the Judges should look to the expectations of the parties to the benchmark agreement and find that evidence of actual performance does not inform that inquiry.

II. IN CHOOSING BENCHMARKS, EVIDENCE OF IN-MARKET TRANSACTIONS IS SUPERIOR TO EVIDENCE OF TRANSACTIONS IN OTHER MARKETS

10. This is the first Webcasting proceeding in which there are rate proposals based on multiple agreements between webcasters and record labels for statutory webcasting services. iHeartMedia's rate proposal is based on the agreements that it reached with 28 record labels (including one of the three majors and many significant independent labels), and the agreement between Pandora and Merlin, into which some 15,000 record labels have voluntarily opted.[22] SoundExchange, by contrast, eschews in-market agreements and instead bases its rate proposal on out-of-market agreements for interactive Webcasting services, which even by SoundExchange's own admission require myriad adjustments to compute a rate proposal for noninteractive services.[23] There should be no question as to which set of proposed benchmarks best serves the task at hand: the Judges should rely on agreements involving the same statutory services that are the subject of the hypothetical negotiation, rather than agreements for non-statutory services.

11. The Copyright Act provides that, in establishing rates, "the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission

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evidence that after-the-fact performance, before a contract has ended, proves nothing of relevance.

[22] *See id.* § III.

[23] *See id.* ¶¶ 276, 289, 317.

services and comparable circumstances under voluntary license agreements."[24] This language "authorizes the Judges to utilize a benchmark analysis."[25] Although the Act "does not constrain the Judges from considering any economic evidence . . . that they conclude would be probative of the rate that would be established between willing buyers and willing sellers in the hypothetical marketplace — regardless of whether that evidence relates to a market other than the market for licenses of sound recordings by webcasters," any benchmark should be "sufficiently comparable" to the target market for statutory services that it provides useful information.[26] The Register has concluded that "it is hard to find better evidence of marketplace value than the price actually paid by a willing buyer in the marketplace."[27] It is a core economic principle that direct market prices are better than comparable transactions requiring judgments and adjustments.[28]

12. Where benchmarks are used for valuation in other contexts, such as to value property, it is a general rule that "the more comparable" a benchmark is, "the more probative it will be of the fair market value."[29] By contrast, as the Federal Circuit has held with respect to valuing patents, it is impermissible to rely on benchmarks that are "radically different from the

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[24] 17 U.S.C. § 114(f)(2)(B).

[25] Determination of Royalty Rates for Digital Performance in Sound Recordings & Ephemeral Recordings, 79 Fed. Reg. 23102, 23110 (Apr. 25, 2014) ("*Webcasting III Remand*").

[26] *Id*. at 32-33. *Cf. Lucent Techs.*, 580 F.3d at 1325, 1328 (setting aside royalty award based on prior licenses that dealt with patents for types of personal computer patents that different from the technology of the patents in suit, finding "licenses relied on by the patentee in proving damages [must be] sufficiently comparable to the hypothetical license at issue in suit.").

[27] *Webcasting I Remand*, 67 Fed. Reg. at 45252.

[28] *See* Daniel R. Fischel, *Market Evidence in Corporate Law*, 69 U. Chi. L. Rev. 941, 942-944 (2002).

[29] *United States v. 320.0 Acres of Land*, 605 F.2d 762, 798 (5th Cir. 1979).

hypothetical agreement under consideration."[30] To determine whether a benchmark is "sufficiently compatible," the rate-setting court "must consider whether the [benchmark] agreement dealt with a comparable right, whether it involved similar parties in similar economic circumstances, and whether it arose in a sufficiently competitive market."[31] Among the economic circumstances that must be considered is the relative degree of "economic demand" in the benchmark and target markets.[32] It is also necessary to consider "the degree to which the assertedly analogous market under examination reflects an adequate degree of competition to justify reliance on agreements that it has spawned."[33] Merely "alleging a loose or vague

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[30] *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1316 (Fed. Cir. 2011) (quoting *Lucent Techs.*, 580 F.3d at 1328); *see also*, *e.g.*, *Wordtech Sys. Inc. v. Integrated Networks Solutions, Inc.*, 609 F.3d 1308, 1319 (Fed. Cir. 2010) (declining to find licenses comparable because they "arose from divergent circumstances and covered different material"); *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869-73 (holding that evidence of royalty rates from licenses without a relationship to the claimed invention could not form the basis of a reasonable royalty calculation); *Trell v. Marlee Electronics Corp*., 912 F.2d 1443, 1447 (Fed. Cir. 1990) (overturning district court's royalty determination relying on license for same intellectual property where license "conveyed rights more broad in scope" for the use of that intellectual property).

[31] *Broadcast Music, Inc. v. DMX, Inc.*, 683 F.3d 32, 46 (2d Cir. 2012); *United States v. Broadcast Music, Inc.*, 426 F.3d 91, 95 (2d Cir. 2005) ("In choosing a benchmark and determining how it should be adjusted, a rate court must determine 'the degree of comparability of the negotiating parties to the parties contending in the rate proceeding, the comparability of the rights in question, and the similarity of the economic circumstances affecting the earlier negotiators and the current litigants.'") (quoting *United States v. ASCAP (Application of Buffalo Broad. Co., Inc.)*, No. 13-95, 1993 U.S. Dist. LEXIS 2566, at *61 (S.D.N.Y. Mar. 1, 1993)); *SSL Servs., LLC v. Citrix Sys., Inc*., 769 F.3d 1073 (Fed. Cir. 2014) ("'agreements sufficiently comparable to be probative of the hypothetical negotiation' as they involve[d] the actual parties, relevant technology, and were close in time to the date of the hypothetical negotiation") (quoting *SSL Servs., LLC v. Citrix Sys., Inc*., 940 F. Supp. 2d 480, 489-90 (E.D. Tex. 2013)).

[32] *ResQNet.com, Inc.*, 594 F.3d at 872-73.

[33] *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 569 (2d Cir. 1990); *see also DMX Inc.*, 683 F.3d at 45 (rate setting court must consider whether agreement "arose in a sufficiently competitive market").

comparability between different technologies or licenses does not suffice."[34] Indeed, "comparisons to other licenses are inherently suspect because economic" and other factors "vary greatly" between different types of products or services.[35] Parties "attempting to use comparable licenses" bear the burden "to account for 'the technological and economic differences between them.'"[36] Once a court determines that "an agreement is non-comparable as to one aspect of the [valuation] question, it is non-comparable as to all aspects."[37]

13. The Judges have previously noted the significant practical difficulties of using out-of-market agreements as benchmarks because of the need to adjust these agreements to make them economically comparable to statutory services. Although both in-market agreements and out-of-market agreements are influenced by the shadow of the CRB,[38] out-of-market agreements require additional adjustments for all the ways in which those out-of-market services differ from statutory services. For example, in the *Webcasting III* proceeding, the Judges recognized that there is a "major difference" between the markets for statutory and interactive webcasting, which "is the role of the ultimate consumer in selecting the sound recordings for listening," and that it was therefore "necessary to isolate the value of such consumer choice, i.e., the utility of interactivity, and subtract that value from any estimate of the value of sound recordings in the

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[34] *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 79 (Fed. Cir. 2012) ("Actual licenses to the patented technology are highly probative as to what constitutes a reasonable royalty for those patent rights because such actual licenses most clearly reflect the economic value of the patented technology in the marketplace.").

[35] *Integra Lifesciences I*, 331 F.3d at 871.

[36] *I/P Engine, Inc. v. AOL, Inc.*, No. 2:11-cv-512, 2012 U.S. Dist. LEXIS 190813, at *9 (E.D. Va. Oct. 12, 2012) (quoting *Wordtech Sys.*, 609 F.3d at 1320) (excluding purportedly comparable agreements where the court found the proponent had not met that burden).

[37] *Id.* at *10.

[38] *See* iHeartMedia Proposed Findings of Fact ¶ 271.

interactive market, in order to make that value more comparable to the value in the noninteractive market."[39] This "major difference" is only one of many significant differences: interactive services differ from statutory services in numerous other ways that justify significantly higher prices to copyright owners. Therefore, agreements with interactive services require numerous adjustments, including with respect to features such as the ability to listen offline, the ability to skip songs, caching, and others, in order to develop a rate proposal for noninteractive services from those agreements.[40] Each of these adjustments is complex, contested, and subject to numerous alternative implementations.

14. Because the Judges have a "thick" set of agreements between labels and statutory services — in fact, *more* such agreements than the number of agreements with interactive services that Professor Rubinfeld used as benchmarks for SoundExchange's rate proposal[41] — there is no reason for the Judges to undertake the multiple, complicated adjustments that would be required to translate the agreements for interactive services into the rate a willing seller and willing buyer would agree in the market for noninteractive services.

III. PROMOTING THE SALES OF AN INDIVIDUAL RECORD LABEL'S PHONORECORDS OR ENHANCING ITS OTHER STREAMS OF REVENUE IS COUNTED AS A BENEFIT OF A STATUTORY LICENSE

15. SoundExchange's expert David Blackburn asserted that promotion that diverts sales from one record company to another (so-called "diversionary promotion") is irrelevant under the statutory rate-setting criteria, and that the only promotion the Judges should consider is promotion that increases the revenues received by all sound recordings from sources other than

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[39] *Webcasting III Remand*, 79 Fed. Reg. at 23115.

[40] *See* iHeartMedia Proposed Findings of Fact § V.C.

[41] *See id.* ¶ 268.

statutory webcasting (so-called "expansionary promotion"). *See* Blackburn WRT ¶¶ 8-9. The other expert economists rejected this position as a matter of economic theory. For example, Professor Katz testified:

> [I]f I am a record company and I am competing, that's a good thing from my perspective. If I can shift share from my rivals to me and make money on it, I'm going to count that, so when I'm thinking about what sort of deals I'm going to enter into, I'm going to count that kind of — that diversionary promotion is going to count, and that is something I'm going to take into account in thinking about the costs and benefits.

Tr. at 5664:4-13 (Katz). And Dr. Blackburn was forced to admit on cross-examination that the terms "expansionary promotion" and "diversionary promotion" are not found in any economics textbook or peer-reviewed economics article. *See* Tr. at 5926:20-5927:4 (Blackburn). Moreover, he conceded that "firms conduct diversionary promotional tactics all the time" to convince consumers to choose their products over rivals' products. *See* Tr. at 5928:2-12 (Blackburn).

16. SoundExchange's claim that "diversionary promotion" does not count is also contrary to the controlling statute. Section 114(f)(2)(B) directs the Judges, "[i]n establishing rates and terms for transmissions by eligible nonsubscription services and new subscriptions services," 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 willing seller." 17 U.S.C. § 114(f)(2)(B). It further directs that, in setting such rates, the Judges are to consider "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." *Id.* § 114(f)(2)(B)(i).

17. Since the first Webcasting proceeding, the Judges have consistently held that the "willing sellers" in the hypothetical negotiation are the "individual record companies," and the

Register has consistently upheld this determination.[42] This comports with the plain language of the statute, which refers to individual copyright owners, in the singular, rather than to all copyright holders collectively.[43] Therefore, given the focus of the statutory hypothetical willing-buyer-willing-seller negotiation on individual record companies, when the Judges consider "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,"[44] the Judges must take into account promotional benefits that one record label may achieve at the expense of other record labels, as well as promotional benefits that accrue to the record label through increased consumer expenditures on music as a whole.

18. When a webcasting service agrees to steer consumers to a particular record label's music, such as by agreeing to play more of that label's music than it otherwise would, that is a promotional benefit to the label that receives the additional performances. The increased performances are valuable not only for their own sake — because increased plays generate increased royalty revenues — but also for the additional exposure they provide to the label and its artists. To the extent this exposure results in increased sales of phonorecords or other streams

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[42] *Webcasting I Remand*, 67 Fed. Reg. at 45243; *Webcasting II*, 72 Fed. Reg. at 24087 (noting "[t]he 'sellers' in this hypothetical marketplace are record companies"); *Webcasting III*, 76 Fed. Reg. at 13033 ("Rather than a single seller, the sellers in the hypothetical market we are to consider consist of multiple record companies.").

[43] *See* 17 U.S.C. § 114(f)(2)(B)(i) (in determining the rates that would have been negotiated between a willing buyer and a willing seller, the Judges are required to consider "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") (emphases added).

[44] *Id*.

of revenue, such as concert tickets or merchandise, it provides additional economic value — "other streams of revenue" — to the record label that must be taken into account.[45]

19. The fact that those additional plays come at the expense of other record labels is an additional *benefit* to the record label that signed the steering agreement. After all, the record labels are in competition with each other. *See* Tr. at 5664:4-13 (Katz). Other record labels can respond by pursuing their own steering agreements with other noninteractive services or by pursuing other avenues available for promotion. *See* Tr. at 1423:17-24 (Harleston) (testifying that "there are a multitude of outlets that one must go to" when promoting music).

20. The Judges should not presume that such competition among labels for promotion opportunities would not exist in the hypothetical marketplace. The background presumption should instead be one of a competitive marketplace, not a marketplace with artificial restraints on such competition. This is so for at least three reasons.

21. *First*, statutory webcasting services naturally lend themselves to steering among record labels, because these services — unlike interactive on-demand services — select all of the music that is played to listeners. For example, custom services can use computerized algorithms to generate playlists for listeners based on a "seed" artist or song. These algorithms may be programmed to prefer the music of particular record labels in generating these playlists.[46] Steering also is possible on simulcast services using song replacement technology, which allows songs or other content broadcast on terrestrial radio to be swapped out with the song of a preferred record label when transmitted over the Internet.[47]

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[45] 17 U.S.C. § 114(f)(2)(B)(i).

[46] *See* iHeartMedia Proposed Findings of Fact ¶¶ 125, 166.

[47] *See id.* ¶ 16.

22. *Second*, the Judges should assume that the antitrust laws would preserve competition and, therefore, the ability to steer, in the hypothetical marketplace. Steering is a common practice in a competitive market:

> As a general matter, steering is both pro-competitive and ubiquitous. Merchants routinely attempt to influence customers' purchasing decisions, whether by placing a particular brand of cereal at eye level rather than on a bottom shelf, discounting last year's fashion inventory, or offering promotions such as "buy one, get one free."[48]

"Steering is," in fact, "a lynchpin to inter-network competition on the basis of price," and therefore a mechanism for keeping prices low.[49] "When faced with rising prices, [webcasters] can attempt to steer [listeners] to lower cost [record labels] and away from the [record labels] imposing a price increase, thereby pressuring the [record labels] to eliminate the price increase."[50] Steering is "quite effective in disciplining prices because [record labels] are sensitive to declines in volume."[51] And "cutting prices to increase business is the very essence of competition."[52]

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[48] *United States v. American Express Co.*, No. 10-cv-4496, 2015 U.S. Dist. LEXIS 20114 at *8 (E.D.N.Y. Feb. 19, 2015); *see also Sidibe v. Sutter Health*, 51 F. Supp. 3d 870, 875 (N.D. Cal. 2014) ("In a competitive market, commercial health plans have the ability to steer some of their members to lower-cost, quality providers that participate in their provider networks, thus reducing the costs of medical expenses.").

[49] *American Express Co.*, 2015 U.S. Dist. LEXIS 20114, at *187; *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 895 (2007) (Antitrust laws "are designed primarily to protect interbrand competition, from which lower prices can later result.").

[50] *California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1129-30 (N.D. Cal. 2001).

[51] *Id*.

[52] *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 478 (1992) (internal quotation marks omitted).

23. *Third*, the 29 benchmark agreements establish that record labels can and do compete for additional spins on digital radio to obtain both incremental revenue and also increased promotion.[53]

24. For these same reasons, the Judges may not presume that, absent the statutory license, all of the willing sellers in the hypothetical marketplace (the individual record labels) would — or lawfully could — prohibit steering by contract. As an initial matter, and as the record in this proceeding conclusively demonstrates, first movers plainly receive an economic advantage from agreeing to steering,[54] and there is every reason to expect those incentives to remain if the statutory license were eliminated. Moreover, those incentives would result in competition among the record labels in the hypothetical willing-buyer-willing-seller negotiations either to obtain the benefits of steering — or to prevent rivals from obtaining those benefits — which would have the effect of driving down the price, without any service needing to be able to increase performances to every record label. By contrast, it would be economically irrational to conclude that every record label would independently determine that it should refrain from seeking a steering agreement, and there is certainly no evidence to suggest this would occur.

IV. A WILLING BUYER IS A REPRESENTATIVE WEBCASTER, NOT ONE THAT ENJOYS UNUSUAL ADVANTAGES

25. Both the Register and the Judges have recognized that, "[i]n the hypothetical marketplace we attempt to replicate, there would be significant variations among both buyers and sellers, in terms of sophistication, economic resources, business exigencies, and myriad other

[53] *See* iHeartMedia Proposed Findings of Fact § II.D.

[54] *See id.* ¶¶ 129-32, 203-04.

factors."[55] The Register and the Judges have accordingly "construe[d] the statutory reference to rates that 'most clearly represent the rates . . . that would have been negotiated in the marketplace' as the rates to which, absent special circumstances, most willing buyers and willing sellers would agree."[56] Following this principle, the Judges have previously rejected attempts to use a single webcaster's financial predicament —– for example, an asserted need to earn a particular profit margin — as representative of willing buyers as a whole.[57]

26. Applying this same precedent and logic, a webcasting agreement involving a buyer that is largely or entirely indifferent to the profit it may earn from the agreement is likewise not representative of willing buyers as a whole. For example, the evidence in this proceeding established that, [redacted] Because "most willing buyers" are not similarly situated [redacted] — and could

[55] *Webcasting II*, 72 Fed. Reg. at 24087; *see also Webcasting I Remand*, 67 Fed. Reg. at 45244-45; Report of the Copyright Arbitration Royalty Panel at 25, 26, *Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2000-9 (CARP DTRA 1 & 2) (Feb. 20, 2002) ("*Webcasting I CARP Report*").

[56] *Webcasting II*, 72 Fed. Reg. at 24087 (quoting *Webcasting I Remand*, 67 Fed. Reg. at 45244-45).

[57] *See Webcasting III*, 76 Fed. Reg. at 13028 (rejecting claim that "a buyer can only be considered 'willing' if that buyer is able to obtain the sound recording input at a price that allows the buyer to earn at least at a 20 percent operating profit margin from the use of that input," on the ground that "[n]othing in the statute supports reading such a behavior constraint into the hypothetical marketplace to be derived by the Judges in this proceeding."); *see also Webcasting I Remand*, 67 Fed. Reg. at 45254 ("Thus, the Panel had no obligation to consider the financial health of any particular service when it proposed the rates.").

[58] *See* iHeartMedia Proposed Findings of Fact ¶¶ 385-88.

[59] *See id.*

never be, [redacted] — they would not be likely to agree to the same price. In these circumstances, the Judges are required to consider what most webcasters would be willing to pay, [redacted].[60]

V. THE STATUTE DOES NOT GUARANTEE THAT THE RECORD LABELS WILL MAINTAIN REVENUES AT ANY SET LEVEL

27. Section 114(f)(2)(B) directs the 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." The statute further specifies that the "economic, competitive and programming information" the Judges are to consider "includ[es]" evidence of "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)(i). The evidence in the hearing showed that digital radio service is the record labels' most profitable product,[61] and that a much lower royalty rate (e.g., [redacted]) would be sufficient to maintain copyright holders' total *revenues* at current levels.[62] The statute, however, looks at effects on the record labels' "other streams of revenue" as part of the broader willing-buyer-willing-seller analysis. Section 114(f)(2)(B) does not guarantee that the statutory license will provide any particular level of revenue or profit for the record labels.

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[60] As set forth in iHeartMedia's Findings of Fact, there are also numerous other reasons why Apple's agreements with the record labels for iTunesRadio are not valid benchmarks. *See id.* § VI.

[61] *See* iHeartMedia Proposed Findings of Fact ¶¶ 64-72.

[62] *See id.* ¶ 237.

28. In the very first *Webcasting* proceeding, the Panel concluded that the statutory reference to "other streams of revenue" does "*not* represent [an] additional criteri[on]," but instead is "merely [a] factor[] to consider, along with many other relevant factors, in setting rates under the willing buyer/willing seller standard" and in determining "fair market value."[63] On review of that decision, the Register agreed that the "other streams of revenue" language "does not constitute an additional standard or policy consideration" and is not to be "accorded any special consideration."[64] The Register explained further that "the standard for setting rates for nonsubscription services set forth in section 114(f)(2)(B) is strictly fair market value — willing buyer/willing seller" — and is not "policy-driven."[65] Moreover, to the extent that a hypothetical willing seller would consider the effects of any deal on its other revenue streams, those considerations are already "reflected in the rates . . . reached through arms length negotiations in the marketplace," so that no additional adjustment to the benchmark agreements underlying iHeartMedia's rate proposal would be required.[66]

29. Furthermore, nothing in the statutory language guarantees that the statutory license will ultimately provide any particular level of revenue for any individual record label, let alone for record labels as a whole. That is true especially with regard to any reductions in record label revenues attributable to piracy, interactive services (paid or free), changing consumer preferences (such as for singles rather than albums or for shifting their entertainment spending to other types of media), or any other reductions that are *not* attributable to noninteractive, statutory services. Nothing in § 114 suggests that Congress intended to require statutory services to make

[63] *Webcasting I CARP Report* at 32-33.

[64] *Webcasting I Remand*, 67 Fed. Reg. at 45244.

[65] *Id.*

[66] *Id.*

up for all of the economic changes facing record labels. Moreover, any focus on maintaining revenue levels improperly obscures the much higher profit margins that record labels achieve on noninteractive services.[67]

30. But even if there were any reductions in traditional streams of record label revenues that could be attributed to noninteractive services — and the record shows the opposite — the statute still does not require statutory licensees to make up for those revenues. Section 114(f)(2)(B)(i) notably refers to the effect of webcasting on "the sound recording copyright owner's *other* streams of revenue from its sound recordings" (emphasis added). In marked contrast, § 112(e)(4)(A) requires the consideration, in the context of the license for ephemeral reproductions, of the effect of those copies on "the copyright owner's *traditional* streams of revenue" (emphasis added). Congress's decision to use the broader term "other" in § 114 — rather than the narrower "traditional" as in § 112 — is evidence that Congress was not concerned in § 114 with record labels' "traditional" revenue streams.[68] Congress's use of the broader term "other" in § 114 demonstrates further that the willing-buyer-willing-seller framework must include a consideration of record labels' ability to look to non-traditional and (perhaps) currently untapped revenue streams — whether by receiving royalties from listeners who had previously used terrestrial radio or by signing deals with artists that entitle the record label to a portion of the artists' touring and merchandizing revenues. Moreover, the willing-buyer-willing-seller framework also requires consideration of the demonstrated

[67] *See* iHeartMedia Proposed Findings of Fact ¶¶ 64-72.

[68] *See SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) ("It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words.") (citing *Russello v. United States*, 464 U.S. 16, 23 (1983); and collecting cases).

promotional benefits of webcasting, which increase those other sources of revenue for the record labels.[69]

VI. THE REGULATIONS ESTABLISHING THE TERMS FOR TRANSMISSION UNDER THE STATUTORY LICENSE SHOULD ALTER THE BACKGROUND LICENSE TERMS IN TWO RESPECTS

31. Under § 114(f)(2)(B), the Judges are directed to establish not only rates, but also "terms for transmissions" by noninteractive services that "most clearly represent the . . . terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."[70] The agreements that iHeartMedia has entered into demonstrate not only that the rate to which a willing buyer and willing seller would agree is $0.0005 per performance, but also that they would agree to certain modifications to background terms of transmission in order to reduce the costs to the willing buyer. Because these additional terms are ones to which willing buyers and willing sellers have actually agreed, they should be included in the statutory license from 2016 through 2020. Moreover, because these terms lower the costs the willing buyer incurs in providing noninteractive simulcasting and custom webcasting services, if these terms were excluded from the statutory license, the rate evidenced by iHeartMedia's benchmark agreements would have to be *reduced*.

32. Specifically, [redacted]

33. [redacted]

[69] *See* iHeartMedia Proposed Findings of Fact Part II.

[70] 17 U.S.C. § 114(f)(2)(B) (further stating that the "Judges shall establish . . . [such] terms").

[redacted]

34. [redacted]

[redacted]

[71] *See* iHeartMedia Proposed Findings of Fact ¶ 425.

[72] iHeartMedia has proposed additional language to 37 C.F.R. § 380.10(b)(2) [redacted]

[73] *See See* iHeartMedia Proposed Findings of Fact ¶ 426.

[74] iHeartMedia has proposed additional language to 37 C.F.R. §§ 380.1(b), 380.10(b)(1), (2) [redacted]

35. Because these are "terms for transmissions" by noninteractive services that "clearly represent" terms entered into between willing buyers and willing sellers, the Judges can — and, indeed, must — include them within the regulations that implement the statutory license. 17 U.S.C. § 114(f)(2)(B). Further confirmation of the Judges' authority to adopt these terms is found in § 114(f)(5)(E)(iii), which defines a "webcaster" as an "entity that has obtained a compulsory license under section 112 or 114 *and the implementing regulations therefor*" (emphasis added) The Judges thus have the authority to modify the background terms of the statutory license where, as here, numerous marketplace agreements show that different terms would be agreed to by willing buyers and willing sellers in the absence of the statutory license.

VII. ANY RATES AND TERMS SPECIFIC TO SIMULCAST SHOULD PROMOTE COMPETITION

36. Although it is well recognized that simulcast services differ from custom webcasting services in a number of respects, no party has proposed separate rates for the two services, much less submitted evidence from which differential per-performance rates could be established. Moreover, [redacted]. The economic analysis by iHeartMedia's experts shows that those agreements support a $0.0005 per-performance rate for all statutory services, as a blend of simulcast and custom.

37. However, if the Judges were nonetheless to adopt a separate, lower rate for simulcasts, that rate should apply to *all* songs that are simulcast — that is, broadcast terrestrially and simultaneously transmitted over the Internet — even if a simulcast stream includes some songs that are not played to terrestrial listeners. Such additional or different songs might be included on the simulcast stream for two reasons. *First*, even after the statutory rate is set at a level consistent with the evidence iHeartMedia has submitted in this proceeding, a record label

may still want to induce a simulcaster to play music from its catalog — or from a particular artist in its catalog — more often than that music would otherwise be played on terrestrial stations, for example by agreeing to an even lower rate for additional performances of that music on simulcast stations. *Second*, for some advertisements played on terrestrial radio stations, the advertiser — and, therefore, the radio station — lacks the rights to transmit those advertisements over the Internet.[75] A simulcaster may elect to fill the space with music rather than an advertisement.[76]

38. A rule that caused a simulcaster to lose the benefit of a lower simulcast rate for *all* songs on an entire simulcast stream — even those that precisely mirror a terrestrial broadcast — would discourage competition. In particular, a record label that sought to induce a simulcaster to play its artists' songs more often would have to offer the simulcaster a *much* lower rate to induce those additional plays. That is because the rate the label offered would not only have to be lower than the statutory simulcast rate, but it would also have to cover the *additional* royalty rate the simulcaster would have to pay on all of the songs on the simulcast stream. That would make steering deals — in which record labels compete against one another for market share — much harder to accomplish, diminishing competition among the labels. Furthermore, a simulcaster seeking to fill in "dead air" on a simulcast stream because it cannot simulcast certain advertisements would not play additional music on the simulcast stream if that would cause its royalty rate for all the songs on the stream to increase. In this situation as well, such a rule would reduce competition because record labels could not compete to get played during those

[75] For example, the advertiser may only have secured (and paid for) the rights to use the performances of the voice actors in an advertisement on terrestrial radio broadcasts.

[76] Songs that are selected for iHeartMedia's Digital Artist Integration Program are played on simulcast stations during the unsold portions of commercial breaks. *See* Morris WRT ¶¶ 20-21; Poleman WDT ¶ 24

additional slots without having to offer a *much* lower rate for the additional songs that would sufficiently offset the increase in the rate for *all* of the remaining songs on the feed.

39. Furthermore, one advantage simulcasters have over terrestrial broadcasters is that the simulcast signal is not limited by the strength of the broadcast antenna — it can be heard anywhere a user can connect to the Internet. That allows radio stations to compete outside their traditional, home markets — much as individual terrestrial radio shows compete outside their home markets through syndication. Not only do consumers benefit from that increased competition, but also record labels and artists benefit because radio stations with different playlists can now be heard more widely, introducing more consumers to more music. The Judges should not adopt any rule that could undermine that competition.

40. However, if the Judges were to conclude that the ability of simulcasters to "broadcast" to listeners outside of the terrestrial station's home market should be addressed in some manner within the context of the statutory license, Congress has already provided the Judges with a dividing line. Congress provided that the "performance of a sound recording publicly by means of a digital audio transmission" on a noninteractive service does not infringe if it is a "retransmission of a radio station's broadcast transmission" that remains within "a radius of 150 miles from the site of the radio broadcast transmitter." 17 U.S.C. § 114(d)(1)(B)(i). A user within that 150-mile radius seeking to listen to the radio can either turn on her AM/FM radio or boot up her Internet radio app on her computer or smartphone. Arguably, simulcast transmissions within that 150-mile radius should be royalty-*free*, no different from the terrestrial broadcasts. But if the Judges were to try to draw a line that identifies simulcasting that is truly just terrestrial radio on a different device, the Judges should look to Congress's 150-mile radio

line. Simulcasters seeking to benefit from a lower rate for simulcasts within that line can use geofencing technology to determine when users are inside or outside that line.

Dated: June 24, 2015

Respectfully submitted,

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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	
DETERMINATION OF ROYALTY RATES FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)	)	**Docket No. 14-CRB-0001-WR (2016-2020)**

DECLARATION AND CERTIFICATION OF JOHN THORNE ON BEHALF OF iHEARTMEDIA, INC.

1. I am one of the counsel for iHeartMedia, Inc. ("iHeartMedia") in this proceeding, and I submit this Declaration in support of the restricted version of Proposed Findings of Fact and Conclusions of Law of iHeartMedia, Inc.

2. On October 10, 2014, the CRB adopted a Protective Order that limits the disclosure of materials and information marked "RESTRICTED" to outside counsel of record in this proceeding and certain other parties described in subsection IV.B of the Protective Order. *See* Protective Order (Oct. 10, 2014). The Protective Order defines "confidential" information that may be labeled as "RESTRICTED" as "information that is commercial or financial information that the Producing Party has reasonably determined in good faith would, if disclosed, either competitively disadvantage the Producing Party, provide a competitive advantage to another party or entity, or interfere with the ability of the Producing Party to obtain like information in the future." *Id.* The Protective Order further requires that any party producing such confidential information must "deliver with all Restricted materials an affidavit or declaration . . . listing a description of all materials marked with the 'Restricted' stamp and the basis for the designation." *Id.*

3. I submit this declaration describing the materials iHeartMedia has designated "RESTRICTED" and the basis for those designations, in compliance with Sections IV.A of the Protective Order. I have determined to the best of my knowledge, information and belief that the materials described below, which are being produced to outside counsel of record in this proceeding, contain confidential information.

4. The confidential information comprises or relates to information designated RESTRICTED by other participants in this proceeding. iHeartMedia has designated such information as RESTRICTED to maintain its confidentiality in accordance with the Protective Order's command to "guard and maintain the confidentiality of all Restricted materials." Protective Order at 2.

5. The confidential information comprises or relates to (1) contracts, contractual terms, and contract strategy that are proprietary, not available to the public, competitively sensitive, and often subject to express confidentiality provisions with third parties; (2) financial projections, financial data, and business strategy that are proprietary, not available to the public, and commercially sensitive; and (3) material subject to third-party licenses or other limitations that restrict public disclosure.

6. If the confidential information were to become public, it would place iHeartMedia at a commercial and competitive disadvantage; unfairly advantage other parties to the detriment of iHeartMedia; and jeopardize iHeartMedia's business interests. Information related to iHeartMedia's confidential contracts or iHeartMedia's relationships with content providers could be used by iHeartMedia's competitors, or by other content providers, to formulate rival bids, bid up iHeartMedia payments, or otherwise unfairly jeopardize iHeartMedia's commercial and competitive interests.

7. With respect to the financial information, I understand that iHeartMedia has not disclosed to the public or the investment community the financial information that it seeks to restrict here, including its internal financial projections and specific royalty payment information. Consequently, neither iHeartMedia's competitors nor the investing public has been privy to that information, which iHeartMedia has treated as highly confidential and sensitive, and has guarded closely. In addition, when iHeartMedia does disclose information about its finances to the market as required by law, iHeartMedia provides accompanying analysis and commentary that contextualizes disclosures by its officers. The information that iHeartMedia seeks to restrict by designating it confidential is not intended for public release or prepared with that audience in mind, and therefore was not accompanied by the type of detailed explanation and context that usually accompanies such disclosures by a company officer. Moreover, the materials include information that has not been approved by iHeartMedia's Board of Directors, as such sensitive disclosures usually are, and is not accompanied by the disclaimers that usually accompany such disclosures. iHeartMedia could experience negative market repercussions and competitive disadvantage were this confidential financial information released publicly without proper context or explanation.

8. The contractual, commercial and financial information described above must be treated as restricted confidential information in order to prevent business and competitive harm that would result from the disclosure of such information.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury that the foregoing is true and correct.

June 24, 2015

Respectfully submitted,

/s/ John Thorne

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Counsel for iHeartMedia, Inc.

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of **DETERMINATION OF ROYALTY RATES FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)**	)	**Docket No. 14-CRB-0001-WR (2016-2020)**

REDACTION LOG FOR THE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF iHEARTMEDIA, INC.

iHeartMedia hereby submits the following list of redactions from the Proposed Findings of Fact and Conclusions of Law of iHeartMedia, Inc., filed June 24, 2015, and the undersigned certifies, in compliance with 37 C.F.R. § 350.4(e)(1), and based on the Declaration of John Thorne submitted herewith, that the listed redacted materials are properly previously designated confidential and "RESTRICTED."

Document	Page/Paragraph/ Line	General Description
Proposed Findings of Fact	P. i, ¶ 1, n. 1	Contains information previously designated restricted by other participants.
	P. ii-iii, ¶ 2	Contains hearing testimony previously designated restricted.
	P. ii, ¶ 1, n. 3	Contains hearing testimony previously designated restricted.
	P. ii, ¶ 1, n. 4	Contains hearing testimony previously designated restricted.
	P. ii, ¶ 2, n. 6	Contains hearing testimony previously designated restricted.
	P. ii-iii, ¶ 2, n. 7	Contains information previously designated restricted by other participants.

Document	Page/Paragraph/ Line	General Description
	¶ 10	Contains information previously designated restricted by other participants.
	¶ 13	Contains hearing testimony previously designated restricted.
	¶ 14	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 15	Contains hearing testimony previously designated restricted.
	¶ 16	Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 17	Contains hearing testimony previously designated restricted.
	¶ 22	Contains information previously designated restricted by iHeartMedia.
	¶ 25	Contains information previously designated restricted by other participants.
	¶ 26	Contains information previously designated restricted by other participants.
	¶ 29	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 30	Contains information previously designated restricted by other participants.
	¶ 31	Contains information previously designated restricted by other participants.

Document	Page/Paragraph/ Line	General Description
	¶ 32	Contains information previously designated restricted by other participants.
	¶ 33	Contains information previously designated restricted by iHeartMedia and other participants.
	¶ 34	Contains information previously designated restricted by iHeartMedia.
	¶ 38	Contains hearing testimony previously designated restricted.
	¶ 41	Contains hearing testimony previously designated restricted.
	¶ 44	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 45	Contains hearing testimony previously designated restricted.
	¶ 49	Contains information previously designated restricted by other participants.
	¶ 55	Contains hearing testimony previously designated restricted.
	¶ 56	Contains hearing testimony previously designated restricted.
	¶ 57	Contains hearing testimony previously designated restricted.
	¶ 59	Contains information previously designated restricted by other participants.
	¶ 61	Contains hearing testimony previously designated restricted.
	¶ 64	Contains written testimony previously designated restricted by other participants.
	¶ 65	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.

Document	Page/Paragraph/ Line	General Description
	¶ 66	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 67	Contains written testimony previously designated restricted by other participants.
	¶ 68	Contains information previously designated restricted by other participants.
	¶ 69	Contains hearing testimony previously designated restricted.
	¶ 70	Contains information previously designated restricted by other participants.
	¶ 71	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 72	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 74	Contains hearing testimony previously designated restricted.
	¶ 76	Contains information previously designated restricted by other participants.
	¶ 78	Contains hearing testimony previously designated restricted.
	¶ 79	Contains information previously designated restricted by other participants.

Document	Page/Paragraph/ Line	General Description
	¶ 80	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 81	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 82	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 83	Contains hearing testimony previously designated restricted.
	¶ 84	Contains hearing testimony previously designated restricted.
	¶ 89	Contains hearing testimony previously designated restricted.
	¶ 90	Contains hearing testimony previously designated restricted.
	¶ 91	Contains information previously designated restricted by other participants.
	¶ 92	Contains hearing testimony previously designated restricted.
	¶ 93	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 94	Contains information previously designated restricted by other participants.
	¶ 95	Contains information previously designated restricted by other participants.

Document	Page/Paragraph/ Line	General Description
	¶ 97	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 98	Contains information previously designated restricted by iHeartMedia.
	¶ 100	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 103	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 104	Contains information previously designated restricted by other participants.
	¶ 106	Contains information previously designated restricted by other participants.
	¶ 107	Contains hearing testimony previously designated restricted.
	¶ 108	Contains hearing testimony previously designated restricted.
	¶ 109	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 110	Contains information previously designated restricted by other participants.

Document	Page/Paragraph/ Line	General Description
	¶ 111	Contains hearing testimony previously designated restricted.
	¶ 112	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 115	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 116	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 116, n.12	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 117	Contains information previously designated restricted by iHeartMedia and other participants.
	¶ 118	Contains information previously designated restricted by iHeartMedia.
	¶ 118, n. 13	Contains information previously designated restricted by other participants.
	¶ 120	Contains hearing testimony previously designated restricted.
	¶ 122	Contains information previously designated restricted by other participants.
	¶ 126	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.

Document	Page/Paragraph/ Line	General Description
	¶ 128	Contains information previously designated restricted by other participants.
	¶ 129	Contains hearing testimony previously designated restricted.
	¶ 129, n.14	Contains information previously designated restricted by other participants.
	¶ 130	Contains hearing testimony previously designated restricted.
	¶ 130, n.15	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 131	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 131, n.16	Contains information previously designated restricted by other participants.
	¶ 133	Contains hearing testimony previously designated restricted.
	¶ 134	Contains information previously designated restricted by other participants.
	¶ 135	Contains information previously designated restricted by other participants.
	¶ 136	Contains information previously designated restricted by other participants.
	¶ 137	Contains information previously designated restricted by other participants.
	¶ 138	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.

Document	Page/Paragraph/ Line	General Description
	¶ 139	Contains information previously designated restricted by other participants.
	¶ 140	Contains hearing testimony previously designated restricted.
	¶ 140, n. 17	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 141	Contains hearing testimony previously designated restricted.
	¶ 142	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 142, n.18	Contains information previously designated restricted by iHeartMedia.
	¶ 143	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 144	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 146	Contains information previously designated restricted by iHeartMedia.
	¶ 148	Contains information previously designated restricted by iHeartMedia.
	¶ 154	Contains hearing testimony previously designated restricted.
	¶ 164	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.

Document	Page/Paragraph/ Line	General Description
	¶ 165	Contains hearing testimony previously designated restricted.
	¶ 167	Contains hearing testimony previously designated restricted.
	¶ 173	Contains information previously designated restricted by iHeartMedia.
	¶ 174	Contains information previously designated restricted by iHeartMedia.
	¶ 175	Contains information previously designated restricted by iHeartMedia.
	¶ 177	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedia.
	¶ 178	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 179	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 180	Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 181	Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 182	Contains written testimony previously designated restricted by iHeartMedia.

Document	Page/Paragraph/ Line	General Description
	¶ 183	Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 184	Contains information previously designated restricted by iHeartMedia. Contains written testimony previously designated restricted by iHeartMedia.
	¶ 185	Contains written testimony previously designated restricted by iHeartMedia.
	¶186	Contains information previously designated restricted by iHeartMedia. Contains written testimony previously designated restricted by iHeartMedia.
	¶ 188	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 190	Contains information previously designated restricted by iHeartMedia. Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 191	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 192	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 193	Contains hearing testimony previously designated restricted.

Document	Page/Paragraph/ Line	General Description
	¶ 195	Contains information previously designated restricted by other participants.
	¶ 196	Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 198	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 199	Contains information previously designated restricted by iHeartMedia and other participants. Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 200	Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 201	Contains written testimony previously designated restricted by SoundExchange.
	¶ 202	Contains hearing testimony previously designated restricted.
	¶ 203	Contains written testimony previously designated restricted by SoundExchange. Contains hearing testimony previously designated restricted.
	¶ 204	Contains written testimony previously designated restricted by iHeartMedia.

Document	Page/Paragraph/ Line	General Description
	¶ 205	Contains written testimony previously designated restricted by SoundExchange. Contains hearing testimony previously designated restricted.
	¶ 206	Contains information previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 207	Contains written testimony previously designated restricted by SoundExchange.
	¶ 208	Contains information previously designated restricted by iHeartMedia and other participants. Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 209	Contains hearing testimony previously designated restricted.
	¶ 210	Contains information previously designated restricted by iHeartMedia.
	¶ 211	Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 212	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 213	Contains information previously designated restricted by iHeartMedia.

Document	Page/Paragraph/ Line	General Description
	¶ 214	Contains information previously designated restricted by iHeartMedia. Contains written testimony previously designated restricted by iHeartMedia.
	¶ 214, n.19	Contains information previously designated restricted by iHeartMedia.
	¶ 215	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 216	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 217	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 218	Contains information previously designated restricted by iHeartMedia. Contains written testimony previously designated restricted by iHeartMedia.
	¶ 219	Contains information previously designated restricted by iHeartMedia.
	¶ 220	Contains hearing testimony previously designated restricted.
	¶ 221	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by SoundExchange.
	¶ 222	Contains written testimony previously designated restricted by SoundExchange.

Document	Page/Paragraph/ Line	General Description
	¶ 223	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedia and SoundExchange. Contains hearing testimony previously designated restricted.
	¶ 224	Contains hearing testimony previously designated restricted.
	¶ 225	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedia.
	¶ 226	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedia and SoundExchange.
	¶ 227	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedia
	¶ 229	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by SoundExchange. Contains hearing testimony previously designated restricted.
	¶ 230	Contains information previously designated restricted by iHeartMedia. Contains written testimony previously designated restricted by iHeartMedia.

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	¶ 231	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedaia.
	¶ 232	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 233	Contains information previously designated restricted by iHeartMedia and other participants. Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 243	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedia.
	¶ 244	Contains information previously designated restricted by other participants.
	¶ 259	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 260	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 264	Contains hearing testimony previously designated restricted.
	¶ 268	Contains written testimony previously designated restricted by SoundExchange.
	¶ 270	Contains written testimony previously designated restricted by SoundExchange.
	¶ 278	Contains hearing testimony previously designated restricted.

Document	Page/Paragraph/ Line	General Description
	¶ 279	Contains information previously designated restricted by other participants.
	¶ 281	Contains information previously designated restricted by other participants.
	¶ 284	Contains written testimony previously designated restricted by SoundExchange. Contains hearing testimony previously designated restricted.
	¶ 285	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 286	Contains information previously designated restricted by other participants.
	¶ 287	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedia.
	¶ 290	Contains written testimony previously designated restricted by iHeartMedia and Pandora.
	¶ 292	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 294	Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 295	Contains hearing testimony previously designated restricted.
	¶ 298	Contains written testimony previously designated restricted by iHeartMedia.

Document	Page/Paragraph/ Line	General Description
	¶ 301	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 303	Contains hearing testimony previously designated restricted.
	¶ 313	Contains information previously designated restricted by other participants.
	¶ 316	Contains information previously designated restricted by other participants.
	¶ 318	Contains hearing testimony previously designated restricted.
	¶ 319	Contains hearing testimony previously designated restricted.
	¶ 325	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 326	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 327	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 328	Contains hearing testimony previously designated restricted.
	¶ 329	Contains hearing testimony previously designated restricted.
	¶ 331	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 333	Contains hearing testimony previously designated restricted.
	¶ 338	Contains hearing testimony previously designated restricted.
	¶ 339	Contains hearing testimony previously designated restricted.

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	¶ 341	Contains written testimony previously designated restricted by SoundExchange. Contains hearing testimony previously designated restricted.
	¶ 342	Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 343	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 344	Contains information previously designated restricted by other participants and iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 345	Contains information previously designated restricted by iHeartMedia. Contains written testimony previously designated restricted by iHeartMedia.
	¶ 346	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 347	Contains written testimony previously designated restricted by iHeartMedia and National Association of Broadcasters.
	¶ 348	Contains hearing testimony previously designated restricted.
	¶ 349	Contains hearing testimony previously designated restricted.
	¶ 350	Contains hearing testimony previously designated restricted.
	¶ 351	Contains hearing testimony previously designated restricted.

Document	Page/Paragraph/ Line	General Description
	¶ 352	Contains written testimony previously designated restricted by iHeartMedia and SoundExchange. Contains hearing testimony previously designated restricted.
	¶ 353	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 354	Contains hearing testimony previously designated restricted.
	¶ 355	Contains information previously designated restricted by iHeartMedia.
	¶ 356	Contains hearing testimony previously designated restricted.
	¶ 357	Contains hearing testimony previously designated restricted.
	¶359	Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 360	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedia.
	¶ 361	Contains information previously designated restricted by other participants. Contains hearing testimony previously designated restricted.
	¶ 362	Contains information previously designated restricted by other participants.

Document	Page/Paragraph/ Line	General Description
	¶ 363	Contains written testimony previously designated restricted by SoundExchange. Contains hearing testimony previously designated restricted.
	¶ 364	Contains hearing testimony previously designated restricted.
	¶ 365	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 366	Contains hearing testimony previously designated restricted.
	¶ 367	Contains written testimony previously designated restricted by SoundExchange.
	¶ 368	Contains written testimony previously designated restricted by iHeartMedia and Pandora. Contains hearing testimony previously designated restricted.
	¶ 369	Contains information previously designated restricted by iHeartMedia. Contains written testimony previously designated restricted by iHeartMedia and Pandora. Contains hearing testimony previously designated restricted.
	¶ 370	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 371	Contains information previously designated restricted by iHeartMedia. Contains written testimony previously designated restricted by iHeartMedia and SoundExchange.
	¶ 372	Contains hearing testimony previously designated restricted.

Document	Page/Paragraph/ Line	General Description
	¶ 373	Contains information previously designated restricted by iHeartMedia. Contains written testimony previously designated restricted by iHeartMedia and Pandora.
	¶ 374	Contains hearing testimony previously designated restricted.
	¶ 374, n. 21	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by National Association of Broadcasters. Contains hearing testimony previously designated restricted.
	¶ 375	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 377	Contains written testimony previously designated restricted by SoundExchange.
	¶ 378	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 379	Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 380	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 381	Contains written testimony previously designated restricted by iHeartMedia.

Document	Page/Paragraph/ Line	General Description
	¶ 382	Contains written testimony previously designated restricted by SoundExchange.
	¶ 383	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 384	Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶ 385	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedia and SoundExchange.
	¶ 386	Contains written testimony previously designated restricted by iHeartMedia.
	¶387	Contains written testimony previously designated restricted by iHeartMedia. Contains hearing testimony previously designated restricted.
	¶388	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedia.
	¶ 389	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 390	Contains written testimony previously designated restricted by iHeartMedia.

Document	Page/Paragraph/ Line	General Description
	¶ 391	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedia.
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	¶ 394	Contains hearing testimony previously designated restricted.
	¶ 395	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedia.
	¶ 396	Contains information previously designated restricted by other participants.
	¶ 397	Contains information previously designated restricted by iHeartMedia.
	¶ 401	Contains hearing testimony previously designated restricted.
	¶ 402	Contains hearing testimony previously designated restricted.
	¶ 404	Contains written testimony previously designated restricted by SoundExchange.
	¶ 405	Contains written testimony previously designated restricted by National Association of Broadcasters.
	¶ 406	Contains written testimony previously designated restricted by National Association of Broadcasters.
	¶ 407	Contains hearing testimony previously designated restricted.

Document	Page/Paragraph/ Line	General Description
	¶ 408	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by iHeartMedia.
	¶ 411	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 418	Contains written testimony previously designated restricted by National Association of Broadcasters and Pandora.
	¶ 419	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 420	Contains written testimony previously designated restricted by iHeartMedia and National Association of Broadcasters.
	¶ 421	Contains written testimony previously designated restricted by National Association of Broadcasters.
	¶425	Contains information previously designated restricted by other participants. Contains written testimony previously designated restricted by National Association of Broadcasters.
	¶ 425, n. 24	Contains information previously designated restricted by iHeartMedia.
	¶ 426	Contains information previously designated restricted by other participants.
	¶428	Contains information previously designated restricted by iHeartMedia and other participants. Contains hearing testimony previously designated restricted.

Document	Page/Paragraph/ Line	General Description
	¶ 429	Contains written testimony previously designated restricted by iHeartMedia.
	¶ 430	Contains written testimony previously designated restricted by SoundExchange. Contains hearing testimony previously designated restricted.
	¶ 431	Contains hearing testimony previously designated restricted.
	¶438	Contains hearing testimony previously designated restricted.
	¶ 439	Contains information previously designated restricted by other participants and iHeartMedia.
	¶ 441	Contains written testimony previously designated restricted by iHeartMedia.
Proposed Conclusions of Law	¶ 26	Contains information previously designated restricted by iHeartMedia.
	¶ 27	Contains information previously designated restricted by iHeartMedia.
	¶ 32	Contains information previously designated restricted by iHeartMedia.
	¶ 33	Contains information previously designated restricted by iHeartMedia.
	¶ 33 n.72	Contains information previously designated restricted by iHeartMedia.
	¶ 34	Contains information previously designated restricted by iHeartMedia.
	¶ 34 n.74	Contains information previously designated restricted by iHeartMedia.
	¶ 36	Contains information previously designated restricted by iHeartMedia.

/s/ John Thorne

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Counsel for iHeartMedia, Inc.

CERTIFICATE OF SERVICE

I, John Thorne, hereby certify that a copy of the foregoing PUBLIC version of the Proposed Findings of Fact and Conclusions of Law of iHeartMedia, Inc. has been served on this 24th day of June 2015 on the following persons:

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