Public Version

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
ADJUSTMENT OF RATES AND TERMS FOR PREEXISTING SUBSCRIPTION SERVICES AND SATELLITE DIGITAL AUDIO RADIO SERVICES	)	**Docket No. 2006-1 CRB DSTRA**

PROPOSED CONCLUSIONS OF LAW OF SOUNDEXCHANGE, INC.

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PROPOSED CONCLUSIONS OF LAW OF SOUNDEXCHANGE, INC.

1. The purpose of this proceeding is to set the royalty rates and terms for the statutory license created by the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 114(f)(1), 17 U.S.C. § 112 and 17 U.S.C. § 801(b)(1) for Preexisting Satellite Digital Audio Radio Services' ("SDARS") transmissions of sound recordings over their services. This license applies to the all sound recordings played on both "music" and "non-music" channels.

2. The Copyright Royalty Judges ("Court" or "CRJs") must set the rates and terms for the license period of January 1, 2007, through December 31, 2012. 17 U.S.C. § 803(b)(1)(A)(i)(V).

3. According to 17 U.S.C. § 803(a)(1), the CRJs

> shall act in accordance with regulations issued by the Copyright Royalty Judges and the Librarian of Congress, and on the basis of a written record, prior determinations and interpretations of the Copyright Royalty Tribunal, Librarian of Congress, the Register of Copyrights, copyright arbitration royalty panels (to the extent those determinations are not inconsistent with a decision of the Librarian of Congress or the Register of Copyrights), and the Copyright Royalty Judges (to the extent those determinations are not inconsistent with a decision of the Register of Copyrights that was timely delivered to the Copyright Royalty Judges pursuant to section 802(f)(1)(A) or (B), or with a decision of the Register of Copyrights pursuant to section 802(f)(1)(D)), under this chapter, and decisions of the court of appeals under this chapter before, on, or after the effective date of the Copyright Royalty and Distribution Reform Act of 2004.

I. THE STATUTORY STANDARD

4. Under the DMCA, 17 U.S.C. § 114(f)(1)(A), the Court must "determine reasonable rates and terms of royalty payments for subscription transmissions by . . . preexisting satellite digital audio radio services." These rates and terms must be calculated to achieve the statutory objectives set forth in 17 U.S.C. § 801(b)(1), and in establishing such rates and terms, the Court "may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements" for

subscription transmission by the SDARS. 17 U.S.C. § 114(f)(1)(B); H.R. Conf. Rep. 105-796 at 85 (1998), *available at* U.S.C.C.A.N. 639 at 655-56.

5. The objectives set forth in § 801(b)(1) are as follows:

> (A) To maximize the availability of creative works to the public.
>
> (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
>
> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
>
> (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

6. Under 17 U.S.C. § 112, the rate for making ephemeral copies is to be set in this proceeding as well. By the statute's terms, the rate for ephemeral copies is to be set pursuant to the willing buyer/willing seller standard. 17 U.S.C. § 112(e)(4).

7. Congress first provided copyright protection for the performance of sound recordings in 1995. It did so with the goal of "address[ing] the concerns of record producers and performers regarding the effects that new digital technology and distribution systems might have on their core business." S. Rep. 104-128, at 13 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 356, 360. In addressing these concerns, Congress determined that "[j]ustice requires that performers and producers of sound recordings be accorded a public performance right." S. Rep. 104-128, at 13 (quoting the Register of Copyrights). Recognizing the critical role that the record industry plays in the creation of sound recordings and making those creative works available to the public, Congress determined that "in the absence of appropriate copyright protection in the digital environment, the creation of new sound recordings . . . could be discouraged, ultimately denying the public some of the potential benefits of the new digital transmission technologies."

S. Rep. 104-128, at 14. Therefore, to more "effectively protect[]" recording artists and record companies, Congress granted copyright protection to the performance of sound recordings by the SDARS and other digital services. S. Rep. 104-128 at 14.

8. The resulting legislation -- the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA") -- was thus a response to the record industry's concerns "that certain types of subscription and interactive audio services might adversely affect sales of sound recordings and *erode copyright owners' ability to control and be paid for use of their work.*" S. Rep. 104-128 at 15 (emphasis added). Recognizing that these new "[s]ubscription and interactive audio services can provide multichannel offerings of various music formats in CD-quality recordings, commercial free and 24 hours a day," Congress concluded it was necessary "that copyright owners of sound recordings should enjoy protection with respect to" use of their intellectual property by such services. S. Rep. 104-128 at 15. Congress thus enacted the DPRA in order "to *protect the livelihoods* of the recording artists, songwriters, record companies, music publishers and others who depend upon revenues derived from traditional record sales." S. Rep. 104-128 at 14 (emphasis added). In light of the growing "commercial exploitation of new technologies in ways that may change the way prerecorded music is distributed to the consuming public," Congress created a performance right "to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions." S. Rep. 104-128 at 15. At the same time, Congress created a compulsory license, requiring copyright owners to make their sound recordings available to new technologies making non-interactive transmissions -- to prevent "hampering the arrival of new technologies" -- while providing copyright protection to the sound recordings to ensure that record companies and recording artists were able to continue to earn adequate revenues. S. Rep. 104-128 at 14-15.

9. Because of the obvious administrative burdens that digital distribution services would face if they had to separately negotiate with hundreds or thousands of individual copyright holders, Congress created a compulsory blanket license and permitted the new digital services to negotiate with one entity (or a limited number of entities) for the right to perform any copyrighted sound recording. 17 U.S.C. § 114(e). Although the statute permits and encourages the parties to negotiate a rate on a voluntary basis, by compelling a license even absent a successful negotiation, and by authorizing the record industry to bargain collectively (and thereby to exercise more market power than in the markets in which the record companies bargain on an individual basis), Congress also concluded it was appropriate to authorize an adjudicatory body (at that time a Copyright Arbitration Panel) to set rates based on the terms ultimately set out in § 801(b) of the Act.

10. In 1998, Congress further amended the copyright laws by passing the DMCA

> to achieve two purposes: first, to further a stated objective of Congress when it passed the [DPRA] *to ensure that recording artists and record companies will be protected as new technologies affect the ways in which their creative works are used*; and second, to create fair and efficient licensing mechanisms that address the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services.

H.R. Conf. Rep. 105-796 at 79-80 (emphasis added). In amending the DPRA, Congress left intact the *conditions* that applied to the SDARS and to preexisting subscription services ("PSS") under the DPRA -- primarily the "five conditions for eligibility for a statutory license" -- out of concern that these industries had developed their businesses, or were in the process of doing so, and that a change in these eligibility conditions might disrupt the industries. H.R. Conf. Rep. 105-796 at 81. Thus, Congress "grandfathered" the eligibility conditions that applied to the PSS and the SDARS, as well as the statutory standard applicable to setting the royalty rates for these services.

11. At the time of the passage of the DMCA, the SDARS were not yet operating and there was no royalty rate. Thus, the grandfathering of the conditions and standards obviously did not reflect Congress's position as to what would be a "reasonable" rate for the SDARS, and Congress made it clear that it was not suggesting anything one way or the other about the applicability of the existing PES rate to any future SDARS proceeding. *See, e.g.*, H.R. Conf. Rep. 105-796 at 85 ("the Conferees take *no position*" as to the applicability of the PSS rate to the SDARS) (emphasis added). *Cf. Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords; Rates & Adjustment of Rates* ("*Phonorecords*"), 46 Fed. Reg. 10466, 10478 (Feb. 3, 1981) (prior rate set by Congress having no precedential value). This point has been emphasized repeatedly by the Librarian and the Register, explaining that a rate set for one type of service does not, by itself, provide a basis for setting rates for another service at another time. Docket No. RF 2006-2, Memorandum Opinion at 4, n.7 (Oct. 20, 2006) (quoting *PES I*, 63 Fed. Reg. at 25405).

12. Notably, Congress also explained that "the absence of criteria that should be taken into account for distinguishing rates and terms for different services in subsection (f)(1)" -- the subsection applicable to the SDARS -- "does not mean that evidence relating to such criteria may not be considered when adjusting rates and terms for preexisting subscription services and preexisting satellite digital audio radio services in the future." H.R. Conf. Rep. 105-796 at 86. Congress also explained that under the DMCA, determination of reasonable rates "should consider the objectives set forth in section 801(b)(1), as well as rates and terms for comparable types of subscription services." H.R. Conf. Rep. 105-796 at 85.

13. Thus, the overriding purpose of the DPRA and the DMCA was and continues to be "to protect the livelihoods" of record companies and recording artist copyright owners and to

ensure that their copyrighted works receive adequate protection in this age of rapid technological development and transition to digital transmission of sound recordings so that the record companies and artists continue to produce creative works for dissemination to and enjoyment by the public.

II. THE APPROPRIATE METHOD TO BE USED IN SETTING A RATE UNDER SECTION 801(B)

14. As the Librarian explained in the last case decided under § 801(b), the first step in determining an appropriate rate is to look at voluntary transactions in comparable markets -- *i.e.*, marketplace benchmarks – making appropriate adjustments to account for differences between the benchmark and target markets to best reproduce a rate that would represent a hypothetical marketplace transactions between a willing SDARS buyer and a willing record company seller. *See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings* ("*PES I*"), 63 Fed. Reg. 25394, 25399, 25404 (May 8, 1998). More specifically, in *PES I*, the Librarian explained that

> [t]he Panel considered the parties' representations of different rates negotiated in comparable marketplace transactions and first determined whether the proposed models mirrored the potential market transactions which would take place to set rates for the digital performance of sound recordings.

63 Fed. Reg. at 25399, 25404. Thus, marketplace benchmarks are "the starting point" for determining a rate pursuant to § 801(b)(1). 63 Fed. Reg. at 25404.

15. Courts and regulators agree that the appropriate way to proceed pursuant to section 801(b) is first to rely on a marketplace benchmark, and then to make whatever adjustments are appropriate to further account for statutory objectives. *See, e.g.*, *Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal*, 676 F.2d 1144, 1148 (7th Cir. 1982) (approving tribunal's decision under § 801(b) to "rely[] primarily on marketplace analogies");

1980 Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players ("*Juke Box Decision*"), 46 Fed. Reg. 884, 889 (Jan. 5, 1981) (analyzing marketplace benchmark rate and finding no need to adjust the market rate to achieve the objectives in § 801(b)(1)(A)). Indeed, it is difficult to conceive of any starting point other than a voluntarily negotiated market rate or voluntary license agreements -- and the statute itself mentions no others -- as appropriate starting points for calculating an appropriate royalty rate under this statutory structure.

16. After determining appropriate marketplace benchmarks (using the criteria discussed in the immediately following section, *infra* Section III), the next step in calculating reasonable rates pursuant to § 801(b)(1) is to evaluate these benchmarks "in light of the statutory objectives to determine a reasonable royalty rate." *PES I*, 63 Fed. Reg. at 25399, 25404. Where a marketplace benchmark adequately addresses the statutory factors, adjustments to that benchmark may be unnecessary. *See, e.g.*, *Juke Box Decision*, 46 Fed. Reg. at 889 (analyzing benchmark rate under factor one and "find[ing] nothing in this record which would justify any reasonable concern that the [market-based] schedule we have adopted will deprive the public of access to music").

17. Ultimately, marketplace outcomes may or may not satisfy the four statutory objectives. *Recording Industry Association of America v. Librarian of Congress*, 176 F.3d 528, 533-34 (D.C. Cir. 1999); Memorandum Opinion at 4, n.7, Docket No. RF 2006-2 (Oct. 20, 2006) (quoting *PES I*, 63 Fed. Reg. at 25405) (indicating that the end result of the analysis of the four statutory factors may, but need not, result in a market rate). *See also Amusement & Music Operators Ass'n v. Copyright Tribunal*, 676 F.2d 1144, 1148 (7th Cir. 1982) (approving tribunal's decision under 801(b) to "rely[] primarily on marketplace analogies" designed to determine "fees charged for comparable rights in a regime of competition"); *National Cable*

Television Association v. Copyright Royalty Tribunal, 724 F. 2d 176, 184 (D.C. Cir. 1983) (describing approvingly the Seventh Circuit's *Amusement & Music Operators Ass'n Phonorecords* "affirming the CRT to set market rate for jukebox royalties despite absence of explicit statutory instruction"); 46 Fed. Reg. 10466 at 10479 ("reasonable adjustment of the statutory rate should work to ensure the full play of market forces, while affording individual copyright owners a reasonable rate of return for their creative works").

18. As these cases demonstrate, marketplace transactions provide acceptable and proper benchmarks from which to set a rate under § 801(b)(1), although the ultimate result after adjustment for the statutory factors may or may not lead to a marketplace rate.

III. SELECTING AN APPROPRIATE BENCHMARK UNDER SECTION 801(b)

19. An appropriate benchmark for use in setting a rate under 801(b) should "reflect accurately the characteristics and dynamics of the industries subject to the proposed rate." *PES I,* 63 Fed. Reg. at 25404 n.24. If there are differences between the industries, these differences should be identified and accounted for. The closer a marketplace benchmark is to the target market, the fewer adjustments that need to be made to achieve the objectives under § 801(b)(1), as the more the benchmark "reflect[s] accurately the characteristics and dynamics of the industries subject to the proposed rate." *PES I,* 63 Fed. Reg. at 25404 n.24. *See, e.g.*, 8/16/07 Tr. 237:3-243:6 (Noll).

20. Likewise, an appropriate benchmark must be sufficiently transparent and reflective of market dynamics that it provides useful information on the equilibrium struck in the marketplace that is reflected in the benchmark rate. For that reason, "it is difficult to understand how a license negotiated under the constraints of a compulsory license, where the licensor has no

choice but to license, could truly reflect 'fair market value.'" *Noncommercial Educational Broadcasting Compulsory License*, 63 Fed. Reg. 49823, 49834 (Sept. 18, 1998).

21. However, the law does not require the impossible: that the benchmark market be perfectly competitive. Rather, it is sufficient that buyers and sellers "have comparable resources and market power." *Digital Performance Right in Sound Recordings & Ephemeral Recordings* ("*Webcasting II*"), 72 Fed. Reg. 24084, 24093 (May 1, 2007) (describing appropriate hypothetical competitive marketplace in context of willing buyer/willing seller standard).

22. Moreover, the law does not require the CRJs to focus only a single benchmark, but rather permits the CRJs to look to multiple benchmarks, none of which may be perfect, to reach an ultimate conclusion, which is fundamentally to set royalty rates that are "reasonable" and consistent with the statutory factors. *PES I*, 63 Fed. Reg. at 25404. The D.C. Circuit has recognized that, in selecting a benchmark, it is impossible to "mathematically derive" a reasonable royalty rate; the Court may use the best analogies available to it to begin the process of setting a rate. *National Cable Television Ass's Inc., v. Copyright Royalty Tribunal*, 724 F.2d 176, 187 (D.C. Cir. 1983).

23. As prior tribunals have recognized, rates set in prior proceedings for different services that have already been adjusted to achieve the 801(b)(1) factors are not useful or appropriate benchmarks. The 801(b)(1) factors are both fact-and time-specific. *See, e.g.*, § 801(b)(1)(B) (reflecting the need to afford both a fair return and a fair income "under *existing* economic conditions") (emphasis added). The Register of Copyrights held that such rates have no precedential value in subsequent proceedings because "a future [tribunal] may reach an entirely different result based on the then-current economic state of the industry and new

information on the Services' impact on the marketplace." Docket No. RF 2006-2, Memorandum Opinion at 4, n.7 (Oct. 20, 2006) (quoting *PES I*, 63 Fed. Reg. at 25405).

24. A rate for a different service adjusted according to the § 801(b) factors makes a poor benchmark because it is extremely difficult to know how, if at all, the rate has been adjusted to take account of economic and market conditions that may not apply to the copyright holders and users at issue in the current proceeding. This problem is exacerbated when (as with the PES rate chosen as a benchmark by Dr. Woodbury) the benchmark rate is a rate negotiated in the shadow of a pending § 801(b) proceeding, and nothing is known about the dynamics of that negotiation. In that case, it is impossible to know what adjustments if any have been made by the parties to take account of § 801(b), and whether those considerations apply in the same way to the SDARS. Such a benchmark rate is opaque and not transparent – it is impossible to know what the rate indicates in relation to the SDARS. SoundExchange PFOF Section VII.

25. In sum, the fact that a prior rate for a different service has been adjusted for the § 801(b) factors makes it a worse benchmark, not a better one. Congress has specified that the § 801(b) criteria shall be used to set rates for jukeboxes, mechanical licensing of musical works, pre-existing subscription services, and the SDARS. That all of the rates are set with one statutory standard does not mean that a rate previsouly set for jukeboxes, for example, has any value in setting a rate for the SDARS. That is why prior tribunals that lacked a rate previously set for a particular service pursuant to the § 801(b) factors have first tried to evaluate the market value of the rights at issue, and then made adjustments pursuant to the statutory factors. *PES I*, 63 Fed. Reg. at 25399, 25404; *Juke Box Decision*, 46 Fed. Reg. at 889. To begin with a rate for another service at another time already adjusted for the § 801(b) factors provides a poor starting place -- and one not consistent with governing precedent.

26. Finally, as this Court, the Webcaster I CARP, and the Librarian have previously held, the rate paid by a service for musical works is not itself a reasonable benchmark from which to begin analysis of an appropriate rate for sound recordings here. As this Court found in the webcasting proceeding, the musical works benchmark is "fatally flawed." *Webcasting II*, 72 Fed. Reg. at 24094. This conclusion does not change because the statutory standard is different in this proceeding, and the Court's webcasting decision is dispositive here. Whatever the ultimate outcome of the Court's analysis of the statutory factors, it is clear on this record, as it was on the webcasting record, that the musicals work benchmark -- or any rate derived therefrom -- cannot be the starting point. The musical works rate cannot be squared with marketplace analogies (because sound recording copyright owners receive multiples of what musical works copyright owners receive in the free market) nor can it be squared with the relative investment, costs, and risks of the record companies, who do the lion's share of investing in the sound recordings from which each copyright owner benefits. *Webcasting II*, 72 Fed. Reg. 24094-95.

IV. APPLICATION OF THE § 801(b)(1) STATUTORY OBJECTIVES

27. Once the Court has established the appropriate benchmark rates or range of rates from which to set a reasonable royalty, it must then "evaluate" that rate to ensure that it achieves the statutory objectives set forth in § 801(b)(1). *See, e.g.*, *Juke Box Decision*, 46 Fed. Reg. at 889; *PES I*, 63 Fed. Reg. at 25399, 25404.

28. The first three statutory factors -- maximizing the availability of creative works to the public, providing both a fair return and a fair income to the parties involved, and reflecting the relative roles of the parties with respect to various contributions, costs, and risks -- each promote policies that are best advanced through free and open market transactions. Past decisions observe that "market" rates may in fact provide "reasonable" rates that satisfy the four

statutory criteria in certain situations. *See Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal*, 676 F.2d 1144, 1148 (7th Cir. 1982) (approving tribunal's decision under § 801(b) to "rely[] primarily on marketplace analogies" designed to determine "fees charged for comparable rights in a regime of competition"); *National Cable Television Association v. Copyright Royalty Tribunal,* 724 F.2d 176, 184-86 (D.C. Cir. 1983) (descrbing approvingly the Seventh Circuit's *Amusement & Music Operators Ass'n Phonorecords* "affirming the CRT to set market rate for jukebox royalties despite absence of explicit statutory instruction").

29. Indeed, the D.C. Circuit has noted that "the statutory factors pull in opposing directions, and reconciliation of these objectives is committed to the [the CRJs] as part of [their] mandate to determine 'reasonable' royalty rates." *Recording Industry Association of America v. Copyright Royalty Tribunal*, 662 F.2d 1, 9 (D.C. Cir. 1981). As discussed in more detail in SoundExchange's Proposed Findings of Fact, this pull in opposite directions replicates the forces that operate in the marketplace and are generally accounted for by marketplace rates. *See* SoundExchange PFOF Section III.

30. As discussed in more detail in SoundExchange's Proposed Findings of Fact and below, SoundExchange's marketplace benchmarks sufficiently achieve the statutory objectives set forth in § 801(b)(1), and thus little, if any, adjustments to these benchmarks are necessary.

A. Section 801(b)(1)(A): Maximizing Availability of Creative Works

31. Section 801(b)(1)(A) seeks to "maximize the availability of creative works to the public." Previous tribunals have concluded that the principal way to achieve this objective is to assure that copyright holders are fully compensated for their creative efforts and continue to be incentivized to create additional works. *See, e.g.*, *Phonorecords*, 46 Fed. Reg. at 10479 (the first factor is to provide "an economic incentive and the prospect of pecuniary reward" for the

copyright owner's "creative efforts"). As the Supreme Court has recognized -- and the Librarian has affirmed -- the goal of maximizing the availability of creative works "is achieved by allowing the copyright owners to receive a fair return for their labors." *Twentieth Century Music v. Aiken*, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return from an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."); *PES I*, 63 Fed. Reg. at 25406.

32. "The economic philosophy behind the [Copyright Clause] is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors." *Mazer v. Stein*, 347 U.S. 201, 219 (1954). "Accordingly, 'copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge . . . . The profit motive is the engine that ensures the progress of science.'" *Eldred v. Ashcroft*, 537 U.S. 186, 212 n. 18 (2003) (quoting *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992), *aff'd* 60 F. 3d 913 (2d Cir. 1994)) (emphasis added). "Rewarding authors for their creative labels and 'promot[ing] . . . Progress' are thus complementary; as James Madison observed, in copyright '[t]he public good fully coincides . . . with the claims of individuals.'" *Eldred*, 537 U.S. at 212 n.18 (quoting The Federalist No. 43, p. 272 (C. Rossiter ed. 1961)).

33. Compensating copyright owners and performers stimulates both the creation of copyrighted works *and* their dissemination. *Eldred*, 537 U.S. at 205-06. "[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and

disseminate ideas." *Harper & Row Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 558 (1985).

34. In contrast, nothing in the Constitution, the Copyright Act, copyright jurisprudence, or the economic philosophy behind copyright suggests that allowing the use of copyrighted works for low or below market rates will increase the dissemination of those works. Rather, low rates for those who disseminate will simply result in a dearth of creative works because such works will never be created or disseminated by authors in the first place. As the Supreme Court has explained, "[t]o propose that fair use be imposed whenever the social value [of dissemination] . . . outweighs any detriment to the artist, would be to propose depriving copyright owners of their right in the property precisely when they encounter those users who could afford to pay for it." *Harper & Row,* 471 U.S. at 559 (internal quotation marks and citations omitted). As the Court noted, the result of privileging those who disseminate over those who create is that "the public [soon] would have nothing worth reading." *Harper & Row,* 471 at 559 (internal quotation marks and citations omitted).

35. Providing compensation to copyright owners and performers also stimulates the creation and dissemination of older works because ensuring fair compensation encourages copyright owners to invest in the restoration and public distribution of their own works. *Eldred,* 537 U.S. at 206-07; H.R. Rep. No. 105-452, at 4 (1998) (explaining that extension of copyright term allowing copyright owners to earn revenues from copyrights for a longer period "provide[s] copyright owners generally with the incentive to restore older works and further disseminate them to the public").

36. As the Supreme Court has recognized, Congress has legislatively ensured that owners of existing copyrights receive the benefit of future copyright expansion. Thus, part of the

incentive for creation of copyrighted works in the past was the belief on the part of authors and copyright owners that they would be fairly compensated in the future as technologies and laws change; that reliance was part of their original calculus in deciding to create works in the first place. *Eldred*, 537 U.S. at 214-15.

37. Ensuring additional income for existing works itself helps "to finance the production and publication of new works." *Eldred*, 537 U.S. at 207 & n. 15 (quoting testimony of Mary Beth Peters, Register of Copyrights). As the Register has explained,

> Authors would not be able to continue to create . . . unless they earned income on their finished works. The public benefits not only from an author's original work but also from his or her future creations. Although this truism may be illustrated in many ways, one of the best examples is Noah Webster[,] who supported his entire family from the earnings on his speller and grammar during the twenty years he took to complete his dictionary."

Eldred, 537 U.S. at 207 & n. 15 (quoting testimony of Marybeth Peters, Register of Copyrights).

38. Based on these principles, previous tribunals uniformly have concluded that the principal way to achieve this objective is to assure that copyright holders are fully compensated for their creative efforts and continue to be incentivized to create additional works. *See, e.g.*, *Phonorecords*, 46 Fed. Reg. at 10479 (the first factor is to provide "an economic incentive and the prospect of pecuniary reward" for the copyright owner's "creative efforts"); *PES I*, 63 Fed. Reg. at 25406. *See* S. Rep. 104-128 at 11 (the performance right may become an "incentive to[] the creation of" sound recordings).

39. Moreover, the courts, the Librarian, and the former Copyright Royalty Tribunal have repeatedly rejected claims that those who use and disseminate copyrighted works are entitled to some reduction to the market rate based on this factor. They have uniformly concluded to the contrary that compensating authors is the most effective way to maximize the availability of copyrighted works. Indeed, in *PES I*, the Librarian reversed the decision of the

CARP on this very point, finding the assertion that "a new mode of distribution will itself stimulate the creation of additional works" to be without foundation. 63 Fed. Reg. at 25406. Likewise, in the 1981 mechanical rate adjustment proceeding, the Copyright Royalty Tribunal rejected arguments that § 801(b)(1)(A) benefited those who use copyrights, finding instead that this factor focused on encouraging the creation and dissemination of copyrighted works and such encouragement "takes the form of an economic incentive" for the copyright owners. *Phonorecords*, 46 Fed. Reg. at 10479.

40. The SDARS are just one of many ways that the public is able to avail itself of creative works. As the SDARS themselves acknowledge in their FCC filings, satellite radio competes in a broad and growing audio entertainment market with numerous other audio digital services such as iPods, portable subscriptions streaming services, digital download services, wireless services, and much more. *See* SX Trial Ex. 106 at 35, 37. As prior tribunals have concluded, "[t]here is no record evidence to support a conclusion that the existence of the digital transmission services stimulates the creative process." *PES I*, 63 Fed. Reg. at 25406 (reversing the CARP for finding that the benefits associated with "disseminating creative works to the public" warranted setting a rate on the low side to advance § 801(b)(1)(A)).

41. Finally, the claim repeated by the SDARS that the revenue at issue here is merely incremental to record companies and artists and therefore unlikely to induce the creation of new copyrighted works is both wrong as a matter of fact and irrelevant as a matter of law. As the CRT previously held, it is sufficient that revenues from music services -- there jukeboxes -- provided "incrementally" more revenue to copyright owners and performers for this factor to weigh in favor of the record companies. *Juke Box Decision*, 46 Fed. Reg. at 889; *PES I*, 63 Fed. Reg. at 25406.

42. For all of these reasons, achievement of the objective set forth in § 801(b)(1)(A) -- maximizing the availability of creative works to the public -- counsels in favor of a relatively higher rate and does not require any adjustment downward of a benchmark market rate.

B. Section 801(b)(1)(B): Affording the Copyright Owner a Fair Return and the Copyright User a Fair Income

43. The second statutory objective requires the Court to adopt a rate that results in a fair return for the copyright owner and a fair income for the copyright user. Past adjudicators have consistently held that fairness to both parties under this provision is best accomplished by replicating to the greatest extent possible the returns that would exist in workably competitive markets, where producers and distributors are rewarded for their risks and for the value of what they bring to the market. *See, e.g.*, *Phonorecords*, 46 Fed. Reg. at 10479 ("We find that the copyright owner's right to receive a fair rate of return for the compulsory use of his song derives from Congress' decision to afford commercial protection to the author of a creative work . . . . [I]n most instances, the rate of return afforded the copyright owner is determined on the free market."). *See also PES I*, 63 Fed. Reg. at 25409 ("proposed marketplace benchmarks" address the second factor).

44. That copyright owners may have other markets in which they sell their sound recordings provides no basis for reducing the return here. Thus, the CRT has held that the fact that copyright owners receive most of their revenues from the sale of sound recordings provides no basis for denying them a return consistent with the marketplace under the second statutory factor. *Juke Box Decision*, 46 Fed. Reg. at 889.

45. Fairness also has a horizontal dimension. A fair return for copyright owners and a fair income for the SDARS therefore would be reflected in the fees that the recording copyright

owners regularly receive in other markets and what the SDARS are willing to pay for other types of content. Herscovici WRT at 21, SX Trial Ex. 130. When the SDARS negotiate in the free market for use of *non-music* content on their services, they are willing to pay a price that reflects the value of that content to the service, and in that sense they believe that the price they have agreed to is a fair one. Karmazin WRT at ¶¶ 5-21, SIR Trial Ex. 62. Accordingly, a fair rate in this proceeding should compensate the record companies for their contribution to the SDARS' service commensurately with how other content providers have been compensated for their contribution.

46. Indeed, prior tribunals have focused on the fact that copyright users have themselves paid reasonable market prices for all other goods and services as a basis on which to conclude that a marketplace rate for copyrighted works is fair as well. *Juke Box Decision*, 46 Fed. Reg. at 889; *Phonorecords*, 46 Fed. Reg. at 10480-81. Here, where the SDARS pay marketplace rates for other content that serves the same basic purpose as sound recordings -- to draw subscribers and earn revenues -- there is no basis for claiming that a marketplace rate is unfair.

47. By that measure, the SDARS' proposed rate is anything but fair. They propose to pay SoundExchange approximately $9 million in 2007 for the use of sound recordings that provide the programming content for roughly 70 channels for each service, 24 hours per day, 7 days a week, every day of the year. By comparison, in 2007, one or the other (or both) of the SDARS will pay: [ ] million for professional baseball, [ ] million for Howard Stern, [ ] million for professional football, [ ] million for Oprah, [ ] million for NASCAR, [ ] million for professional basketball, [ ] million for Fox News, and [ ] million for professional hockey. In fact, in 2007, Sirius will pay [ ]

[redacted].] And these stated fees do not include any [redacted] associated with many of these content providers. And these fees are for services that provide content over vastly fewer channels, for vastly fewer hours of programming, and for vastly less listening time by the SDARS' customers. *See* SoundExchange's Proposed Findings of Fact at Section II.D.4.e. This is simply not fair.

48. Additionally, the fairness considerations reflected in § 801(b)(1)(B) are not achieved if the record industry does not recover its opportunity costs – the revenues it loses as a result of having its music played by the SDARS. Noll WRT at 19, 55, SDARS Trial Ex. 72; Herscovici WRT at 21, SX Trial Ex. 130. Indeed, one of the reasons Congress enacted the DMCA was to prevent the record industry and artists from suffering such losses. *See* S. Rep. 104-128 at 15 (the DPRA aims to address the music community's concerns "that certain types of subscription and interactive audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for use of their work"). Thus, at a minimum, fairness requires the rate to compensate record companies and performers for their lost opportunity costs-- costs which the record in this case demonstrates are substantial. *See* SoundExchange PFOF Section V.E.1.

C. Section 801(b)(1)(C): To Reflect the Relative Roles of the Copyright Owner and the Copyright User With Respect To Contributions, Investments, Costs, and Risks

49. The third statutory objective, § 801(b)(1)(C), seeks to "reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk,

and contribution to the opening of new markets for creative expression and media for their communication."

50. This factor, also, is one that "marketplace evidence, standing alone" can address. *Amusement & Music Operators*, 676 F.2d at 1157. It is quintessentially the role of markets to take account of such factors, as functioning competitive markets reward creative and technological contributions, and set prices that reflect capital investment, costs, and risks undertaken by businesses that contribute to that market. Ordover WDT at 29, SX Trial Ex. 61; Herscovici WRT at 21-22, SX Trial Ex. 130.

51. This Court has previously considered a nearly identical statutory provision as part of the "willing buyer/willing seller" standard governing rates paid by webcasters for the use of sound recordings. *Compare* § 801(b)(1)(C) *with* 17 U.S.C. § 114(f)(2)(B)(ii). Specifically, section 114(f)(2)(B)(ii) states that the Court should consider "the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk."

52. In analyzing these § 114(f)(2)(B)(ii) factors in the webcasting market, this Court concluded that "[b]ecause we adopt a benchmark approach to determining rates, we agree with Webcaster I that [these] considerations 'would have already been factored into the negotiated price' in the benchmark agreements." *Webcasting II*, 72 Fed. Reg. at 24092. In light of this, the Court determined that these factors are "implicitly accounted for in the rates that result from negotiations between the parties in the benchmark marketplace." *Id.* at 24095. *Cf. Amusement & Music Operators*, 676 F.2d at 1157 (marketplace analogies are appropriate points of reference).

53. With respect to the various subfactors that make up the third statutory factor, prior decisions provide a number of insights. First, the claimed creative contributions of broadcasters in arranging the music that they play is of little value when compared to the creative contribution of copyright owners and performers. The SDARS by and large broadcast the creative works of others, and thus provide very little creative contribution of their own. *PES I*, 63 Fed. Reg. at 25407 & n.29 (citing CRT's determination that broadcasters did not deserve a share of cable royalties for their role in formatting radio stations, and defining services' role to "make no .... significant contribution" in making recordings available to the public because their contribution "merely enhanced the presentation of the final work"); *cf. National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 772 F.2d 922, 931 (D.C. Cir. 1985) (finding reasonable the conclusion "that people listen to retransmitted stations for the music, and thus any award for retransmitted radio broadcasters should go to the Music Claimants", and rejecting the idea that formatting a radio station had any value); *1980 Cable Royalty Distribution Determination*, 48 Fed. Reg. 9552, 9565-66 (Mar. 7, 1983) (reaffirming prior holding that there is "no basis for establishing the value of the broadcast day" nor "any basis for a distribution of royalties to broadcast claimants on this theory").

54. Second, the SDARS' argument that the record companies cannot be given any credit under this factor because while they have made very substantial investments in sound recordings, they would have made these investments and taken on these risks without regard to the SDARS' use of sound recordings is wrong as a matter of law. The Librarian and the CRT have consistently rejected this construction of the third factor, which if accepted would effectively ignore all of the risks and investments the record companies and artists undertake that make their creative contribution possible. Instead, in considering the investment, cost, and risks

faced by record companies and the SDARS, it is necessary to consider all of the record companies' investment, cost, and risk -- not simply some subset that is attributable to satellite radio. *See PES I*, 63 Fed. Reg. at 25407; *Phonorecords*, 46 Fed. Reg. at 10466. That is especially true now, when the ability of record companies to survive and continue to produce music is dependent on receiving reasonable revenues from all revenues sources, not simply their traditional ones. *See* SoundExchange PFOF Section II.C.

55. Third, the trends that each industry is facing in the marketplace are relevant to analyzing this factor. In the *PES I* Proceeding, the CARP and the Librarian found it highly relevant that the business model of the PES was undergoing change as they were no longer able to sell their service as they had previously (as subscriptions), whereas the record companies had seen sales and revenues regularly increasing over a decade. *PES I*, 63 Fed. Reg. at 25407. Here, the opposite is true. The record companies are seeing their business model change radically and are facing declining sales and revenues, while at the same time the SDARS are seeing their revenues and subscribership increase dramatically. *See* SoundExchange PFOF Section II.C.

56. Fourth, the impact of possible substitution or promotion is highly relevant to the risk that record companies face and to the cost -- here an opportunity cost. Whereas in 1998, the Librarian concluded that the PSS services actually promoted other sales of sound recordings and therefore reduced the "risks" faced by the record companies, *PES I*, 63 Fed. Reg. at 25407, the overwhelming evidence demonstrates that the opposite is true. *See* SoundExchange PFOF Section V.E. Because the SDARS service substitutes for, rather than promotes, the sale of sound recordings, a significantly higher rate -- one which at a minimum accounts for the increased opportunity cost and risk -- is compelled here.

57. In sum, because the statutory objectives of the third factor "'would have already been factored into the negotiated price' in the benchmark agreements," *Webcasting II*, 72 Fed. Reg. at 24092, further adjustment of these benchmark rates would double-count for these factors and is therefore both inappropriate and unnecessary. And in any event, an evaluation of the benchmark market rates in light of the statutory objective set forth in § 801(b)(1)(C) reveals that little, if any, adjustment to these benchmark rates is required, considering the greater contributions, risks, and investments incurred by the record companies as compared to the SDARS. *See* SoundExchange PFOF Section VI.

D. Section 801(b)(1)(D): Minimize Any Disruptive Impact on the Structure of the Industries

58. The fourth statutory objective seeks to "minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices." § 801(b)(1)(D). Adjudicators have acknowledged that this is the one statutory objective that "marketplace evidence, standing alone, does not address." *Amusement & Music Operators*, 676 F.2d at 1157.

59. Prior tribunals have addressed this factor by providing a "phasing-in approach to fee increases" that "'adequately reflect[s]' concern for the impact of the change on all parties involved" under the fourth statutory factor. *Amusement and Music Operators*, 676 F.2d at 1148. *See also Juke Box Decision*, 46 Fed. Reg. at 889. That is precisely the method that SoundExchange has used to structure its rate proposal in this proceeding.

60. In contrast, no court or adjudicator has ever accepted the claims made here by the SDARS -- that this objective calls on the Court to protect investor expectations about the projected future stock value of the business, or assure that they are in a position to make up past losses.

61. This is certainly not the type of "disruptive impact" that the statute contemplated, as it would translate into a rule that no rate increase would ever be allowed under the fourth factor. Indeed, prior tribunals have repeatedly rejected such arguments. Any rate increase will increase the service's cost, and will in that sense "disrupt" its business. "The fact that an increase in the rate will increase costs is not per se an argument against raising the rate" under § 801(b)(1)(D). *Phonorecords*, 46 Fed. Reg. at 10486. *See also id.* at 10481 ("We reject the contention that any immediate increase in the mechanical royalty payable to copyright owners, would be disruptive on the record industry. The record in this proceeding clearly shows that an increase in the compulsory license is necessary to afford copyright owners a fair return.").

62. Moreover, the very arguments that the SDARS make here about setting rates in order to maintain the SDARS stock price at some current or projected level have been rejected as a matter of law -- and of economics -- by the D.C. Circuit in an analogous rate-setting proceeding. As the Court explained, "[a] method for determining a fair return . . . which looks solely to a pegging of the market price of the company's stock price . . . is manifestly unacceptable." *Williams v. WMATC,* 415 F.2d 922, 970 (D.C. Cir. 1968). That is exactly the flawed approach taken by the SDARS' finance expert Mr. Musey. Such an approach is unacceptable because even if a royalty rate increase "would reflect adversely on [a company] in the eyes of the financial community and thus affect the market price of its stock, it does not follow inexorably that [a company] would thereby be precluded from securing needed equity capital." *Williams v. WMATC,* 415 F.2d at 971. To know "[w]hether the latter consequence would flow . . . is something the [adjudicator] could not know without at least ascertaining [the company's] financial requirements, assessing the current risks that attend its operation, and examining 'earnings on investments carrying comparable risks.'" *Id.* None of that evidence was

presented here by the SDARS; indeed the only evidence beyond mere assertion of witnesses for the SDARS, is the testimony of Mr. Butson and Dr. Herscovici finding that the SDARS will have no difficulty, if the Court adopts SoundExchange's proposed rate, in securing the capital they need to operate highly profitably. SoundExchange PFOF Section VI.D.

63. Indeed, many of the arguments that the SDARS make here are identical to those that Copyright Royalty Tribunal considered and rejected when they were made by cable companies, albeit in a proceeding to set two different rates under standards that required the CRT to "make a reasonable adjustment" to rate in one case and to set "reasonable' rates giving due consideration to "the economic impact on copyright owners and users," in the other. *Adjustment of the Royalty Rate for Cable Systems*, 47 Fed. Reg. 52146, 52152 (1982) (quoting H.R. 94-1476, at 176). In that proceeding, cable company witnesses testified about:

> the extensive capital investment required in the construction of systems, and the number of years required before many systems become profitable. But our record establishes significant growth in the number of cable subscribers and the prospect of a further steady rise in the percentage of households serviced by cable. . . . [cable witnesses further] asserted that many of the cable systems currently being built will not show a profit before the eighth to twelfth year of operation. Copyright owners in their evidence presented a different picture of the health of the cable industry, but even our acceptance of NCTA's assessments would not produce the result in this proceeding urged by NCTA.

47 Fed. Reg. at 52153.

64. In that proceeding, the CRT rejected the cable industry's claims of poverty, as well as its demand that copyright license rates be set in so that cable operators could show profitability and pay copyright owners last:

> Our statutory mandate to consider the impact of the royalty schedule on the cable industry does not suggest that our task is to ascertain if the cable industry after paying for all other regular costs of operation has adequate remaining revenue for payment of reasonable copyright fees for the carriage of distant signals. The rates we have adopted will result in a significant increase in the cost to an operator for carriage of a distant signal, and are likely to have an impact on the level of profitability of some cable systems. But we cannot restrict our rate determination to its effect on cable industry

> profits. Rather, we must strike a balance between copyright owner and user, while also remembering that only the cable operator has freedom of choice in this congressional mandated marriage.

47 Fed. Reg. at 52153.

65. Prior tribunals have also made clear that the SDARS' prolific spending on non-music content and other investments is highly relevant to determining whether a given rate will be disruptive to the structure of the SDARS' industry. The SDARS evidently do not view these expenditures as disruptive; therefore comparable expenditures cannot be considered disruptive either. Thus, in the 1981 "Mechanicals" proceeding, the Copyright Royalty Tribunal found that the fact that the record companies' other costs had increased significantly without creating a disruptive impact was evidence that there would be no disruption from a significant increase in the mechanical royalty rate. *Phonorecords*, 46 Fed. Reg. at 10481; *Juke Box Decision*, 46 Fed. Reg. at 889 (holding that the fact that jukebox industry "pays reasonable market prices for all other goods and services they require" demonstrates that a market rate is not disruptive). Put another way, the SDARS cannot use § 801(b)(1)(D) as justification for paying all other content providers a fair return for their intellectual property and then claiming that there is nothing left to pay for sound recordings.

66. Finally, in considering whether and to what extent to phase in rates under the fourth factor, it is necessary as well to consider the disruptive effect on the record industry and on artists of any delay in providing them compensation that satisfies the other statutory criteria. Prior tribunals have considered the extent to which the establishment of an unreasonable fee here will affect other rates that are not subject to the statutory license. *Juke Box Decision*, 46 Fed. Reg. at 889. To the extent the SDARS compete with other digital music providers who pay market rates -- and the SDARS concede that they vigorously compete with those services -- an

unduly low rate could warp the market, harming copyright owners and performers (in contravention of at least the first two statutory factors) and encourage inefficiencies in the marketplace to the detriment of copyright owners and the public. *See* SoundExchange PFOF Section III, VI.D.

67. In addition, the evidence establishes that the record industry is in a state of dramatic transformation, transitioning from a business model based predominantly on the sale of physical products to one dependent upon revenue from digital streams. *See* SoundExchange's PFOF at Section VI.D.7. The facts similarly establish that while revenue from digital streams has increased during this period, it has not done so at a rate or amount sufficient to offset these dramatic losses. *Id.;* Section II.C. Since the factual evidence establishes that the survival of the record industry depends on its ability to earn a fair return from digital revenue sources, as a matter of law adjustments to the rate under the fourth factor must account for the record companies' financial situation as well as the SDARS'. Moreover, in any event, any rate, regardless of its impact on the SDARS, must also be consistent with the other three statutory factors, including ensuring a fair return to copyright owners and performers -- at least above the level to compensate them for the opportunity cost caused by satellite radio.

68. In sum, the fourth statutory objective -- to minimize the disruptive impact on the structure of the industry -- does not require this Court to set an unfair rate that does not adequately compensate the copyright owners for their intellectual property. In particular, when examining the SDARS' negotiations for non-music content, it becomes exceedingly clear that an increased royalty rate -- one that fairly provides copyright owners with compensation for the value of their content -- will not pose a disruptive impact on the industry, just as these other multi-million dollar non-music content deals implicitly did not.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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BEFORE THE
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
	)	
ADJUSTMENT OF RATES AND TERMS FOR PREEXISTING SUBSCRIPTION SERVICES AND SATELLITE DIGITAL AUDIO RADIO SERVICES	)	**Docket No. 2006-1 CRB DSTRA**

THIRD AMENDED RATE PROPOSAL FOR SOUNDEXCHANGE, INC.

Pursuant to 37 C.F.R. § 351.4(a)(3), SoundExchange, Inc. ("SoundExchange"), through its undersigned counsel, hereby proposes the following rates for (1) the digital audio transmission of sound recordings by an eligible preexisting satellite digital audio radio service provider ("SDARS") operating under the statutory licenses set forth in 17 U.S.C. § 114; and (2) the making of ephemeral phonorecords necessary to facilitate transmissions by eligible SDARS, 17 U.S.C. § 112(e), during the period January 1, 2007 through December 31, 2012. Pursuant to 37 C.F.R. § 351.4(a)(3), SoundExchange reserves the right to alter or amend its rate proposal prior to or at the time of submission of findings and conclusions if warranted by the record.

I. ROYALTY RATES

A. Option A — Preferred Rate Structre

Each transmitting entity providing eligible preexisting satellite digital audio radio services shall pay a monthly fee ("Royalty") (to cover both the 17 U.S.C. § 114 performance license and the § 112(e)(1) license for making ephemeral copies) as follows:

1) The Royalty Amount. For each month, the Royalty shall equal the greater of (i) or (ii) below, as (ii) is adjusted pursuant to the CPI Increase set out in (3) below:

a) For every month that the SDARS has publicly reported that its number of Subscriptions is a number less than 9 million Subscriptions:

i) 8% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

ii) $0.85 per month per Subscription.

b) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 9 million Subscriptions and less than 11 million Subscriptions:

i) 10% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

ii) $1.15 per month per Subscription.

c) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 11 million Subscriptions and less than 13 million Subscriptions:

i) 12% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

ii) $1.45 per month per Subscription.

d) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 13 million Subscriptions and less than 15 million Subscriptions:

i) 14% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

ii) $1.80 per month per Subscription.

e) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 15 million Subscriptions and less than 17 million Subscriptions:

i) 17% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

ii) $2.25 per month per Subscription.

f) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 17 million Subscriptions and less than 19 million Subscriptions:

i) 20% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

ii) $2.65 per month per Subscription.

g) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 19 million Subscriptions:

i) 23% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

ii) $3.00 per month per Subscription.

2) Subscription. For purposes of the calculation of the royalty amount set out in (1) above, a "Subscription" means the number of ending or total ending subscribers reported by an SDARS in its publicly filed 10-Q or 10-K report or, in the event that an SDARS ceases to be publicly traded, such other public report as possesses similar indicia of reliability.

3) CPI Increases. Each year of the license period, beginning on January 1, 2008, the per subscriber rate shall increase according to the percent change in the CPI-U from November 1 of the year two years prior to the year in which payments are to be made to November 1 of the year prior to the year in which payments are to be made. For example, in January 2008 the rate shall be adjusted based on the percentage increase in the CPI-U from November 1, 2006 through November 1, 2007.

4) Ephemeral Fees. With respect to each of the rates specified above, the royalty payable under 17 U.S.C. § 112(e) for the making of ephemeral copies used solely by the SDARS Service to facilitate transmissions for which it pays royalties shall be deemed to be included within, and to comprise 8.8% of, such royalty payments.

5) Services Covered. For purposes of this section, SDARS shall include the services offered by XM Satellite Radio, Inc., and Sirius Satellite Radio, Inc., their successors and assigns (if such successors and assigns are eligible preexisting satellite digital audio radio services as defined in § 114(j)(10)), to the extent those services are making digital audio transmissions of sound recordings subject to § 114. Any other services offered by either entity shall not be covered by the rates set forth in this proposal.

B. Option B

As an alternative to the preferred rate structure set forth above in "Option A," SoundExchange hereby proposes the following[1]:

Each transmitting entity providing eligible preexisting satellite digital audio radio services shall pay a monthly fee ("Royalty") (to cover both the 17 U.S.C. § 114 performance license and the § 112(e)(1) license for making ephemeral copies) as follows:

1) The Royalty Amount. For each month, the Royalty shall equal the amount set out below, adjusted pursuant to the CPI Increase set out in (4) below:

a) For every month that the SDARS has publicly reported that its number of Subscriptions is a number less than 9 million Subscriptions, a Royalty of $0.0000028 per Subscription per month for each Broadcast of a Sound Recording for the first 150,000 Sound Recordings Broadcast each month, and $0.0000008 per Subscription per month for each Broadcast of a Sound Recording in excess of 150,000 Sound Recording Broadcasts each month.

b) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 9 million Subscriptions and less than 11 million Subscriptions, a Royalty of $0.0000038 per Subscription per month

[1] This Option B is not SoundExchange's preferred proposed rate structure and is being proposed only in the event that the Judges prefer a per-play or per-broadcast/per-subscriber metric. The methodology underpinning this approach, as well as a discussion of the potential deficiencies and pitfalls in using any per-play or per-broadcast metric, are set forth in the Written Rebuttal testimony of Dr. Michael Pelcovits, at 19-26. The royalties in Option B are calculated to result in the same royalty payments as set out in Option A above, assuming the same number of sound recording broadcasts as in 2006, based on the annual compensable plays assumed in the Rebuttal Testimony of Dr. John R. Woodbury, at 22, with 50% of the royalty recovered in the first 150,000 sound recordings each month, and 50% of the royalty recovered in the remaining sound recordings broadcast each month.

for each Broadcast of a Sound Recording for the first 150,000 Sound Recordings Broadcast each month, and $0.0000011 per Subscription per month for each Broadcast of a Sound Recording in excess of 150,000 Sound Recording Broadcasts each month.

c) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 11 million Subscriptions and less than 13 million Subscriptions, a Royalty of $0.0000048 per Subscription per month for each Broadcast of a Sound Recording for the first 150,000 Sound Recordings Broadcast each month, and $0.0000014 per Subscription per month for each Broadcast of a Sound Recording in excess of 150,000 Sound Recording Broadcasts each month.

d) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 13 million Subscriptions and less than 15 million Subscriptions, a Royalty of $0.0000060 per Subscription per month for each Broadcast of a Sound Recording for the first 150,000 Sound Recordings Broadcast each month, and $0.0000018 per Subscription per month for each Broadcast of a Sound Recording in excess of 150,000 Sound Recording Broadcasts each month.

e) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 15 million Subscriptions and less than 17 million Subscriptions, a Royalty of $0.0000075 per Subscription per month for each Broadcast of a Sound Recording for the first 150,000 Sound Recordings Broadcast each month, and $0.0000022 per Subscription per month for each Broadcast of a Sound Recording in excess of 150,000 Sound Recording Broadcasts each month.

f) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 17 million Subscriptions and

less than 19 million, a Royalty of $0.0000088 per Subscription per month for each Broadcast of a Sound Recording for the first 150,000 Sound Recordings Broadcast each month, and $0.0000026 per Subscription per month for each Broadcast of a Sound Recording in excess of 150,000 Sound Recording Broadcasts each month.

g) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 19 million Subscriptions, a Royalty of $0.0000100 per Subscription per month for each Broadcast of a Sound Recording for the first 150,000 Sound Recordings Broadcast each month, and $0.0000030 per Subscription per month for each Broadcast of a Sound Recording in excess of 150,000 Sound Recording Broadcasts each month.

2) Subscription. For purposes of the calculation of the royalty amount set out in (1) above, a "Subscription" means the number of ending or total ending subscribers reported by an SDARS in its publicly filed 10-Q or 10-K report, or, in the event that an SDARS ceases to be publicly traded, such other public report as possesses similar indicia of reliability.

3) Broadcast. For purposes of the calculation of the royalty amount set out in (1) above, a "Broadcast" is an audio transmission made by an SDARS operating under the statutory licenses set forth in 17 U.S.C. § 114 of a performance of a Sound Recording, or of any part of a Sound Recording.[2] Sound Recording has the meaning it has in 17 U.S.C. §§ 106, 114, and includes, without limitation, recordings subject to the statutory license performed on the SDARS' music, comedy, children's, sports or other channels.

[2] Only for the purposes of this Royalty Rate, "Broadcast" therefore has a different meaning than it has in 17 U.S.C. §114(j)(3). "Broadcast" refers to each Sound Recording performed by an SDARS, without regard to the number of subscribers that may be receiving or listening to that Broadcast.

4) CPI Increases. Each year of the license period, beginning on January 1, 2008, the Royalty rate shall increase according to the percent change in the CPI-U from November 1 of the year two years prior to the year in which payments are to be made to November 1 of the year prior to the year in which payments are to be made. For example, in January 2008 the rate shall be adjusted based on the percentage increase in the CPI-U from November 1, 2006 through November 1, 2007.

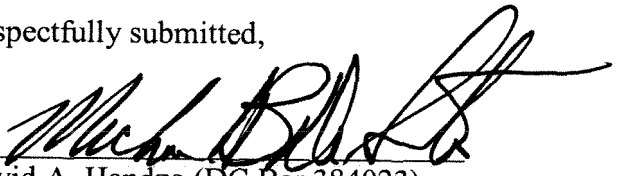
5) Ephemeral Fees. With respect to each of the rates specified above, the royalty payable under 17 U.S.C. § 112(e) for the making of ephemeral copies used solely by the SDARS Service to facilitate transmissions for which it pays royalties shall be deemed to be included within, and to comprise 8.8% of, such royalty payments.

6) Services Covered. For purposes of this section, SDARS shall include the services offered by XM Satellite Radio, Inc., and Sirius Satellite Radio, Inc., their successors and assigns (if such successors and assigns are preexisting satellite digital audio radio services as defined in § 114(j)(10)), to the extent those services are making digital audio transmissions of sound recordings subject to § 114. Any other services offered by either entity shall not be covered by the rates set forth in this proposal.

II. TERMS

SoundExchange proposes terms as described in the written direct and rebuttal statements of Barrie Kessler and as set forth in the attached Proposed Regulatory Language for Terms for Preexisting Satellite Digital Audio Radio Services. Pursuant to Section 351.4(a)(3), SoundExchange reserves the right to propose alternative or additional terms prior to or at the time of submission of findings and conclusions.

Respectfully submitted,

By 

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Dated: July 23, 2007

CERTIFICATE OF SERVICE

I, Albert Peterson, hereby certify that a copy of the foregoing motion has been served this 6th day of August, 2007 by electronic mail and overnight mail to the following persons:

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REGULATORY LANGUAGE IMPLEMENTING SOUNDEXCHANGE'S PROPOSED RATES AND TERMS

PART 38_ -- RATES AND TERMS FOR SUBSCRIPTION TRANSMISSIONS AND THE REPRODUCTION OF EPHEMERAL RECORDINGS BY PREEXISTING SATELLITE DIGITAL AUDIO RADIO SERVICES

§ 38_.1 General

(a) Scope. This part 38_ establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Licensees in accordance with the provisions of 17 U.S.C. § 114, and the making of Ephemeral Recordings by Licensees in accordance with the provisions of 17 U.S.C. § 112(e), during the period January 1, 2007, through December 31, 2012.

(b) Legal compliance. Licensees relying upon the statutory licenses set forth in 17 U.S.C. § 112 and § 114 shall comply with the requirements of those sections, the rates and terms of this part, and any other applicable regulations.

(c) Relationship to voluntary agreements. Notwithstanding the royalty rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this part to transmission within the scope of such agreements.

§ 38_.2 Definitions

For purposes of this part, the following definitions shall apply:

(a) "Collective" is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2007-2012 license period, the Collective is SoundExchange, Inc.

(b) "Copyright Owners" are sound recording copyright owners who are entitled to royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. § 112(e) and § 114(f).

(c) "Ephemeral Recording" is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. § 114(f), and subject to the limitations specified in 17 U.S.C. § 112(e).

(d) "Licensee" is a person that has obtained a statutory license under 17 U.S.C. § 114, and the implementing regulations, to make transmissions over a preexisting satellite digital audio radio service ("SDARS") (as defined in 17 U.S.C. 114(j)(10)), and has obtained a statutory license under 17 U.S.C. § 112(e), and the implementing regulations, to make Ephemeral Recordings for use in facilitating such transmissions.

(e) "Performers" means the independent administrators identified in 17 U.S.C. § 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. § 114(g)(2)(D).

(f) "Qualified Auditor" is a Certified Public Accountant.

(g) "Revenue" is all revenue paid or payable to an SDARS that arises from the operation of the SDARS service, including but not limited to subscription revenue, advertising and sponsorship revenue, and all other revenue related to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10), and excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services, as defined in 17 U.S.C. § 114(j)(10).

(h) "Subscription" is, as used in Section 38_.3(a)(1), the number of ending or total ending subscribers reported by an SDARS in its publicly filed 10-Q or 10-K report, or, in the event that an SDARS ceases to be publicly traded, such other public report as possesses similar indicia of reliability.

(i) "Term" means the period commencing January 1, 2007 and continuing through December 31, 2012.

§ 38_.3 Royalty fees for the public performance of sound recordings and for ephemeral recordings

(a) Royalty rates and fees for eligible digital transmissions of sound recordings made pursuant to 17 U.S.C. § 114 by means of digital audio transmissions through a Licensee's SDARS, and the making of ephemeral recordings pursuant to 17 U.S.C. § 112 to facilitate digital audio transmissions through a Licensee's SDARS, are as follows:

(1) The Royalty Amount. For each month, a Licensee shall pay a monthly fee ("Royalty") equal to the greater of (i) or (ii) in subparts (a) through (g) below, as appropriate, as (ii) is adjusted pursuant to the CPI Increase set out in (2) below:

(a) For every month the SDARS has publicly reported that its number of Subscriptions is a number less than 9 million Subscriptions:

(i) 8% of all revenue paid or payable to the SDAR, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

(ii) $0.85 per month per Subscription.

(b) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 9 million Subscriptions and less than 11 million Subscriptions:

(i) 10% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

(ii) $1.15 per month per Subscription.

(c) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 11 million Subscriptions and less than 13 million Subscriptions:

(i) 12% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

(ii) $1.45 per month per Subscription.

(d) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 13 million Subscriptions and less than 15 million Subscriptions:

(i) 14% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

(ii) $1.80 per month per Subscription.

(e) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 15 million Subscriptions and less than 17 million Subscriptions:

(i) 17% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

(ii) $2.25 per month per Subscription.

(f) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 17 million Subscriptions and less than 19 million Subscriptions:

(i) 20% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

(ii) $2.65 per month per Subscription.

(g) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 19 million Subscriptions:

(i) 23% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

(ii) $3.00 per month per Subscription.

(2) CPI Increases. Each year of the license period, beginning on January 1, 2008, the per subscriber rate shall increase according to the percent change in the CPI-U from November 1 of the year two years prior to the year in which payments are to be made to November 1 of the year prior to the year in which payments are to be made. For example, in January 2008 the rate shall be adjusted based on the percentage increase in the CPI-U from November 1, 2006 through November 1, 2007.

(3) Ephemeral Fees. With respect to each of the rates specified above, the royalty payable under 17 U.S.C. § 112(e) for the making of ephemeral copies used solely by the SDARS Service to facilitate transmissions for which it pays royalties shall be deemed to be included within, and to comprise 8.8% of, such royalty payments.

(4) Services Covered. For purposes of this section, SDARS shall include the services offered by XM Satellite Radio, Inc., and Sirius Satellite Radio, Inc., their successors and assigns (if such successors and assigns are preexisting satellite digital audio radio services as defined in § 114(j)(10)), to the extent those services are making digital audio transmissions of sound recordings subject to § 114(j)(10). Any other services offered by either entity shall not be covered by the rates set forth herein.

§ 38_.4 Terms for making payment of royalty fees and statements of account

(a) Payment to the Collective. A Licensee shall make the royalty payments due under § 38_.3 to the Collective.

(b) Designation of the Collective.

(1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Licensees due under § 38_.3 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. § 112(e) or § 114.

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Judges designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. § 112(e) or § 114 that have themselves authorized such Collective.

(ii) The Copyright Royalty Judges shall publish in the Federal Register within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) Monthly payments. A Licensee shall make any payments due under § 38_.3 on a monthly basis on or before the 45th day after the end of each month, except that payments due under § 38_.3 for the period beginning January 1, 2007, through the last day of the month in which the Copyright Royalty Judges issue their final determination adopting these rates and terms shall be due 45 days after the end of such period. All payments shall be rounded to the nearest cent.

(d) Late payments, statements of account and reports of use. A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account and/or report of use received by the Collective after the due date. Late fees shall accrue separately for each of the above components (payment, statements of account, and reports of use) from the due date until each such component is properly received by the Collective.

(e) Statements of account. Any payment due under § 38_.3 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(3) The handwritten signature of a duly authorized agent of the Licensee;

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) The title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

"I, the undersigned officer or representative of the Licensee, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence."

(f) Distribution of royalties.

(1) The Collective shall promptly distribute royalties received from Licensees to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the reports of use requirements for Licensees contained in § 38_.9 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (f)(1) of this section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with Section 38_.8.

(g) Retention of records. All books and records (including but not limited to source data) of a Licensee and of the Collective relating to calculation, payment and distribution of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 38_.5 Confidential information

(a) Definition. For purposes of this part, "Confidential Information" shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) Exclusion. Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) Use of Confidential Information. In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) Disclosure of Confidential Information. Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of

performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee's statement of account pursuant to § 38_.6 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 38_.7;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. § 112(e) and § 114(f) by the Licensee whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. § 112(e) and § 114(f) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) Safeguarding of Confidential Information. The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 38_.6 Verification of royalty payments

(a) General. This section prescribes procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) Frequency of verification. The Collective may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) Notice of intent to audit. The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) Acquisition and retention of report. The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of

not less than 3 years.

(e) Acceptable verification procedure. An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) Consultation. Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) Costs of the verification procedure. The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 38_.7 Verification of royalty distributions

(a) General. This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) Frequency of verification. A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) Notice of intent to audit. A Copyright Owner or Performer must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) Acquisition and retention of report. The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) Acceptable verification procedure. An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards

by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) Consultation. Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) Costs of the verification procedure. The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 38_.8 Unclaimed funds

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this part, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. § 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State, including but not limited to state escheat statutes.

§ 38_.9 Reports of use

(a) Reports of Use. Licensees shall deliver to SoundExchange on a monthly basis notice of use of their sound recordings on all channels.

(b) Delivery and Format. Licensees shall deliver Reports of Use to SoundExchange by no later than the 45th day after the close of each month. Unless otherwise agreed to by a Licensee and the Collective, Reports of Use shall be delivered and formatted in accordance with the Copyright Royalty Judges' regulations for the delivery and format of Reports of Use of sound recordings for the statutory licenses issued on October 6, 2006 and embodied at 79 Fed. Reg. 59010.

(c) Content.

(1) A "Report of Use of Sound Recordings under Statutory License" shall be identified as such by prominent caption or heading, and shall include census reporting of a Licensee's actual playlist for each channel and each day of the reported month. Each playlist shall include a consecutive listing of every recording actually transmitted, including musical, spoken word and comedy recordings, and shall contain the following information in the following order for all sound recordings, including sound recordings played on news, talk, sports or other non-music

channels, and including sound recordings played in programming provided to a Licensee by a third party:

(A) The name of the service or entity;

(B) The channel;

(C) The sound recording title;

(D) The featured recording artist, group, or orchestra;

(E) The retail album title;

(F) The marketing label of the commercially available album or other product on which the sound recording is found;

(G) The catalog number;

(H) The International Standard Recording Code (ISRC) embedded in the sound recording, where available and feasible;

(I) Where available, the copyright owner information provided in the copyright notice on the retail album or other product (e.g., following the symbol ℗ (the letter P in a circle) or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual sound recording;

(J) The date of transmission;

(K) The time of transmission; and

(L) The release year of the retail album or other product (as opposed to an the individual sound recording), as provided in the copyright notice on the retail album or other product (e.g., following the symbol © (the letter C in a circle), if present, or otherwise following the symbol ℗ (the letter P in a circle).

(d) Signature. Reports of Use shall include a signed statement by the appropriate officer or representative of the Licensee attesting, under penalty of perjury, that the information contained in the Report is believed to be accurate and is maintained by the Service in its ordinary course of business. The signature shall be accompanied by the printed or typewritten name and title of the person signing the Report, and by the date of signature.

(e) Documentation. Licensees shall, for a period of at least three years from the date of delivery of the Report of Use, keep and retain a copy of the Report of Use.

(f) Late reports of use. Licensees shall pay late fees of 1.5% per month of the revenue owed for the period to which the report of use corresponds, or the highest lawful rate, whichever is lower,

for any report of use received by the Collective after the due date. Late fees shall accrue from the due date until the report of use is received by the Collective.