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**

REPLY CONCLUSIONS OF LAW OF SOUNDEXCHANGE, INC.

I. INTRODUCTION

1. The SDARS' Proposed Conclusions of Law are remarkable in many respects, but one overriding one: they turn copyright law (including the Copyright Clause, the relevant statutes (the DPRA and DMCA), legislative history, and the § 801(b) factors) on its head. Throughout their Proposed Conclusions, the SDARS present a picture of the law that misinterprets and misrepresents relevant case law, warps the legislative history of the DPRA and DMCA, and misapplies the case law to the facts of this case. As a result -- and not surprisingly -- their legal conclusions conflict not only with the objectives of the statutory scheme governing the compulsory license for sound recordings, but also with a long line of precedent from the Supreme Court, circuit courts, the Librarian of Congress, and the Copyright Royalty Tribunal expounding upon the purposes of copyright law in general, the DPRA and DMCA, and the § 801(b)(1) factors.

2. The SDARS build their legal conclusions upon a fundamentally flawed premise that the statutory license for performances of sound recordings embodies a congressional mandate to encourage new technologies by allowing them to pay royalties at zero or near zero rates for the use of the sound recordings that form the foundation of their service. *See, e.g.*, SDARS COL at ¶¶ 135, 141 (arguing the rate must be set to "avoid undermining the incentive to invest in innovative technologies"). Based on this misguided view of the law -- a view that is in no way supported by the Copyright Act, legislative history or the case law interpreting the statutory objectives -- the SDARS reach the wholly untenable conclusion that the record companies and artists should receive virtually nothing so that the SDARS can pay huge sums of money to the likes of Howard Stern and Martha Stewart, can pay subsidies to automotive and

retail partners, and can make certain that every investor in the company since its inception receives a competitive return on investment. On a very basic level, their conclusions are that:

- paying the record companies and artists near nothing will encourage the creation and dissemination of *more* sound recordings;
- a rate of "near zero" provides a *fair* return to the record industry which provides to the SDARS their most valuable content, when Howard Stern gets [redacted] million,[1] Major League Baseball gets [redacted] million, National Football League gets [redacted] million, Fox News gets [redacted] million, NASCAR gets [redacted] million, Oprah gets [redacted] million, and even Howard Stern's manager gets [redacted] million in licensing fees, SX FOF at ¶ 240;
- paying record companies and artists next to nothing adequately reflects the creative contributions as well as the costs and risks the record industry has endured and continues to endure in creating the sound recordings upon which the SDARS service is based;
- a rate of near zero is required because the Court must ensure that all investors in the SDARS business from its inception receive a competitive rate of return by 2012 if possible, and all future investors in future technologies must be assured that they can exploit copyrighted sound recordings at little or no cost.

These conclusions are absurd. And as discussed below, not only do they lack all basis in logic, but they also lack any support in the law.

3. In addition to their flawed interpretation of the law, the SDARS mischaracterize SoundExchange's position. As discussed in more detail below, the SDARS' claim that SoundExchange has argued that the four statutory factors require the setting of a market rate is incorrect. Rather, SoundExchange's view -- consistent with the interpretation of the § 801(b) factors by prior tribunals -- is that the Court should begin by ascertaining the marketplace rate

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[1] In SoundExchange's Findings of Fact, it inadvertently excluded from the total cash licensing fees for Stern the [redacted] million signing bonus that Howard Stern and his manager collectively received; thus, the cash payment number used in the findings of fact -- [redacted] million -- should actually have been the more accurate [redacted] million. *See* SX FOF p.73 & ¶¶ 1128, 1130. This figure does not include *any* of the [redacted] to which Stern and his manager are entitled pursuant to the terms of the deal. Once these terms are factored in, the total value of the deal is actually [redacted] million. SX FOF at ¶ 578 & n.24.

through benchmarks or other marketplace analogies and then must adjust that rate consistent with the statutory factors, ultimately reaching a rate that may or may not be a marketplace rate. SX COL Section II. Consistent with that approach, SoundExchange has submitted a rate proposal that begins well below its marketplace benchmarks, increasing as a percentage of the SDARS revenue (whether expressed as a percentage of revenue or a per broadcast per customer rate) as the SDARS grow, face rapidly declining risks, and have a greater ability to pay.

4. As discussed in more detail below, and in contrast to the SDARS' Proposed Conclusions of Law, SoundExchange's presentation of the law is consistent with the cases that have interpreted the DPRA, the DMCA and the § 801(b) factors. Among other things, SoundExchange's proposed conclusions of law make clear that:

- consistent with numerous Supreme Court copyright decisions and all prior decisions applying the § 801(b) factors, it is compensation to those who create copyrighted works that drives both their creation and dissemination;
- a fair return to the copyright owner and a fair income to the copyright user can best be assessed by looking to marketplace analogies or benchmarks, as each of the prior tribunals has held;
- the risks, costs, and investment of copyright owners and performers, as well as the SDARS, must be evaluated based on all of their investments and risks, not simply the "incremental" ones, and can only be assessed by considering the expected return on those investments over the long-term;
- whether a royalty rate has a disruptive impact can only be evaluated based on the long-term impact of the rate on the viability of the companies at issue here; claims that past investors (going back more than a decade) may be disappointed, or that the rate should be manipulated so that the SDARS achieve a specified financial result by 2012 or some other arbitrarily set date have no place here;
- with respect to each of the statutory factors, although they do not compel marketplace rates, nonetheless marketplace rates provide a useful measure against which any assessment of a "reasonable rate" should be judged.

5. Ultimately, the parties present to the Court a stark choice as to what is a "reasonable rate" -- the end result to be obtained from application of the statutory factors. In the

SDARS' view, a "reasonable rate" is one in which billion dollar companies such as the SDARS, whose customers will enjoy something in the order of 2 trillion sound recordings over the rate term, will expend zero or near zero on sound recordings, even though the SDARS have expended and continue to expend hundreds of millions of dollars each year for non-music content that, by every measure, is less valuable to their service than sound recordings, and even though the SDARS' competitors pay significant percentages of their revenues for the sound recordings that they exploit. In SoundExchange's view, a "reasonable rate" consistent with the evidence in this proceeding and the § 801(b) factors is one that begins well below a marketplace rate, but increases over time as the SDARS' revenues continue to increase, ultimately reaching a rate that is closer to, but still below, the marketplace benchmarks presented by SoundExchange's economists.

II. THE OBJECTIVES OF COPYRIGHT LAW SUPPORT COMPENSATION TO COPYRIGHT OWNERS AND PERFORMERS, NOT NEAR ZERO RATES TO THOSE WHO USE CREATIVE WORKS

6. The SDARS devote several pages of their conclusions of law to discussing the purposes underlying copyright law, and they regularly reference those purposes throughout their conclusions. *See* SDARS COL at ¶¶ 1-14, 27-39, 61-64, 119-121, 149. Their recitation can best be described as reading copyright law in a world where everything is opposite what it should be. The lengths to which the SDARS go to upend copyright law are so striking that they must be taken as a reflection of the weakness of their factual case: unless copyright law means the exact opposite of what it does, the SDARS cannot justify the near zero rates that they propose.

7. SoundExchange agrees with the SDARS that the objectives advanced by copyright law are public ones. Those objectives, however, are not advanced, as the SDARS suggest, by giving those who use creative works the lowest possible royalty rate. *See, e.g.*,

SDARS COL at ¶ 69 (arguing that "the availability of works to the public will be maximized if rates are as low as possible"). Rather, the core public purposes of copyright law are advanced primarily, if not exclusively, by ensuring adequate compensation to authors and copyright owners for their labors. That is clear from the text of the Copyright Clause itself, which notes that, not only is its purpose to "promote the Progress of Science and useful Arts," U.S. Const. Art. I, § 8, cl. 8, but the means by which this purpose is advanced is by "securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

8. Thus, the Supreme Court has repeatedly held that providing protection for creative works and ensuring compensation to authors is the means by which this public purpose is advanced. *See infra*, Section V.A.1; *Sony Corp. of America v. Universal City Studios,* 464 U.S. 417, 429 (1984) ("'[R]eward to the author or artist serves to induce release to the public of the products of his creative genius.'") (*quoting United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948)). Indeed, the Supreme Court has made clear that compensating authors does not merely induce creation of copyrighted works, but it also best promotes their "availability." *Twentieth Century Music v. Aiken,* 422 U.S. 151, 156 (1975) (compensating authors "serve[s] the cause of promoting broad public availability of literature, music, and the other arts").

9. Nothing in the Constitution or the Copyright Act suggests that an objective of copyright law is to ensure low cost use of creative works. Indeed, such an objective is the antithesis of the Copyright Clause and the statutes at issue here. As a federal court held in interpreting Section 114, the very statutory provision at issue here,

> copyright law is an issue which the framers of the Constitution thought important enough to address in the document which sets out the framework of our legal system. *See* U.S. Const. art. I, § 8 cl. 8. The importance of guaranteeing secure copyrights has been with this nation since its earliest years. The seriousness with

> which courts should approach any weakening of copyright protections stems from the fact that copyright law is not "a tax on creativity," as Lord Macaulay once branded it, Thomas B. Macaulay, Speech before the House of Commons (Feb. 5, 1841) in VIII THE WORKS OF LORD MACAULAY 195, 201 (Trevelyan, ed. 1879), but a complex system designed to benefit not just the holders of copyrights but society as a whole. *See* Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. Copyright Soc'y U.S.A. 1 (1997), at 4-5. "Copyright is a law about creativity; it is not, and should not become, merely a law for the facilitation of consumption." *Id.*

Bonneville Intern. Corp. v. Peters, 153 F.Supp.2d 763, 785 (E.D.Pa. 2001), *aff'd*, 347 F.3d 485 (3d Cir. 2003).

10. The SDARS attempt to revise the purpose of copyright law by arguing that "dissemination" -- as distinct from creation -- is a purpose of copyright law and that the only dissemination of relevance is exploitation of creative works by them, not the dissemination by the authors themselves (or even all of the numerous other channels of distribution licensed by authors). They therefore contend that dissemination requires low rates for them. SDARS COL at ¶ 69. However, this contention turns copyright law on its head. As the cases make clear, copyright law is concerned with securing investments necessary to create copyrighted works and give them commercial life. Typically it is authors who make those investments. Consequently, the Supreme Court has repeatedly held that compensation *to authors* encourages *both* creation and dissemination, and that inadequate compensation to authors will ensure that neither occurs -- to the detriment of the public. *Eldred v. Ashcroft*, 537 U.S. 186, 206-07 (2002). Elevating the interests of a small class of users who seek to distribute the creative works of others over the interests of the creators themselves will result in less creation and less dissemination. *Harper & Row Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 559 (1985) (explaining that the impact of expanding rights of copyright users will mean that "the public [soon] would have nothing worth reading.") (internal quotation marks and citations omitted). The objectives of creating

copyrighted works and disseminating them are both advanced in this proceeding primarily by ensuring adequate compensation to the record companies and artists.

11. There is thus no basis in the Constitution or the Copyright Act to conclude that the goals underlying copyright law will best be advanced by a zero or near zero rate here. Not surprisingly, in proceedings under the § 801(b) factors, the Librarian (citing the Supreme Court) has held that, although the benefit of copyright is a public one, the goal of fostering creation and *dissemination* of creative works is achieved "by allowing the copyright owners to receive a fair return for their labor." *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings* ("PES I"), 63 Fed. Reg. 25394, 25406 (May 8, 1998) (citing and quoting *Twentieth Century Music v. Aiken,* 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.'")). Similarly, the CRT found in the 1981 mechanicals proceeding that encouraging the creation and dissemination of musical compositions required a royalty rate that would "afford songwriters a financial and not merely a psychic reward for their creative efforts." *Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords; Rates and Adjustment of Rates* ("Phonorecords"), 46 Fed. Reg. 10466, 10479 (Feb. 3, 1981). *See also PES I*, 63 Fed. Reg. at 25406 (discussing same).

III. THE PURPOSE OF THE DPRA AND THE DMCA WAS TO ENSURE COMPENSATION TO COPYRIGHT OWNERS AND PERFORMERS, NOT TO PROMOTE THE DEVELOPMENT OF NEW TECHNOLOGIES THROUGH LOW RATES

12. The SDARS assert that "[v]aluing the statutory license at issue in this proceeding must be done with an eye toward Congress' objectives" in creating the statutory right. SDARS COL at ¶ 15. But they turn Congress' objectives on their head, and contort the statutory factors

to fit a vision of the objectives of the copyright law that has no basis in Congress' objectives. This argument infects their discussion of each of the statutory factors. *See, e.g.*, SDARS COL at ¶¶ 64, 119-121.

13. To the extent that the Court takes into consideration the objectives behind the DPRA and DMCA when analyzing the statutory factors, those objectives counsel a higher, rather than lower, rate in this proceeding, because Congress' paramount objective in enacting the DPRA and the DMCA was to protect the interests of sound recording copyright owners and performers whose livelihood was threatened by new technologies. Nothing in the DMCA or DPRA suggests that Congress desired a zero or near zero rate to be set for the SDARS, or any other statutory licensee. Moreover, it is ludicrous for the SDARS to argue here that Congress sought to encourage new technologies through the establishment of zero or near zero rates because Congress clearly chose the willing-buyer/willing-seller standard for all new technologies.

A. The Purpose of the DPRA and DMCA Was to Protect the Livelihoods of Copyright Owners and Performers Which Were Threatened by New Technologies, Such as the SDARS.

14. The legislative history of the DPRA and the DMCA could not be more clear: the purpose of the DPRA and DMCA was to ensure adequate compensation to copyright owners and performers whose works were being exploited in new ways and whose livelihoods were threatened by new technologies disseminating sound recordings in digital form -- such as the SDARS. The first section of the House Report that underlies the DPRA, entitled "Purpose and Summary," explains:

> The purpose of [the DPRA] is to ensure that performing artists, record companies and others whose livelihood depends upon effective copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative works are used. [The DPRA] does this by granting a limited right to

> copyright owners of sound recordings which are publicly performed by means of a digital transmission.

H.R. Rep. 104-274, at 10 (1995). Virtually identical language appears in the "purpose" section of the Senate Report. S. Rep. 104-128, at 10 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 356. Nowhere in its discussion of the statutory purpose does Congress suggest that its goal in enacting the DPRA was to encourage new technologies by setting low rates for their exploitation of the labor, creative efforts, and financial investment of copyright owners and performers.

15. Moreover, this clear purpose is reiterated throughout the legislative history of the DPRA, as Congress repeatedly explained that it was creating the performance right because services such as the SDARS posed a danger to the livelihood of copyright owners and performers and thereby would threaten the availability of creative works to the public:

> in the absence of appropriate copyright protection in the digital environment, the creation of new sound recordings and musical works could be discouraged, ultimately denying the public some of the potential benefits of the new digital transmission technologies. Current copyright law is inadequate to address all of the issues raised by these new technologies dealing with the digital transmission of sound recordings and musical works and, thus, to protect the livelihoods of the recording artists, songwriters, record companies, music publishers and others who depend upon revenues derived from traditional record sales.

H.R. Rep. 104-274, at 13. Once again, the Senate Report echoes the House Report on this point. S. Rep. 104-128, at 14.

16. Senator Feinstein, a co-sponsor of the DPRA, similarly stated upon the occasion of its passage:

> Why should the digital transmission businesses be making money by selling music when they are not paying the creators who have produced that music?
>
> If this should occur without copyright protection, investment in recorded music will decline, as performers and record companies produce recordings which are widely distributed without compensation to them. This would result in the decline of what presently constitutes one of America's most important, productive and competitive industries.

141 Cong. Rec. S11,945-04, 11,960 (daily ed. Aug. 8, 1995) (statement of Sen. Feinstein).

17. In enacting legislation to advance these purposes, Congress was reflecting the longstanding concern of the Copyright Office that

> [t]echnological changes have occurred that facilitate transmission of sound recordings to huge audiences. Satellite and digital technologies make possible the celestial jukebox, music on demand, and pay-per-listen services. . . . Sound recording authors and proprietors are harmed by the lack of a performance right in their works.

S. Rep. 104-128, at 11-12 (quoting comments of the Register).

18. In the DMCA, Congress reiterated that its purpose was to protect copyright owners and performers and to create a fair and efficient licensing system. As explained in the Conference Report, the modifications to the compulsory license were

> intended to achieve two purposes: first, to further a stated objective of Congress when it passed the Digital Performance Right in Sound Recordings Act of 1995 ("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. 105-769 at 79-80, *as reprinted in* 1998 U.S.C.C.A.N. 639.

19. In sum, Congress enacted the DPRA and the DMCA because new technologies, such as digitally transmitted subscription programming delivered via satellite, threatened the livelihood of copyright owners and performers. In interpreting 17 U.S.C. § 114, one federal court explained that

> [t]he motivating force behind Congress' creation of the limited public performance right was the desire to protect record companies and recording artists from a reduction of record sales threatened by technological developments, specifically interactive and subscription services made possible by the emergence of digital audio services capable of delivering high-quality transmissions of sound recordings.

Bonneville Intern. Corp., 153 F.Supp.2d at 767.

20. It is against this backdrop -- expressed concern with the record companies' and artists' "livelihood[s]" and recognition that new technologies "might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for use of their work" -- that the compulsory license for digital audio transmissions of sound recordings developed. S. Rep. 104-128 at 14-15. And it is against this same backdrop that this Court will determine the "reasonable" royalty rate in this proceeding.

B. The SDARS' Repeated Claim that the Statutory Factors Must Be Interpreted to Encourage the Development of New Technologies Is False.

21. Repeatedly throughout their findings, the SDARS argue that the legislative history of the DPRA and the DMCA requires that the Court set a rate that encourages new technologies. SDARS COL at ¶¶ 11, 30, 39, 64. This claim undergirds all of the SDARS' legal arguments and in particular much of Dr. Noll's analysis, including his claim that the first factor requires a zero or near zero royalty rate to encourage investment in new modes of distribution, and his claim that the second factor requires a zero or near zero rate because only such a rate will ensure that all past investors in the SDARS earn a competitive return and thereby encourage investors in future technology. SDARS COL at ¶ 64, 135-36, 147. That argument fails on multiple grounds.

22. First, the SDARS' entire argument is based on plucking a single paragraph out of an extensive legislative history and ignoring all of the rest, which we have set out above. SDARS COL at ¶¶ 11, 30, 64. But even the SDARS quoted paragraph is misleadingly taken out of context. The language repeatedly quoted by the SDARS concerning the potential of new technologies[2] is immediately followed by a statement that Congress has concluded that only

[2] "These new digital transmission technologies may permit consumers to enjoy performances of a broader range of higher-quality recordings than has ever before been possible. These new

through copyright protection will the public receive any potential benefits at all from these technologies:

> However, in the absence of appropriate copyright protection in the digital environment, the creation of new sound recordings and musical works could be discouraged, ultimately denying the public some of the potential benefits of the new digital transmission technologies. Current copyright law is inadequate to address all of the issues raised by these new technologies dealing with the digital transmission of sound recordings and musical works and, thus, to protect the livelihoods of the recording artists, songwriters, record companies, music publishers and others who depend upon revenues derived from traditional record sales.

H.R. Rep. 104-274, at 13. *See also* S. Rep. 104-128 at 14 (same). Thus, even the isolated snippet of legislative history discussed by the SDARS demonstrates that Congress' primary purpose was to provide copyright owners with protection -- not to incentivize new technologies exploiting copyrights.

23. Second, the SDARS' claimed policy objective -- setting rates at low levels to encourage new digital technologies -- appears nowhere in the statutory text or the legislative history of the DPRA or the DMCA or even the 1976 Copyright Act (when the § 801(b) factors were originally enacted). To be sure, Congress expressed the view that it did not want to "hamper[] the arrival of new technologies," H.R. Rep. 104-274, at 14, but it achieved that objective by creating a statutory license (thereby removing the transaction costs of negotiating with thousands of copyright owners and performers) and establishing a fair and efficient system for resolving the licensing disputes, i.e., the former CARP process and now proceedings before this Court. Congress did not, as the SDARS repeatedly suggest, place an additional thumb on the scales of the statutory factors by suggesting that low rates are required to promote new

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technologies also may lead to new systems for the electronic distribution of phonorecords with the authorization of the affected copyright owners. Such systems could increase the selection of recordings available to consumers, and make it more convenient for consumers to acquire authorized phonorecords." H. Rep. 104-274, at 12. *See also* S. Rep. 104-128 at 14 (same).

technologies. Rather, Congress directed the Court to apply the statutory factors, as written, to digital music services without any bias toward "high" or "low" rates, other than those consistent with the statutory factors.[3]

24. Third, the policy objective advanced by the SDARS, even if could be found in the legislative history or the text of the statute, has no relevance to this proceeding. Nothing that the Court can do by interpreting the statutory factors will provide "incentive[s] to invest in innovative technologies" that the SDARS claim "section 801(b)(1) was designed to protect." SDARS COL at ¶ 135. The § 801(b)(1) factors have been superseded and continue to apply to digital audio transmissions by only 5 (now 4) business entities making transmissions in very specific ways. There can be no other SDARS and no other PSS services, and the § 801(b)(1) factors will be applied to no other types of services or technologies making digital audio transmission.

25. Congress did not grandfather the statutory conditions applicable to the SDARS because it wanted to encourage new technologies. To the contrary, that grandfathering is a protection of old technologies. As the SDARS concede and Congress made clear, the Congress grandfathered the SDARS because they had previously sought to enter the market under a specific set of conditions, and Congress wanted to preserve the same conditions and benefits when it amended the statute. H.R. Conf. Rep. 105-796 at 81 (1998). The decision to grandfather the SDARS was decidedly *not* to encourage others to enter the market based on some unspoken reliance interest that low rates would apply.

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[3] As the Librarian indicated in the PES I decision, the interest in not hampering the technology upon which the SDARS heavily rely is fully addressed in the § 801(b) factors by the fourth statutory factor, which requires the Court to consider whether a royalty rate will drive the SDARS' out of the business of providing digital music services. *PES I*, 63 Fed. Reg. at 25408.

26. Indeed, to the extent that Congress could be understood to be encouraging new technologies under the DPRA and DMCA, it is clear that Congress must have concluded that *marketplace rates under the willing buyer-willing seller* would encourage new technologies, because it is that rate standard -- and not the § 801(b) standard -- that Congress established to govern *every other technology* making digital audio transmissions. 17 U.S.C. § 114(f)(2)(C) (applying willing buyer-willing seller standard to new types of subscription services). This decision necessarily reflects both a decision by Congress that marketplace rates can be reasonable rates and that to the extent Congress sought to encourage the development of new technologies in the DPRA and DMCA, it believed marketplace rate would achieve that objective.

27. Setting a "low rate" here will not encourage the development of any technology or encourage new business entrants. It will only mean a low rate for the SDARS. Absent a rate that is so disruptive that it will cause the SDARS to cease offering music, nothing the Court does here will affect the number of distributors of music.

C. The History of the Sound Recording Performance Right Provides No Additional Guidance For Interpreting the Statutory Factors.

28. The SDARS spill a great deal of ink discussing the history of the sound recording performance right and cite to legislative history concerning Congress' decision not to require terrestrial broadcasters to pay sound recording performance royalties. SDARS COL at ¶¶ 15-39. That extended detour can have only one purpose -- to suggest to the Court that the sound recording performance right is somehow of lesser value and to attempt to associate the SDARS' subscription-based, commercial-free, multi-channel, nationwide, digital delivery of sound recordings with terrestrial radio's predominant offering, which is geographically limited, single channel, free-to-the-user, and interrupted by commercials. This history is not relevant in analyzing the statutory factors or for setting a reasonable rate in this proceeding.

29. As a threshold matter, the fact that there was no sound recording performance royalty until 1995 is of little consequence here -- there is no dispute that Congress has now created the right and the fact that Congress established the right in 1995 provides no basis for devaluing it today. Nothing in the statute or legislative history suggests that Congress believed the right was of less value because it was newly created. Indeed, Congress made clear both that it needed to establish this new right because of the threat posed by services like the SDARS and that it intended these new rights to be governed by existing principles of copyright law. As the House Report explained:

> New technological uses of copyrighted sound recordings are arising which require an affirmation of existing copyright principles and application of those principles to the digital transmission of sound recordings, to encourage the creation of and protect rights in those sound recordings and the musical works they contain.

H.R. Rep. 104-274, at 22.

30. Thus, although Congress exempted terrestrial radio from paying royalties under the performance right, it required the SDARS to pay royalties precisely because of the threat that the SDARS posed to sound recording copyright owners and performers, a threat which, as discussed in SoundExchange's Findings of Fact, has in fact come to fruition. *See* SX FOF Section V.E. Whatever Congress' views about the potential promotional value of terrestrial radio, Congress plainly concluded that entities making subscription digital audio transmissions were a threat to other revenue streams on which sound recording copyright owners and performers relied, and did not on balance simply promote the purchase of sound recordings. Congress therefore created this copyright in performances of sound recordings, expressly distinguishing the situation present with terrestrial radio, to protect against this substitution threat created by new digital services:

> An important rationale for enactment of this legislation is to address the potential impact on the prerecorded music industry of digital subscription and interaction services. The sale of many sound recordings and the careers of many performers have benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The radio industry has grown and prospered with the availability and use of prerecorded music. H.R. 1506 does not change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.
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> This legislation is a narrowly crafted response to one of the concerns expressed by representatives of the recording community, namely that certain types of subscription and interaction audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for use of their work. Subscription and interactive audio services can provide multi-channel offerings of various music formats in CD-quality recordings, commercial free and 24 hours a day.

H.R. Rep. 104-274, at 13. *See also* S. Rep. 104-128 at 14-15 (same). Congress specifically recognized that "changed circumstances: the commercial exploitation of new technologies in ways that may change the way prerecorded music is distributed to the consuming public," S. Rep. 104-128 at 15, compelled a different treatment here.

D. The Fact That Congress Created a Statutory License Does Not, By Itself, Suggest that Low Rates Are Required.

31. Notwithstanding the fact that the objectives of copyright law, the DPRA, and the DMCA so clearly support ensuring adequate compensation to authors in order to ensure both creation and dissemination, the SDARS nevertheless suggest that these overarching objectives are somehow changed by the existence of a statutory license here. SDARS COL at ¶¶ 27-34. At the heart of the SDARS' implausible and unsupported legal conclusions in this proceeding is their mistaken belief that the purpose of a compulsory license is to force copyright holders to make their creative works available at low rates to encourage as many people as possible to take those creative works and exploit them. SDARS COL ¶ 13. Their faulty logic appears to be that

because there is a statutory license at issue, Congress must have intended for the royalty to be low.

32. As we have just shown, nothing in the DPRA or DMCA remotely supports that conclusion. Instead, absent an indication to the contrary, the fundamental objective of compulsory licenses is "to facilitate the exploitation of copyrighted materials by removing the prohibitive transaction costs that would attend direct negotiations" between multiple copyright owners and copyright users, "while at the same time assuring copyright holders compensation for the use of their property." *National Broadcasting Co. v. Copyright Royalty Tribunal*, 848 F.2d 1289, 1291 (D.C. Cir. 1988) (addressing the compulsory license for retransmission of broadcast television signals). Specifically, the purpose of compulsory licenses is two-fold: first, "to encourage creativity by ensuring . . . benefits would accrue" to the authors, and second, to ensure copyright users could access the creative materials. *See Heilman v. Bell*, 583 F.2d 373, 376 (7th Cir. 1978). Compulsory licenses thus allow user access while "protect[ing] the . . . copyrightholder who can realize the full benefit of" his creative work. *Id.*

33. Thus, the existence of a statutory license suggests no bias in favor of "high" or low" rates. The SDARS at times intimate that the policy behind the statutory license was a fear of monopoly power, but there is nothing to suggest that monopoly rents are being obtained in the free marketplace, and no evidence in the statute or its legislative history that Congress established a statutory license based in any part on such a concern. Rather, as discussed below, the sole and explicit goals that Congress sought to advance were to ensure compensation to copyright owners and performers and to establish mechanisms for fair and efficient licensing, given the number of sound recording copyright owners at issue and the sheer number of licenses that would need to be obtained.

34. Nor is there any evidence in this proceeding to suggest that the marketplace for sound recordings is beset by monopoly power, Ricardian rents, or any of the concepts thrown out as theoretical possibilities by Dr. Noll. Noll WRT at 48-51, SDARS Trial Ex. 72. The SDARS' suggestion that marketplace agreements are inherently unfair due to undue market power by record companies founders for the same reasons that the identical arguments made by webcasters did -- there is no evidence in the record to suggest that record companies have undue market power. *Digital Performance Right in Sound Recordings & Ephemeral Recordings* ("*Webcasting II*"), 72 Fed. Reg. 24084, 42093 (May 1, 2007) (rejecting arguments about lack of competition in sound recording markets due to lack of evidence). Indeed, as in the webcasting case, the record establishes exactly the opposite because there is ample evidence of multiple sellers and multiple buyers in markets for sound recordings (as shown by the hundreds of agreements examined by Dr. Ordover). Ordover WDT at 3-4 & n.21, SX Trial Ex. 61.[4]

E. Pre-1972 Sound Recordings Are Encompassed By the Sections 114 and 112 Statutory Licenses

35. The SDARS have made the assertion, somewhat indirectly, that pre-1972 sound recordings are not covered by the statutory license. SDARS COL at ¶¶ 17-22. This novel and complex legal issue has never been raised or litigated in the context of §§ 114 and 112, and the SDARS provide little analysis and no case law to support their argument here.

36. As SoundExchange explains in its Reply Findings of Fact, SX RFOF Section VII.A.8., there is no need to address the merits of this novel and unresolved legal question because there is no basis in the record for doing so. The SDARS have not claimed any

[4] There is rich irony in the SDARS' suggestion that they need to be protected from monopoly when they have a government created duopoly that they are now seeking to transform into a monopoly.

"discount" on the statutory license as a result of their use of pre-1972 sound recordings, nor have they provided any persuasive evidence by which the Court could calculate such a discount.

37. If the Court nevertheless were to make the legal determination, it still could not rule for the SDARS on this issue. The plain text of Section 114 creates a statutory license for "sound recordings," a term defined in the statute without any reference to the date on which the sound recording was fixed. 17 U.S.C. § 114(d)(2). Nowhere in § 114 is there a limitation on the grant of the statutory license that says that the SDARS are permitted to reproduce and play some sound recordings, but not others. If pre-1972 sound recordings were not covered by the statutory license, it would mean that such sound recordings, generally subject to federal copyrights, *see* 17 U.S.C. § 301, would be governed by a patchwork of state laws, raising the possibility that the SDARS could be permitted to reproduce and perform pre-1972 sound recordings in some states, but not others. This result would be inconsistent with the intent of Congress at the time of the passage of the DPRSA in 1995 and the DMCA in 1998, which was to create an administrable blanket license that would best serve the public interest by striking a delicate balance between the interests of all copyright owners and nation-wide services such as the SDARS.

IV. SOUNDEXCHANGE FOLLOWED PAST PRECEDENT IN DEVELOPING ITS RATE PROPOSAL; THE SDARS DID NOT

A. Prior Tribunals Have Started With Marketplace Benchmarks And Evaluated Those Benchmarks According to the Statutory Objectives -- the Same Methodology That SoundExchange Follows to Reach Its Proposed Rate.

38. Despite the SDARS' mischaracterization, SoundExchange does not contend that a reasonable rate in this proceeding is necessarily a marketplace rate. SDARS COL at ¶ 46. In fact, as a review of SoundExchange's Third Amended Proposed Rate reveals, the rate that SoundExchange proposes as a "reasonable rate" under § 114(f)(1) for the SDARS' performance of sound recordings is one that is well *below* market rates.

39. Indeed, SoundExchange relies upon marketplace rates for the same purpose as prior tribunals that have set reasonable rates for compulsory licenses -- for identifying rates which can then be evaluated according to the § 801(b)(1) statutory criteria. As Dr. Ordover explained, absent use of marketplace benchmarks, it is impossible to apply the statutory factors to develop a numerical rate and, indeed, multiple courts have made clear that the second statutory factor *compels* consideration of marketplace benchmarks. SX FOF Section III.B. Thus, it is hardly a surprise that prior panels applying the § 801(b)(1) factors have held that it is appropriate to start with marketplace analogies and then adjust to account for the § 801(b)(1) factors -- ultimately to reach the result of "reasonable rates" as required by the Act. That is precisely what SoundExchange has done.

40. Prior panels that have determined reasonable rates pursuant to statutory licenses -- including all of the cases that the SDARS suggest the Court should follow in reaching its determination of a reasonable rate in this proceeding, *see* SDARS COL at ¶¶ 43-45 -- have employed analogous marketplace transactions as a starting point for determining a reasonable rate. The most recent case decided under the 801(b)(1) standard -- a case upon which the SDARS place much reliance in this proceeding, *see* SDARS COL at ¶¶ 44, 47-48 -- is directly on point. *See PES I*, 63 Fed. Reg. 25394. As the Librarian aptly explained in *PES I*, "[a] benchmark is a marketplace point of reference, and as such, it need not be perfect in order to be considered in a rate setting proceeding." 63 Fed. Reg. at 25404. The Librarian found "that the Panel correctly analyzed how to determine a reasonable rate under section 114." *Id.* at 25400. In so finding, the Librarian approved the same methodology for setting reasonable royalties as that advanced by SoundExchange:

> as a first step, determin[e] a range of possible rates after considering different proposed rates *based on negotiated licenses or analogous marketplace models. . .*

> . Once the Panel identified the useful models, it used the corresponding rate information to craft a range of potential royalty rates for the section 114 license, then chose the rate within the range which would further the stated statutory objectives.

Id. at 25396 (emphasis added). The United States Court of Appeals for the District of Columbia approved this "interpretation and application of the statute." *Recording Industry of America v. Librarian of Congress*, 176 F.3d 528, 529 (D.C. Cir. 1999).

41. Likewise, in a case establishing reasonable rates for the use of performing rights by jukebox operators -- determined pursuant to the same § 801(b)(1) statutory objectives governing this proceeding -- the Copyright Royalty Tribunal determined that a reasonable rate should be based "on marketplace analogies." *1980 Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players* ("*Juke Box Decision*"), 46 Fed. Reg. 884, 888 (Jan. 5, 1981). "While acknowledging that our rate cannot be directly linked to marketplace parallels, we find that *they serve as an appropriate benchmark* to be weighed together with the entire record and the statutory criteria." *Id.* (emphasis added). The Seventh Circuit approved this approach, endorsing the Tribunal's "weigh[ing of] the evidence derived from the marketplace analogies and other evidence specifically in light of the four statutory criteria of section 801(b) and arriv[ing] at a royalty rate." *Amusement & Music Operators Association v. Copyright Royalty Tribunal*, 676 F.2d 1144, 1157 (7th Cir. 1982). As the Seventh Circuit recognized, "[c]omparable rate analogies" -- i.e., use of marketplace benchmarks -- "have been repeatedly endorsed as appropriate ratemaking devices." *Id.*

42. Thus, while "[t]he standard for setting the royalty rate for the performance of a sound recording by a digital audio subscription service is not fair market value," nevertheless, where there are analogous marketplace benchmarks, panels establishing reasonable rates must nevertheless "consider[] the parties' presentations of *different rates negotiated in comparable*

marketplace transactions and first determine[] whether the proposed models mirror[] the potential market transactions which would take place to set rates for the digital performance of sound recordings. These benchmarks [a]re then evaluated in light of the statutory objectives to determine a reasonable royalty." *PES I*, 63 Fed. Reg. at 25399 (emphasis added). *See also Amusement & Music Operators*, 676 F.2d at 1157 ("[c]omparable rate analogies have been repeatedly endorsed as appropriate ratemaking devices"). This is precisely the methodology that SoundExchange followed in arriving at its proposed rates in this proceeding.

43. It is this methodology -- establishing where possible market analogies, or marketplace benchmarks, and adjusting in light of the § 801(b)(1) statutory factors -- that was "grandfathered" in for the SDARS when Congress amended the copyright laws in 1998. The SDARS' contrary contention that this grandfathering aimed to protect "the reliance interests" of the SDARS "in not being subjected to excessive copyright royalties" utterly belies logic. *See* SDARS COL at ¶ 39. First, at the time Congress amended the statute, *there was no rate at all* applicable to the SDARS; thus, it is illogical to argue that the amendment protected reliance on any particular *rate*, as opposed to a *process* for setting such rates. Second, the legislative history makes clear that the "reliance interest" that Congress was concerned with preserving was not reliance on any particular rate, but rather reliance on the "five conditions for eligibility for a statutory license," since the SDARS were developing their businesses pursuant to these conditions. H.R. Conf. Rep. 105-769 at 81. In fact, Congress explicitly stated that it was taking "no position" as to whether the existing PSS rate -- the *only* rate set under § 114(f)(1) at the time -- would apply to the SDARS at all. *Id.* at 85. It is thus wrong to suggest that the reliance interest Congress was concerned with when it grandfathered the SDARS under § 114(f)(1) was a concern with "excessive copyright royalties."

44. The SDARS rely heavily on the language of § 114(f)(1)(B) that the Court may consider "rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A)," arguing that this language supports the use of the PSS rate as a benchmark here. SDARS COL at ¶¶ 152-53. Congress, however, made clear that the Court has discretion to consider a wide range of evidence in applying the four factors and evaluating whether a prior agreement is "comparable." Congress emphasized 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. Thus, § 114(f)(1)(B) does not compel the Court to use the PSS rate or any other agreement as a benchmark -- especially where, as here, the PSS rate advanced by the SDARS is for a type of service that is not comparable and was based on an agreement made under circumstances that are not at all analogous.[5] See SX FOF Section VII.A.

45. At bottom, nothing in the statute or the legislative history concerning comparable agreements changes the proper analysis here. Consistent with prior panels, the Court should begin with an estimate of the marketplace value of the rights at issue and then adjust according to the four statutory factors.

[5] For example, if the Court had before it a recent example of an agreement between a major record company and one of the SDARS for a catalog-wide license, it might well be able to use such an agreement in its analysis of the statutory factors here. No such agreement exists.

B. Both of the SDARS' Benchmarks Are Fatally Flawed.

46. In contrast, the SDARS not only do not start with freely negotiated agreements, but rather they argue that the fair market value of sound recordings is actually irrelevant to this proceeding. The SDARS maintain that the 2003 PSS rate -- a rate negotiated in the shadow of litigation with no indication of how, or even whether, the § 801(b)(1) factors were applied -- is an appropriate benchmark for this proceeding. SDARS COL at ¶ 153. This rate is fatally flawed for all of the reasons set forth in SoundExchange's Findings of Fact. *See, e.g.*, SX FOF Section VII.A.

47. Even assuming that the 2003 PSS rate could be considered a prior § 801(b)(1) rate -- which is by no means clear -- the PSS services are not "comparable" for a host of reasons, not the least of which is that that the consumer value for the SDARS is dramatically different than the near zero consumer value of the PSS service.[6] As this Court has held, the value of sound recordings to a service is a derived demand based on the consumer value of that service. *See Webcasting II,* 72 Fed. Reg. at 24092 (explaining that the market for sound recordings as part of a digital music service is an "input market[] and demand for these inputs is driven by or derived from the ultimate consumer markets in which these inputs are put to use"). And nowhere do any of the experts for the SDARS consider changes in the market for sound recordings from 1997 or 2003 to the present. Herscovici WRT at 26, SX Trial Ex. 130.

48. As the Librarian has repeatedly made clear, rates for different services set under the statutory factors at a different time may be a poor reflection of currently-existing economic

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[6] Dr. Woodbury's "cost adjustment" has many flaws, not the least of which is that it is inconsistent with the D.C. Circuit's interpretation of the four statutory factors. In the 1981 mechanicals decision, the D.C. Circuit held that "[i]t is evident that the 'fairness' of the return to a songwriter for his creative effort cannot be defined by the traditional methods of cost of service ratemaking." *Recording Industry of America v. Copyright Royalty Tribunal*, 662 F.2d 1, 9 (D.C. Cir. 1981). Yet that is precisely what Dr. Woodbury attempts.

and industry conditions and trends. *See, e.g.*, Docket No. RF 2006-2, Memorandum Opinion at 4, n.7 (Oct. 20, 2006) (quoting *PES I*, 63 Fed. Reg. at 25405). This problem -- fatal to the SDARS' reliance on the PSS rate -- is compounded here because the SDARS have provided this Court with no evidence to suggest how the statutory factors may have affected the PSS rate in 2003 and how any such impact would be different for the SDARS today. Thus, the SDARS simply presume that both their service and the PSS promote the sale of sound recordings -- a critical claim that is wholly undermined by the record in this case. The SDARS' reliance on the PSS rate is therefore completely misplaced.

49. In addition to the 2003 PSS rate, the SDARS rely on the 1998 *PES I* decision in maintaining that the musical works royalty rate is "an appropriate benchmark for setting digital sound recording public performance rights" in this proceeding. SDARS COL at ¶¶ 157-158. Noticeably absent from the SDARS' discussion of this benchmark is any mention of this Court's outright rejection of musical works as a useful benchmark in determining reasonable rates for sound recordings. As this Court found in its recent Webcasting decision, "substantial empirical evidence shows that sound recording rights are paid multiple times the amounts paid for musical works rights." *Webcasting II*, 72 Fed. Reg. at 24094. Accordingly, this Court determined that "there is ample empirical evidence in the record to controvert [the] premise that the market for sound recordings and the market for musical works are necessarily equivalent." *Id.* at 24095.

50. The same logic applies with equal force in this proceeding. Regardless of the statutory standard that applies, a proceeding charged with setting the rate applicable to the performance of *sound recordings* should not rely on market rates for *musical works*, because the two markets are not comparable, and thus any reliance on the musical works rate as a benchmark is "fatally flawed." *Webcasting II*, 72 Fed. Reg. at 24094. *See also* SX FOF Section VII.B.

That is consistent with Congress' own policy judgment in 17 U.S.C. § 114(i), which specifies that rates set under the statutory licenses for sound recordings cannot be taken into account in any proceeding to set rates and terms for musical works. The equivalence argument the SDARS make cannot be squared with this congressional policy judgment.

51. Nor does the *PES I* proceeding provide any useful precedent for the use of the musical works rate here. As the Librarian recognized in the first Webcasting proceeding, the primary reason the Librarian focused on the musical works rate in the *PES I* proceeding was because there was little evidence about the value of digital uses of sound recordings; as the Librarian noted, evidence concerning the musical works benchmark had never been fully developed in the record of the *PES I* proceeding, and neither party had focused on it. *Determination of Rates and Terms for the Digital Performance of Sound Recordings & Ephemeral Recordings* ("*Webcasting I*"), 67 Fed. Reg. 45240, 45247 (July 8, 2002). The record distinguishing the value of musical works and sound recordings was clearly established only later in the *Webcasting I* proceeding and again in the recent *Webcasting II* proceeding; in each case, the record conclusively demonstrated that there is no basis to conclude that the value of sound recordings and the value of musical works are or should be the same.

52. Even if precedent had not foreclosed the argument the SDARS make here, the record does. First, the SDARS produced no evidence of any kind to support an argument that musical works and sound recordings should be compensated the same amounts. Thus, they did not even replicate the desultory attempt of the webcasters to argue that the rates paid for musical works correlate to those paid for sound recordings. Second, in contrast to the record from the PSS I proceeding (which found no persuasive evidence one way or the other concerning the relative values of sound recordings rights and musical works rights in the marketplace), there is a

large and unrebutted record in this proceeding that sound recording copyright owners are paid significantly more than musical works copyright owners and that, indeed, musical works copyright owners themselves do not even claim the "equivalence" in value that the SDARS here claim. Eisenberg WRT at 3-11, SX Trial Ex. 126. This is essentially the same record that led this Court to conclude that sound recordings frequently receive multiples of what musical works receive in the marketplace. *Webcasting II*, 72 Fed. Reg. at 24094-95. Third, the record amply distinguishes between the sound recording and musical works markets due to the differing role and investments of each copyright owner. Ciongoli WRT at 3-12, SX Trial Ex. 118.

V. APPLICATION OF THE STATUTORY OBJECTIVES RESULT IN A ROYALTY RATE SUCH AS THAT PROPOSED BY SOUNDEXCHANGE

53. Beginning from a flawed benchmark, the SDARS compound their error by advocating for an interpretation of the statutory factors that is both absurd on its face and foreclosed by the statute and past precedent. The SDARS contend that application of each of the § 801(b)(1) factors dictates adoption of royalty rates that are zero or "near zero." *See, e.g.*, SDARS FOF at 13, 23, 24, ¶ 202, Section V.C., ¶¶ 758, 857, 980. In reaching this conclusion, the SDARS mischaracterize and misinterpret relevant case law analyzing the statutory factors and then mis-apply the factors, *see infra* Section V & SX FOF Sections VII.A., VII.B, & VII.C. The final product of this flawed approach is rates that lack both credibility and reasonableness.

54. As discussed below and in SoundExchange Proposed Conclusions of Law, on the record of this proceeding, the statutory factors cannot be understood to compel a "near zero" royalty rate. Rather, application of the § 801(b)(1) factors to the evidence in the record yields a royalty rate, such as that proposed by SoundExchange, that begins at 8% of revenue (whether expressed as a percentage of revenue or a per performance per customer rate) and increases as a percentage of revenue as the SDARS increase their subscribership. Such a rate would advance

all of the statutory factors and would be decidedly below a market rate for most, if not all, of the term of this license.

A. Section 801(b)(1)(A): Maximizing The Availability of Creative Works to the Public

55. The SDARS' attempt to revise copyright law in favor of those who only distribute creative works of others is nowhere more evident than in their analysis of the first statutory factor. In analyzing this first statutory objective, the SDARS distort prior interpretations of copyright law to support their proposition that they should receive low rates so that they will disseminate sound recordings to more consumers and therefore that low rates will maximize the availability of copyright works created by others. SDARS COL at ¶¶ 58-66. As discussed above and in more detail below, closer examination of the law the SDARS cite (incompletely and thus misleadingly) undermines their argument in its entirety.

1. The Best Means of Promoting Creation and Dissemination of Sound Recordings Is By Adequately Compensating Copyright Owners and Performers.

56. The premise of the SDARS' argument is that copyright law needs both to create incentives for copyright owners and performers to create sound recordings, and incentives for the SDARS to disseminate them. As discussed in Section I, *supra*, that view is inconsistent with the Copyright Clause itself and with the Supreme Court's frequent examination of the objectives to be advanced by copyright law. *See supra* pp. 4-7. Low rates here will result in less creation and hence less dissemination.

57. The SDARS rely on the Supreme Court's decision in *Eldred vs. Ashcroft* for their arguments, but that case decisively rejects the very claims the SDARS make here. SDARS COL at ¶¶ 61-62. *Eldred* concerned, among other things, whether retroactively extending the copyright terms of works previously created was consistent with the policies to be advanced by

the Copyright Clause. The Supreme Court rejected policy arguments -- almost identical to those advanced here -- from copyright users, who argued that dissemination of copyrighted works would best be advanced by prohibiting retroactive extensions of copyright terms. The Court held that providing more protection *to authors* would "provide greater incentive for . . . *authors* to create and *disseminate* their work." 537 U.S. at 206 (emphasis added). Similarly, retroactive extensions would provide greater incentives for authors of existing works to restore their works and disseminate them. 537 U.S. at 206-07. Nowhere in *Eldred* did the Court suggest that less protection for copyrights would encourage dissemination and thereby advance interests protected by the Copyright Clause. Rather, the Court held that the public interest advanced by the Copyright Act "fully coincides" with "[r]ewarding authors for their creative labors." *Eldred*, 537 U.S. at 212 n.18 (quoting The Federalist No. 43, p. 272 (C. Rossiter ed. 1961)).[7]

58. The Supreme Court in *Eldred* held that compensating *authors* was the way to encourage both creation and dissemination -- even of existing works. Specifically, the Court held:

- Extending copyright terms was an effort to "encourage copyright *holders* to invest in the restoration *and public distribution* of their works." *Id.* at 206-07 (emphasis added);
- "According to the Register, extending the copyright law for existing works 'could . . . provide additional income that would finance the production *and publication* of new works.'" *Id.* at 207 n.15 (emphasis added);

[7] The SDARS quote, out of context, a snippet from the oral argument of the *Eldred* case, suggesting that the position of the United States is that privileging copyright users to encourage them to disseminate copyrighted works is an objective of copyright law. The United States' position in that case -- which pitted the interest of copyright users against copyright owners -- was that the best means to promote the creation and dissemination of creative works was to provide additional compensation for authors (including by extending the term of existing copyrights) and thereby increasing the costs to distributors. Brief of Respondents at 44-45, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (explaining that the policy of the Copyright Act would "enhance and promote" access to information "by giving authors and copyright holders an incentive to distribute their works (or to license others to do so) by all available means").

- "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 in 'Science and useful Arts.'" *Id.* at 214 (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954));

- "'[C]opyright 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.'" *Id.* at 212 n. 18 ((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));

- "By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create *and disseminate* ideas." *Id.* at 219 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985)) (emphasis added).

59. *Eldred* is just one of a long line of cases that discuss the need to incent copyright holders to both create *and disseminate* their materials for the benefit of the public, since it would clearly do no good for them to create but then fail to distribute their valuable content. For example, in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), the Supreme Court explained that copyright law

> reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

(citations omitted). *See also Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) (same). By providing an economic incentive to "authors," copyright protection seeks to encourage them to disseminate their materials for the benefit of the public. Thus, while "securing a fair return" may not be the ultimate objective of copyright law, it is the means that Congress selected to incent authors to create *and then to disseminate* their works for the public good. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) ("By

establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create *and disseminate* ideas.") (emphasis added).

60. The SDARS' argument does not improve by focusing on the statutory term "availability" rather than "dissemination." SDARS COL at ¶¶ 58-59. The SDARS argue that "availability" is synonymous with "creation" and "dissemination" -- and as discussed above, both these are intended to be promoted by copyright owners and performers receiving adequate compensation. And even if "availability" means something else, the Supreme Court itself has made clear that providing incentives to creators is the best means to ensure widespread availability of copyrighted works. *Twentieth Century Music*, 422 U.S. at 156 (compensating authors "serve[s] the cause of promoting broad public availability of literature, music, and the other arts").

61. As discussed in SoundExchange's Conclusions of Law, *see* SX COL at ¶¶ 31-42, prior tribunals have consistently held that the principal way to achieve this first statutory objective is to ensure sufficient incentives for authors. *See, e.g.*, *PES I*, 63 Fed. Reg. at 25407 ("the record companies and the performers make the greater contribution in maximizing the availability of the creative works to the public, a conclusion consistent with past CRT precedent"); *Phonorecords*, 46 Fed. Reg. at 10479 (this objective is achieved by providing "an economic incentive and the prospect of pecuniary reward -- royalties payable at a reasonable rate of return"); *Juke Box Decision*, 46 Fed. Reg. at 889 (holding that "reasonable payment for jukebox performances will add incrementally to the encouragement of creation by songwriters and exploitation by music publishers, and so maximize availability of musical works to the public"). The single tribunal that found otherwise -- the 1997 PSS CARP -- was immediately reversed by the Librarian who held that the efforts of the record companies and artists -- not

those of the services -- clearly maximize the availability of creative works to the public. *PES I*, 63 Fed. Reg. at 25407.

2. The SDARS' Claim That Low Rates Will Lead to More Dissemination Is Both Inconsistent with the Economic Incentives Underlying Copyright Law and Belied by the Record.

62. Notwithstanding all of that, the SDARS insist that the first factor is best advanced by a low rate -- one near zero -- because, according to Dr. Noll, a low rate will lead to lower prices for consumers, which will lead to more people listening to sound recordings on the SDARS' service. SDARS FOF at Section V.B.; Noll WRT at 42, SDARS Trial Ex. 72. Nothing in the statute and no prior interpretation has ever suggested that the first statutory factor compels as low a rate as possible merely so that a distributor can charge low prices. That turns copyright law and the incentives that fuel the "Progress" embodied in the Copyright Clause on their head. *See Bonneville Intern. Corp. v. Peters*, 153 F.Supp.2d 763, 785 (E.D.Pa. 2001) ("Copyright is a law about creativity; it is not, and should not become, merely a law for the facilitation of consumption.") (quoting Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. Copyright Soc'y U.S.A. 1 (1997), at 4-5). As the Supreme Court has recognized, driving down compensation to authors will simply result in fewer creative works and less dissemination. *See supra.*

63. In any event, there is nothing in the record to suggest that the SDARS would lower prices for consumers if the sound recording rate was zero or near zero. The SDARS have no history of offering lower rates to consumers to date (indeed XM raised rates by $3.00 a month in 2005 and that had nothing to do with royalties for sound recordings). Moreover, the SDARS' own witness -- Mr. Musey -- indicated that the prudent thing for the SDARS would be to give any additional money resulting from lower royalty rates to their shareholders. Musey WDT at

29-32, XM Trial Ex. 9. The SDARS are about to merge; there is absolutely no reason to think that competition will mean that lower royalty rates will translate into lower rates rather than higher shareholder returns.

64. Thus, even if one accepted the SDARS' upside-down version of the first statutory factor, the record in this case reflects that the SDARS have not and will not lower prices, no matter what the Court does. Therefore, even taking Dr. Noll's theoretical argument at face value, there is no basis on which the Court could conclude that a lower copyright fee will in fact lead to lower prices for consumers.

65. In contrast to the phantom benefits that the SDARS claim will accrue from a low royalty rate, a relatively higher rate -- one consistent with the marketplace benchmarks presented by SoundExchange -- would have the very tangible benefits of providing over one billion dollars of revenue to copyright owners and performers, thereby increasing the incentives for both the production of new creative works and the dissemination of new and old works. Even if one characterizes this additional revenue as "incremental" to copyright owners and performers, in this context that only means that it falls immediately to artists and record companies' bottom lines, and certainly will have the intended effect of maximizing the availability of creative works. *Juke Box Decision*, 46 Fed. Reg. at 889. Moreover, as the record in this case demonstrates, it is clear that revenue streams such as satellite radio are not incremental or unimportant; rather, they are crucial to the future viability of the record industry. SX FOF Section VI.D.7. Thus, this factor supports a relatively higher rate for copyright owners and performers.

B. Section 801(b)(1)(B): Affording a Fair Return To Copyright Owners And a Fair Income to Copyright Users

66. The SDARS' legal conclusions with respect to the second statutory objective -- that only a rate that requires the record companies to provide their product essentially for free

affords copyright holders a fair return and the SDARS a fair income -- is no less troubling and no less flawed than their conclusions under the first statutory objective. SDARS COL Section IV.D. The idea that a near zero rate is in any way fair simply ignores prior precedent, is based on the same flawed reliance on misconstrued legislative history, and defies common sense.

1. The SDARS' Interpretation of the Second Factor as One that Guarantees Profit to the SDARS Is Wrong.

67. As prior tribunals have held, a "copyright owner's right to receive a fair rate of return for the compulsory use of his [sound recording] derives from Congress' decision to afford commercial protection to the author of a creative work." *Phonorecords*, 46 Fed. Reg. at 10479. As we established at the outset, Congress created the copyright at issue out of concern that the advent of new digital technologies would erode record companies' and artists' ability to earn a fair income for their creative product. *See* S. Rep. 104-128 at 14-15. Only by earning a *fair* return will authors continue to create and disseminate their creative works. *See, e.g.*, *Eldred*, 537 U.S. at 206-07; *Harper & Row*, 471 U.S. at 558; *Mazer*, 347 U.S. at 219. *See also Phonorecords*, 46 Fed. Reg. at 10479; *Juke Box Decision*, 46 Fed. Reg. at 889.

68. Contrary to the claims made in the SDARS' Conclusions of Law, and as SoundExchange explained in its Conclusions of Law, this factor is best accomplished in this case by looking to a marketplace benchmark. SX COL Section IV.B. Indeed, although prior panels have found that the statutory rate need not "mirror a freely negotiated marketplace rate," they have also made clear that consideration of analogous marketplace benchmarks is essential to adequately weighing the second statutory objective. *See, e.g.*, *PES I*, 63 Fed. Reg. at 25409 (requiring consideration of marketplace benchmarks to satisfy this statutory factor).

69. With respect to the "fair income" that Congress intended for copyright *users*, such income is appropriately reflected by reference to marketplace benchmarks. *PES I*, 63 Fed. Reg.

at 25049; *Juke Box Decision*, 46 Fed. Reg. at 888-89. The CRT in the 1981 mechanicals proceeding explained that the "fair income" to which the statute refers "derives from Congress' decision to permit entry into the music market by a potential copyright user." *Phonorecords*, 46 Fed. Reg. at 10480. A royalty rate that is consistent with analogous marketplace benchmarks and which does not interfere with the ability of the SDARS to operate, i.e., one that is not disruptive, fully satisfies this factor. *Id.* (noting that a "fair income" is one that permits entry into the market).

70. No prior court has ever suggested what the SDARS argue here -- that the second factor requires the SDARS to have positive net income overall during the period of the license, or positive free cash flow, or EBIDTA margins of a certain size, no matter how much money they are spending on things other than sound recordings. The SDARS have attempted to transform this second factor into a "guaranteed profit" standard, requiring the Court to ensure that the SDARS will meet specified financial goals over some arbitrarily set time period, regardless of all of the other investments they are making in their business and the other expenditures they are making on non-music programming. SDARS COL at ¶ 135 (discussing a "'profitability' standard of fairness"). That was not Congress' concern in this second "fairness" objective, and it is not a goal that could possibly be accomplished through adjustment of the sound recording royalty. Nothing in the legislative history or statute suggests that Congress intended the second factor to require copyright owners and performers to, in a very real sense, pay off all of the other investments the SDARS have and will continue to make.

71. In arguing for a very different, far more invasive regulatory standard, the SDARS rely almost entirely on various musings of Dr. Noll about a fair return, which are based -- as all of his analyses are -- on his flawed belief that it is the role of the Court to set a rate that provides

the SDARS with a return on all investments made by all investors into the business -- including the investments they have made in non-music content. SDARS COL at ¶¶ 130, 140. This simply defies logic. As discussed above, the "fair income" that Congress was referring to "derives from Congress' decision to permit entry into the music market by a potential copyright user." *Phonorecords*, 46 Fed. Reg. at 10480. It is the income they are able to generate by using the copyrighted works that the statute guarantees their access to, not overall net income from every investment they might choose to make. Once the SDARS have entered the market -- based on their use of the copyrighted materials -- it is not up to the copyright holders to guarantee success by providing their valuable sound recordings at near zero rates. Whether the SDARS succeed in earning an income from that access is not the responsibility of the recording industry, and they should not be forced to forego their fair return in an effort to assure the SDARS' an accounting profit by one measure of the other by some arbitrary time deadline.

72. Requiring copyright owners and performers to be the guarantors of the SDARS' profitability is, quite simply, unfair and cannot be squared with the statute's purpose or text or the standard's fairness objective. As all of the experts and even the SDARS' own witnesses concede, the profit and loss of any one year provides little information about the financial health of the SDARS or the ability to earn a net profit in the future. *See, e.g.*, Parsons WDT at ¶ 10, XM Trial Ex. 1. The second statutory factor does not require copyright owners and performers to pay for the SDARS' investments in their future.

73. Finally, the SDARS' conclusions concerning the second factor are refuted by the SDARS' own behavior. The SDARS have spent massive sums on non-music content; evidently they believed that expending those funds would provide them with a fair income or else they would not have entered into those agreements. Thus, in determining a rate that will provide the

SDARS with a "fair income," the Court should consider the prices the SDARS are willing to pay for other content. Fairness cannot require the record companies and artists alone to foot the bill for all of the SDARS' other expenses, including the hundreds of millions of dollars they spend on non-music content each year, by receiving a rate of return of next to nothing for their mandatory content contributions to the SDARS. *See* SX FOF p. 73 (table summarizing the SDARS' payments for non-music content over the license period). Yet that is precisely what the SDARS contend qualifies as both a fair income and fair return. SDARS COL at ¶¶ 124, 126, 150 (concluding -- incredibly -- that only "a royalty at or near zero" satisfies this objective); SDARS COL at ¶ 69 (arguing that a low rate will maximize the availability of non-music programming). Surely this is anything but fair.

74. The SDARS have in fact entered the market, and did so by building the business on music content. The fact that the SDARS have now spent all of the money they have -- plus millions upon millions of additional funds -- on *non-music* content and other expenses does not at all mean that they require a "near zero" rate for music content in order to earn a "fair" income. As this Court has pointed out -- and as the SDARS' own expert agrees -- "the future could be dark for satellite radio for a long list of reasons." 8/16/07 Tr. 77:20-78:11 (Noll). And as the Court recognized, the rates set in this proceeding are only "one component and relatively ... insignificant component of the future of satellite radio[.]" *Id.* Tr. 81:21-82:2. To require the record companies and artists to bear the brunt of the SDARS' financial challenges so that they can receive what they consider to be a fair return is simply unjustified. Such a result is antithetical to the second statutory objective, which is concerned ultimately with fairness. A near zero rate -- when Howard Stern gets [■■■] million, Major League Baseball gets [■■■] million, National Football League gets [■■■] million, Fox News gets [■■■] million, NASCAR gets

[redacted] million, Oprah gets [redacted] million, and even Howard Stern manager gets [redacted] million in licensing fees, SX FOF at ¶ 240 -- is simply not fair, Dr. Noll's theoretical concerns about Ricardian rents and the SDARS' ability to balance their books by 2012 notwithstanding.

75. As the Librarian explained, "the digital performance right . . . affords the copyright owners some control over the distribution of their creative works through digital transmissions, then balances the owners' right to compensation against the users' need for access to the works at a price that would not hamper their growth." *PES I*, 63 Fed. Reg. at 25409. As discussed extensively in SoundExchange's Findings of Fact, the SDARS have demonstrated that they can -- and do -- pay substantial prices for content that they consider valuable to their service. *See, e.g.*, SX FOF Section VI.B.3 & ¶ 1128. Thus, in exchange for the right to play any and all the music they want on each of the SDARS' approximately 70 music channels -- as well as on their non-music channels -- SoundExchange's proposed rate, like the rates the SDARS can and do pay for non-music content, provides a fair return that will not "hamper" the SDARS' growth.

2. The Impact of Substitution Provides a Floor for Satisfying the Second Factor

76. The SDARS acknowledge -- as they must -- that in providing copyright protection for the performance of sound recordings, Congress was concerned with the potential substitution effect that new digital services would have on record industry revenues. SDARS COL at ¶¶ 119-120. In fact, they even recognize that "in assessing a 'reasonable' fee and 'fair return' to the copyright owner, the fee should be *higher*, relatively speaking, in circumstances where there is some reason to believe that the services involved provide little in the way of promotional benefits and cause lost sales of sound recordings." *Id.* at ¶ 122 (emphasis added). *See also id.* at ¶ 124 (acknowledging Professor Noll's recognition that consideration of the substitutional effect

of the SDARS is necessary to determine a fair return for the record companies). SoundExchange wholeheartedly agrees. Indeed, as Dr. Herscovici explained, a royalty that did no more than account for the substitution effect caused by satellite radio would only establish the floor, and could not possibly be fair. Herscovici WRT at 21, SX Trial Ex. 130.

77. Because the record is replete with evidence of the substitution effect the SDARS have on sales of sound recordings, *see* SX FOF Section V.E.2., a fair return for the copyright holders must be set at a rate at a bare minimum sufficient to overcome the losses caused by this substitution.[8] Yet the crux of the SDARS' "fairness" analysis is based on the assumption that the SDARS promote -- rather than substitute for -- sound recordings. SDARS COL at ¶ 123. That assumption proved contrary to the record facts, and for that reason as well the SDARS conclusions about "fairness" are not sustainable.

78. Because the evidence of substitution is so overwhelming, the SDARS retreat in two ways. First, they try to establish the substitution impact as a ceiling on the statutory royalty. Thus, they argue that a fair return can be *no more* than lost sales for sound recording copyright owners in other channels. SDARS COL at ¶¶ 117-23. Although Congress was deeply concerned about the impact of the SDARS' service on other revenue streams for copyright owners and performers, nothing in the statute limits the return to copyright owners and performers to what they lose in other markets -- indeed, that would effectively be no return at all from being compelled to license to the satellite radio services. In fact, the Senate Report notes approvingly the views of the Register that performance rights may not merely be a substitute for other types of income, but may themselves be significant income for record companies in the future:

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[8] Unlike the situation in the 1998 PSS determination, where the record companies produced no evidence of substitution, *see PES I*, 63 Fed. Reg. at 25407, the record in this proceeding is replete with evidence of substitution -- including survey data from the SDARS themselves -- showing the tangible substitution effect of the SDARS service. SX FOF Section V.E.2.

> Congress, in its deliberations on performance rights, should not be unmindful of the possibility that technological developments could well cause substantial changes in existing systems for public delivery of sound recordings. In that event, it is equally possible that a performance right would become the major source of income from, and incentive to, the creation of such works.

S. Rep. 104-128, at 11 (quoting the Register).

79. Second, the SDARS, relying again on Dr. Noll, argue that even if satellite radio overall substitutes for sales of sound recordings, that is irrelevant because, in a free market, individual record companies would compete with each other for revenues derived from satellite radio performances and any potential promotional value would thereby drive the royalty rate down to zero. SDARS COL at ¶ 124. Thus, after running from marketplace analogies throughout their entire case, the SDARS seek to embrace them here. However, Dr. Noll's hypothetical musings are wrong as a matter of economic theory and refuted by evidence in the record.

80. Dr. Noll provides no analysis -- empirical or theoretical -- showing that the record companies would engage in some form of mutual assured destruction, each seeking airplay on satellite radio so aggressively that they drive the rates down to a level where all of them lost money -- to the tune of hundreds of millions of dollars per year in lost sales over the course of the license. As Dr. Herscovici explained, while record companies may, on an individual track basis, find some promotional or other benefit in satellite radio, such benefits are heterogeneous -- they do not apply to all tracks in all ways and no record company would license its entire catalog for reduced rates that resulted in losses for the record company. Herscovici WRT at 8, SX Trial Ex. 130. The evidence in the record demonstrates that even when record companies do directly license sound recordings for a perceived promotional benefit or in a manner that is likely to result in more airplay, they do not discount royalties. Herscovici WRT at 9, SX Trial Ex. 130.

In fact, where additional benefits are being provided to the SDARS, the record companies actually demand significant additional payments. *Id.* Finally, the record also demonstrates that, even for those services that the record companies believe are promotional -- such as clip samples and music videos -- record companies demand and receive significant percentage of revenue and other compensation (including [redacted] of revenue for clip samples and [redacted] of revenue for music videos). SX FOF at ¶¶ 610, 612. They do not behave against their own economic interest, as Dr. Noll theorized. This evidence refutes Dr. Noll's theory and demonstrates that there is no basis to conclude that, in a free market, record companies would compete so much that the royalty rate results in all of them losing money.

81. In sum, because market rates implicitly reflect both a fair return to a copyright holder and a fair income to a copyright user, there is simply no need to adjust SoundExchange's marketplace benchmarks to achieve the second statutory objective.

C. Section 801(b)(1)(C): Relative Contributions of Copyright Holders and Copyright Users

82. The SDARS' analysis of the third statutory objective stems from an erroneous understanding of the statutory scheme governing the performance right, as well as an exaggerated view of their own contributions, costs, and risks. At the outset, the SDARS make two threshold legal errors.

1. While Highly Relevant to Evaluating a Reasonable Rate in this Proceeding, the SDARS' License Payments for Other Non-Music Programming Are Not a Contribution to Be Considered under the Statutory Factors.

83. The SDARS' analysis of the third statutory factor is fundamentally flawed by their erroneous view that their contribution to the "product made available" to the public (especially their creative contribution) includes their acquisition of non-music programming. *See*

SDARS COL at ¶¶ 74-77. That argument finds no basis in the statutory text, prior decisions, or logic. *See infra.* Each of the experts in this case (even the SDARS') accounts for the SDARS' non-music programming expenses by adjusting their benchmarks to account for the value of non-music programming. *See, e.g.*, Woodbury WDT at Section VIII, XM Trial Ex. 8 (using channel attachment index to isolate alleged value of music content); Pelcovits Amended WDT at 5, SX Trial Ex. 70 (multiplying rate by value of music content to remove non-music content from the calculation). Just as the value of non-music content was removed from both parties' benchmarks, so too should it be removed from consideration of the SDARS' contributions, as non-music material is not a relevant contribution for purposes of this proceeding. By accounting for them again in this third factor the SDARS are double counting.

84. The SDARS' argument to the contrary relies on the statement in the *PES I* Librarian's decision that the "product made available" is the "entire digital music service." *PES I*, 63 Fed. Reg. at 25408. But in the *PES I* proceeding, the Librarian was considering a music-only service and nowhere did the Librarian suggest that, for example, creative contributions by non-music programming providers are relevant. The Librarian did not consider the argument made by the SDARS here.

85. Nothing in the legislative history suggests that looking at non-music programming was Congress' intent. As discussed above, the legislative history of the DPRA and DMCA focuses exclusively on sound recordings; nowhere did Congress suggest, as the SDARS themselves contend, that a "reasonable" rate for the same use of sound recordings should be less where the music is offered side-by-side with non-music programming. In creating this new copyright protection, Congress was concerned that

> in the absence of appropriate copyright protection in the digital environment, the creation of new *sound recordings and musical works* could be discouraged . . . .

> The Committee believes that current copyright law is inadequate to address all of the issues raised by these new technologies dealing with the digital transmission of *sound recordings and musical works* and, thus, to protect the livelihoods of 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). As the Committee explained, it created a new copyrighted interest out of concern

> 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. Subscription and interactive audio services can provide multichannel offerings of various music formats in CD-quality recordings, commercial free and 24 hours a day.

S. Rep. 104-128 at 15.[9] There is no discussion whatsoever of any *non-music* content or any other copyrighted interest in the legislative history, or any suggestion of a need to factor non-music content into consideration of the relative contributions of copyright owners and users.

2. There Is No Basis for Excluding the Costs, Risks and Investments of Record Companies and Performers Because Those Investments are "Incremental."

86. The SDARS' analysis of the third statutory factor (like their analysis of the first and second factors) is based on their flawed premise that the investments of sound recording copyright owners and performers are irrelevant because they are "incremental." Woodbury WDT at 48, 50-51, XM Trial Ex. 8; SDARS COL at ¶¶ 79, 87, 90, 94. As discussed in detail in SoundExchange's original conclusions of law, that argument flatly contradicts prior precedent. SX COL at ¶ 54. *See also* SX FOF Section VI.C.5.b. The SDARS desire to count all of their costs and investment, including investment in non-music programming, and none of the record companies' and artists', even though the sound recordings on which the SDARS rely would not

[9] This language belies the SDARS' contention that the concerns Congress had for substitution pertained only to interactive services -- and not to subscription services such as the SDARS. SDARS COL at ¶ 120.

exist but for the risks of and investments by record companies and artists. Prior panels, however, have looked more broadly, considering all of the costs, risks, and investment and not simply incremental ones. *PES I*, 63 Fed. Reg. at 25407; *Phonorecords*, 46 Fed. Reg. at 10480-81.

3. Relative Roles of Copyright Owner and Copyright User With Respect to Contributions, Investments, Costs, Risks, and Opening New Markets

87. As SoundExchange explained it its conclusions of law, the considerations set forth in § 801(b)(1)(C) are precisely those factors that a market rate should encompass. SX COL Section IV.C. Indeed, these are largely the same considerations that the Court must consider under the "willing buyer/willing seller" standard set forth in § 114(f)(2)(B). *Compare* § 801(b)(1)(C) *with* 17 U.S.C. § 114(f)(2)(B)(ii). Just as this Court found that "the relative contributions made by the copyright owner and the webcasting service with respect to creativity, technology, capital investment, cost and risk . . . 'would have already been factored into the negotiated price'" in marketplace benchmark agreements, *Webcasting II*, 72 Fed. Reg. at 24095, so too would the considerations in § 801(b)(1)(C) be reflected by marketplace rates. These factors are undoubtedly "implicitly accounted for in the rates that result from negotiations between parties in the benchmark marketplace." *Id. See also* Herscovici WRT at 21-22, SX Trial Ex. 130; Ordover WDT at 29, SX Trial Ex. 61. Thus, marketplace benchmarks will generally yield rates consistent with these factors.

88. Analysis of each of the individual sub-factors yields the same result.

a. Creative Contribution

89. The SDARS' contention that they make the greater creative contribution is directly contradicted by prior case law. SDARS COL ¶¶ 78, 80-84. The SDARS service merely broadcasts the creative contributions *of others* rather than making any creative contributions of

their own and thus, they do not deserve credit for the mere act of transmitting the creative works of the record companies and artists. *PES I*, 63 Fed. Reg. at 25407 (agreeing with the Panel that "'the artists and the record companies provide greater creative contributions to the release of sound recordings to the public than do the Services,' a finding supported by CRT precedent."). The SDARS' attempt to use language from *PES I* to support their claim that they make substantial creative contributions is both disingenuous and misleading, as it distorts the quoted language by omitting a key word. SDARS COL ¶ 80. In fact the Librarian reached the opposite conclusion. Rather than crediting the PSS for their contributions in "enhanc[ing] the presentation of the final work through unique programming concepts," as the SDARS maintain, SDARS COL ¶ 80 (citing *PES I*, 63 Fed. Reg. at 25407), the Librarian noted that the Panel "credited the performers and the record companies for their work in making the musical work come alive," while noting that the Services' contribution was "*merely* enhanc[ing] the presentation of the final work." *PES I*, 63 Fed. Reg. at 25407 (emphasis added).

90. Likewise, as Judge Roberts observed, *see* 6/13/07 Tr. 93:8-94:4 (Woodbury), courts evaluating the contributions of broadcasters have consistently held that retransmission of the content of others does not qualify as a creative contribution. Rather, these courts have all found 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." *1980 Cable Royalty Distribution Determination*, 48 Fed. Reg. 9552, 9565-55 (Mar. 7, 1983). *See also 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 has any value).

91. The SDARS attempt to resuscitate their claim of creative contribution by pointing to Dr. Hauser's survey and making the improbable claim that consumers value the SDARS' sequencing of music more than the music itself, or the smattering of live performances the SDARS' broadcast more than the millions of sound recordings the SDARS broadcast each year. As discussed in more detail in SoundExchange Reply Findings at __, Dr. Hauser's analysis is deeply flawed. *First*, the sole record evidence that the SDARS cite is Dr. Hauser's survey, which only asked respondents to rate the importance of "music from the 70's, 80's, 90's and today." As became clear at trial, this phrase likely caused respondents to think only of the pop music from those time periods, and not the jazz, country, classical, rap, rock, and other genres of music of which the SDARS play so much. SX FOF ¶ 425.

92. *Second*, the notion that respondents listen to SDARS for the DJs is wrong as a matter of logic and fact. DJs are simply presenters of music: there would be little value in a DJ who simply talked without playing records. The survey data demonstrate this: when XM asked its subscribers what they liked about the service, it was *the lack of DJ chatter* that was attractive to [[redacted]] of respondents. SX FOF ¶ 448. And as SoundExchange explained in its findings of fact, what respondents value about the SDARS is its music programming, and the fact that it is commercial-free: i.e., offered without interruption. SX FOF ¶ 448. Even Dr. Hauser's study found this, as the two highest scoring features of his constant sum survey were "commercial free" music, and "music of the 70's, 80's, 90's, and today." Hauser WRT at Ex. M, SDARS Trial Ex. 77. Indeed, more respondents said those two features alone were the most important than all the other features Dr. Hauser tested combined. Hauser WRT at Ex. M, SDARS Trial Ex. 77.

93. *Third*, and relatedly, claims about the value of the sequencing and selection of music are (a) rebutted by this Court's rulings concerning the value of the broadcast day, and (b) by the common sense notion that the bulk, if not all, of the value of "selection" or "sequencing" is that it is serving up *music*. SX FOF ¶¶ 447-452. In essence, when the SDARS are not simply playing the greatest hits, they are providing the music that is not available on radio, but is available in other forms, such as CDs. SX FOF ¶¶ 457-459. While there is certainly a market for these sound recordings, its value comes from the sound recordings themselves (and is why satellite radio is substitutional for other forms of sound recordings, such as CDs). SX FOF ¶¶ 708-710 (explaining how the SDARS' niche music causes subscribers to substitute away from the CDs that contain such music).

94. *Fourth*, any claim about the value of live music is rebutted by the sheer magnitude of the number of sound recordings that the SDARS play. Dr. Woodbury found that on average, the SDARS play 770,040 sound recordings a month, or over 9 million sound recordings a year. SX FOF ¶ 1448. Assuming that each sound recording is 3 minutes long, that works out to be just shy of a 1,000,000 hours of sound recordings *a year* between the two SDARS (924,048 hours). In contrast, XM's testimony reveals that it has created a grand total of 70 hours of its main live show, Artist Confidential, in XM's entire history. SX FOF ¶ 449. Other XM shows have even smaller repertoires, and Sirius has entered no quantitative evidence into the record about its alleged efforts. 6/5/07 Tr. 261:1-264:20 (Logan). Thus, there is no comparison between the value and importance of the sound recordings in this case and the SDARS' original offerings.

95. Finally, as discussed above, the fact that the SDARS spend large amounts of money to purchase programming from Howard Stern or Fox News is not itself a creative

contribution that provides a basis for lowering the sound recording royalty here. Whatever the creative contribution of Mr. Stern and Fox News, the SDARS purchase these contributions.

96. Juxtaposed with the lack of creative contribution on behalf of the SDARS are the tremendous creative contributions of literally all recording artists and all record companies who create the sound recordings that are essential to the livelihood of the SDARS -- contributions behind the creation and dissemination of the approximate 1 million hours of music they broadcast each year. The creative efforts of these artists and the record companies who work in tandem with them to create sound recordings are the engine of the success of the SDARS, as well as of a host of other music services. *See* SX FOF Section VI.C.3.b. *See also PES I*, 63 Fed. Reg. at 25407. As other panels have found, the creative contribution of recording artists and record companies far exceed those of the SDARS.

b. Technological Contribution

97. As described in detail in SoundExchange's Findings of Fact, the SDARS' view of their contributions of technology is exaggerated. *See* SX FOF Section VI.C. With respect to the SDARS' technological contributions, the SDARS did not invent the technology through which the record companies' and artists' creative content is broadcast, but rather relied upon already-developed technology in building their service. SX FOF Section VI.C.4; Elbert WRT 20, 24-26, SX Trial Ex. 122; SX Trial Ex. 92 at 251.

c. Investment, Cost, and Risks

98. With respect to investments, costs, and risks, the SDARS plead poverty before this Court.[10] SX FOF Section VI.C.5. As Judge Wisniewski aptly pointed out, it requires more

[10] Note too that though the SDARS want this Court to consider all of their startup costs from their inception to date, although they do not consider all of the record industry's past

than a mere assertion that a company is losing money to establish that the company's costs, risks, investments, and other factors favor a lower rate. 8/16/07 Tr. 88:8-15 (Noll). Indeed, an evaluation of these factors requires an examination of not just the current balance sheet, but the future prospects of the satellite radio companies. The SDARS suggest that the Court should not look into the future at all or not beyond the license period, but many of their investments are much longer term investments intended to build the business rather than yielding an immediate return. Their satellites, for example, are 15-year investments that will reap returns far greater than their costs over the life of the investment. The SDARS, however, want to count only the costs in the present and to ignore the returns in the future. Nothing in the statute suggests that the Court is required to be so narrow-minded.

99. Indeed, satellites are only one of many of the SDARS' long-term investments, which also include, among other things, investments in relationships with auto manufacturers and retailers and investments in attracting subscribers. As the record demonstrates, the satellite radio companies are in the business of making long-term investments, losing money today in order to make large sums in the future. At the same time that the SDARS ask this Court to take an exceedingly short-term view of their businesses, they are arguing to the FCC and others that their business can only be evaluated in the long-term and emphasizing that they are today willing to accept lower revenues (through lower prices) and incur higher costs because they are growing their business. Indeed, in the analysis submitted to the FCC by the SDARS, Dr. Salop -- an economist from Dr. Woodbury's firm -- repeatedly emphasized that these businesses can only be evaluated in the long-term and that their incentive is to maximize long-run profits at the expense of short-run profits. SX Trial Ex. 106 at Appendix A, p. 49.

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contributions, investments, and costs in creating the sound recordings upon which their businesses rely.

100. Evaluation of this factor necessarily requires examination of these long-run expected returns -- something only SoundExchange witnesses actually address. As those witnesses demonstrate, the SDARS' costs, investments, and risks are long-term and are expected (by the SDARS, analysts, and witnesses in this proceeding) to yield very significant positive returns. *See, e.g.*, Herscovici WRT at 28-29, SX Trial Ex. 130; Butson WRT, App. A & B. *See also* SX FOF Section VI.D.5.a.

101. In contrast, the record shows a very different picture for the record companies, which invest substantial amounts of money to create the very sound recordings that the SDARS then broadcast. Herscovici WRT at 26, SX Trial Ex. 130. Indeed, this Court has recognized the substantial investments that record companies have made and will continue to make in making its copyrighted products available to the public. *Webcasting II*, 72 Fed. Reg. at 24094. *See also PES I*, 63 Fed. Reg. at 25407 ("record companies face tremendous risks when producing new sound recordings"); *Phonorecords*, 46 Fed. Reg. at 10480 ("The evidence shows that record companies have substantial risks and costs."); Kushner WDT at 5, SX Trial Ex. 65; SX FOF ¶¶ 842-43, 845.

102. Moreover, the difference between the record industry today and that of 1997 -- the era to which Dr. Woodbury purports to compare it -- is striking. In 1997, the Librarian felt that while the risks faced by the record companies were significant, the companies had seen consistent growth in sales and revenues over more than a decade. *PES I*, 63 Fed. Reg. at 35407 (the record companies "have shown consistent growth in units shipped and dollar value of records, CDs, and music videos from 1982-1996"). By comparison, in 2007, sales and revenues are declining and that trend has only accelerated in 2007. Rather than facing a decade of growth and expansion with increasing profits, the record industry is seeing declines in revenues, is

cutting costs and staff to survive, is laying off artists, and is attempting to remake itself based on digital revenues streams, such as the SDARS, which are critical to the industry's survival. SX FOF Section II. Moreover, while the SDARS emphasize the billions they have invested since their inception, record companies invest billions of dollars each year in creating the sound recordings that are the heart of the SDARS' service. In 1997, the Librarian found that the PSS services promoted sales of sound recordings; in this proceeding, the evidence is overwhelming not only that there is no promotional effect, but that the SDARS' service actually substitutes for sales of sound recordings. SX FOF Section V.E. In 1997, it was the PSS services that were undergoing a transition in their business model and facing a great deal of uncertainty. Herscovici WRT at 24-25, SX Trial Ex. 130. Today, it is the record companies -- not the SDARS -- that are in a time of transition. The record industry is in a period of rapid decline, confronting greater risks than ever -- risks that are exacerbated by the substitution effect of the SDARS. SX FOF at ¶¶ 971-74, 999-1003; *compare*, 63 Fed. Reg. at 25407 (lack of evidence of substitution demonstrates no increased risks to the record companies from lost sales due to the PSS). The threat that concerned Congress in enacting the DPRA and the DMCA has been realized in the SDARS' service, which poses a danger to other revenue streams of record companies and artists. Only a rate that more than compensates for that lost revenue can satisfy this and the other statutory factors.

103. In their merger filings, the SDARS go to great lengths to emphasize the difference between the market for audio entertainment today and 1997. SX Trial Ex. 106 at 57 (discussing the "revolutionary changes that have taken place in the audio entertainment industry over the past ten years"); *id.* at 9 ("This is 2007, not 1997," and there are "numerous other audio entertainment services and devices" in the audio entertainment market). They do so when it

benefits them, but ignore those "revolutionary" changes here because those changes show that this statutory factor favors the record companies and not themselves.

d. Opening New Markets

104. Finally, the contribution of the SDARS in opening new markets is quite different than the contributions of the PSS under this sub-factor in 1998. In 1998, the PSS were the first digital music service of any kind; by contrast, the SDARS are one of a multitude of digital audio services that consumers can use to listen to music in a similar format. Herscovici WRT at 30, SX Trial Ex. 130. Indeed, the SDARS frequently (and emphatically) highlight all the many different kinds of audio services that have entered the market in recent years, thereby diminishing their claims under this sub-factor. *See, e.g.*, SX Trial Ex. 106 at 57 (discussing the "revolutionary changes that have taken place in the audio entertainment industry over the past ten years"); *id.* at 9 (there are "numerous other audio entertainment services and devices" in the audio entertainment market); *id.* at 35 ("All available evidence demonstrates that consumers have an abundance of reasonable substitutes for satellite radio, including . . . wireless phones, iPods and other MP3 players, and Internet radio -- and consumer choices are rapidly increasing over time"); *id.* at 37 (same).

105. In sum, as this Court recently recognized, the factors considered under the third statutory objective are implicitly included in marketplace rates. Moreover, analysis of each individual sub-factor demonstrates that no adjustment to the marketplace benchmarks is necessary to achieve this third objective, as the record industry's contributions, investments, costs and risks outweigh those of the SDARS.

D. Section 801(b)(1)(D): Minimizing Disruption on The Structure of the Industries

106. Despite the SDARS' mischaracterization of the final statutory objective, *see* SDARS COL ¶ 99, the fourth factor seeks to minimize the disruptive impact on *both* of the industries involved. § 801(b)(1)(D). The SDARS misleadingly attempt to characterize this objective as focusing predominantly on not "hamper[ing] the arrival of new technologies"; wholly absent from their discussion is the statute's greater concerns with "protect[ing] the livelihoods of the recording artists, songwriters, record companies, music publishers and others who depend upon revenues derived from traditional record sales," as well as the concern "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 14-15. As discussed *supra*, Section III.A, Congress created the copyright in performances of sound recordings -- subject to the statutory objectives set forth in § 801(b)(1) -- "to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmission" in addition to preventing the "hampering the arrival of new technologies." *Id.* at 15. The SDARS' exclusive focus on only part of Congress's intent -- and a small part according to the legislative history -- explains why their entire discussion of § 801(b)(1)(D) focuses solely on the impact on the SDARS, and is devoid of any real substantive discussion of how the royalty rate set in this proceeding will impact the record industry (save some dismissive sentences at the end of their analysis). SDARS COL ¶¶ 99-109.

107. The arguments concerning the impact of different royalty rates on the SDARS and the record companies are developed in more detail in SoundExchange's Proposed Findings of Fact. On the law, courts applying this rate have focused almost exclusively on the short-term effects of a sudden rate increase (which they have addressed under the fourth factor by

increasing the rate gradually, as Sound Exchange does here). The SDARS in contrast focus almost exclusively on long-term effects, but are left to prove a difficult proposition -- that the rate in and of itself will destroy the SDARS. SDARS COL at ¶ 100; Noll WRT at 9, SDARS Trial Ex. 72; SX FOF Section VI.D.2. As we set out in detail in our Findings of Fact, the SDARS completely fail (indeed, do not even really try) to prove such extreme disruption.

108. As explained in more detail in SoundExchange's findings of fact, the SDARS' focus on their stock price has nothing to do with the issue of disruption. Not only has ratemaking based on stock price been wholly rejected by the D.C. Circuit as arbitrary, but, as multiple economists have explained and the SDARS' own witnesses concede, the modest fluctuations in the stock price say nothing about the current operations of the business or their future viability. SX FOF at ¶¶ 1020-1024; *see also* SX COL at ¶ 62. Moreover, even the SDARS' own expert concedes that a royalty rate at the levels that SoundExchange proposed will likely result in the value of Sirius and XM to increase significantly within 18 months. Musey WDT at 29-32, XM Trial Ex. 9; 8/27/07 Tr. at 268:16-269:5 (Butson). At bottom, the arguments about stock price are simply a variation on the arguments that have been routinely rejected in these types of proceeding -- that any increase in cost is "disruptive." Thus, while this Court "must seek to minimize disruptive impacts, in trying to set a rate that provides a fair return it is not required to avoid all impacts whatsoever." *Phonorecords*, 46 Fed. Reg. at 10486. A simple increase in cost -- an inevitable outcome from any increase in the royalty rate -- is not synonymous with disruptive impact. Herscovici WRT at 31, SX Trial Ex. 130. Prior tribunals agree. *See, e.g.*, *Phonorecords*, 46 Fed. Reg. 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."). Indeed, although SoundExchange proves that its rate poses no risk

whatsoever to anything except perhaps the SDARS' shareholder's expectations, as prior tribunals have recognized, and despite the SDARS' contrary contentions, *see, e.g.,* SDARS COL ¶¶ 107-08, this statutory objective "does not require that the rate insure the survival of every company." *PES I*, 63 Fed. Reg. at 25408. As Judge Sledge recognized, it is not the rate set in these proceedings, standing alone, that will ultimately determine the future of satellite radio, but rather "the future could be dark for satellite radio for a long list of reasons." 8/16/07 Tr. 77:20-78:11 (Noll). The rate set here is just one component -- and an insignificant one at that -- which will impact the future of satellite radio. 8/16/07 Tr. 81:21-82:2. The SDARS' approach to the fourth factor -- claiming it requires the Court to use the sound recording royalty as a lever to assure the SDARS an acceptable rate of return or acceptable profit and loss statement -- has no basis in the law. There is no reason for the recording industry to bear sole responsibility for allowing the SDARS to reach a certain financial result when "a long list of reasons" explains their current financial status.

109. In any event, Dr. Noll's focus on ensuring a decades' worth of past investors earn a competitive return says nothing about the current business operations or its future prospects. Its only relevance is to investors in future business who might desire a low royalty rate set under the statutory factors before starting up a business. But that is a mirage -- there are no investors in future technologies who will be affected by this proceeding because no licensing of new technologies subject to the § 114 statutory license will be governed by the § 801(b) factors. The only entities on whom the Court should focus are the SDARS and the record companies.

110. In its findings of facts, SoundExchange anticipated the SDARS' erroneous view of this statutory objective, *see* SX FOF Section VI.D., and will not repeat those arguments here. It does bear repeating, however, that the record demonstrates that the SDARS can afford the rate

proposed by SoundExchange in this proceeding. They have "been able to absorb other cost increases" -- including costs of hundreds of millions of dollars for non-music content, *see*, SX FOF at ¶ 1128 (detailing the millions upon millions of dollars the SDARS expended on non-music content, all at a time prior to earning a profit) -- "without any disruptive impact on the structure of the industr[y]" and thus can undoubtedly absorb the costs associated with their music content as well. *Phonorecords*, 46 Fed. Reg. at 10481. The SDARS have offered no legitimate reason why the record companies -- those who provide the most valuable content to the SDARS, *see* SX FOF Section IV -- are the ones that have to subsidize the SDARS for all of their other expenses. SoundExchange's proposed rate is directly in line with the rates the SDARS' pay for their non-music content, *see, e.g.*, Pelcovits Amended WDT at 4-11, SX Trial Ex. 70, and there is no legitimate reason why the record companies -- and the record companies alone -- should suffer cuts in the fair cost of their creative product. "[N]othing in the statute compels copyright owners to give any discounts to" copyright users. *Phonorecords*, 46 Fed. Reg. at 10483.

VI. THE SURVEYS PRESENTED BY SOUNDEXCHANGE ARE RELIABLE AS A MATTER OF LAW.

111. In a brief coda to their proposed conclusions of law, the SDARS argue that the Wind and Mantis surveys are unreliable as a matter of law. SDARS COL at Part VI. These contentions simply restate the erroneous criticisms contained in their proposed findings of fact. The Wind and Mantis surveys are rigorous and reliable; they contained numerous safeguards; they came to the SDARS coupled with all of their underlying data; and they should be credited by this Court. SX FOF ¶¶ 339-369, 675-693; SX RFOF Section VII.A. & III.B.3.a.

112. Notably, the SDARS here seek to impugn the reliability of surveys that reached precisely the same conclusions as their own companies' internal surveys, and, particularly in the case of substitution, what the SDARS have vociferously advocated to the FCC. SX FOF Part IV,

SX RFOF at Section III.B.3. XM knows that "[n]early three quarters of our subscribers (71%) are here for MUSIC!;" SX FOF at ¶ 335; Dr. Woodbury readily agrees that half of the value of their service comes from music; SX FOF at ¶ 432; and the SDARS have told the FCC in July that "[W]hen people activate a satellite radio subscription, they substitute satellite radio programming for other audio entertainment to which they historically listened." SX Trial Ex. 106 at 37. This hardly places the SDARS in a position to argue that the Wind and Mantis surveys -- which reach the same conclusions -- are unreliable.

113. Nor should the Court, as it assesses reliability, ignore the fact that the SDARS have failed to marshal *any* survey evidence that undercuts SoundExchange's analysis or rate proposal. The SDARS' own surveys are full of statistics showing the predominance of music. Perhaps this explains their complete absence from the SDARS' findings. If the SDARS had evidence to support their claims, they would have submitted it to this Court. Instead, they are left to criticize survey results that confirm what they themselves have found to be accurate and advocated elsewhere.

114. The bulk of the SDARS' criticism simply consists of quoting boilerplate language from other cases considering surveys. None of these criticisms have any application to the Wind or Mantis surveys. SoundExchange has already explained elsewhere why the Wind and Mantis surveys are trustworthy, and will not repeat the explanations here. SX FOF at ¶¶ 339-369, 675-693. But a few particular responses are in order.

115. *First,* the SDARS claim that the Wind survey is unreliable because of the handful of coding errors identified at trial. SDARS COL at ¶ 167. Those errors affected at most 1% of the thousands of verbatim responses in the survey, and they had no meaningful effect on the survey results, which showed overwhelmingly that music is the most valued programming type

on satellite radio. SX FOF at ¶ 350. They are no basis for finding a survey unreliable, and the SDARS have pointed to no case in which such a small number of errors affected reliability. The same response holds for the issue of the verification forms. There is no reason to find the reliability of the survey impugned when Dr. Wind presented verification materials, as well as proffered sworn affidavits from the verifiers themselves attesting to the regularity of the process.

116. The record shows that Dr. Wind was heavily involved with the design, administration, and analysis of his survey. Wind WDT at 9, 18-20, SX Trial Ex. 51 (describing Dr. Wind's involvement). This Court has no reason to doubt the credentials or ability of Dr. Wind, who is a highly recognized expert in survey research. *E.g.*, *Pharmacia Corp. v. GlaxoSmithKline Consumer Healthcare, LP,* 292 F. Supp. 2d 594, 601 (D.N.J. 2003) (agreeing with testimony of Dr. Wind with respect to consumer beliefs about nicotine patch products); *Miramax Films Corp. v. Columbia Pictures Entertainment, Inc.*, 996 F. Supp. 294, 299 (S.D.N.Y. 1998) (crediting Dr. Wind's survey as the basis for the court's findings concerning consumer confusion); *Hertz Corp. v. Avis, Inc.*, 867 F. Supp. 208, 211 (S.D.N.Y. 1994) (noting Dr. Wind's criticism of a consumer survey that the court ultimately discredited); *Metro Mobile CTS, Inc. v. NewVector Comm., Inc.*, 643 F. Supp. 1289, 1292 (D. Ariz. 1986) (noting, and ultimately agreeing, with Dr. Wind's testimony that challenged advertising statements actually deceive or have a tendency to deceive); *Inc. Pub. Corp. v. Manhattan Magazine, Inc.*, 616 F. Supp. 370, 392 (S.D.N.Y. 1985) (finding persuasive Dr. Wind's testimony attacking a survey); *Anheuser-Busch, Inc. v. Stroh Brewery Co.*, 587 F. Supp. 330, 337-38 & 337 n.8 (E.D. Mo. 1984) (crediting Dr. Wind's survey and noting that Dr. Wind "has considerable expertise and experience in the field of consumer research"); *Procter & Gamble Co. v. Colgate-Palmolive Co.*, No. 96 CIV. 9123(RPP), 1998 WL 788802, at *60 & 60 n.25 (S.D.N.Y. Nov. 9, 1998) (crediting

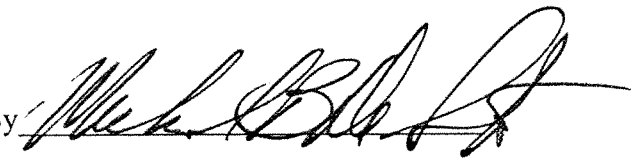
Dr. Wind as "an experienced expert in consumer research" and noting, in crediting his survey, that "the universe was properly defined, a representative sample of the universe was selected, the questions to be asked of interviewees were framed in a clear, precise, and non-leading manner, the data was analyzed in accordance with accepted statistical principles, and the objectivity of the entire process was assured" (internal citations omitted); *Johnson & Johnson-Merck Consumer Pharms. Co. v. SmithKline Beecham Corp.*, No. 91 Civ. 0960 (MGC), 1991 WL 206312, at *6 (S.D.N.Y. Oct. 24, 1991) (noting Dr. Wind's criticism of a consumer survey that the court ultimately discredited).

117. *Second*, the SDARS' critique of the NARM survey is also unavailing. Repeating a criticism made in their proposed findings of fact, the SDARS argue that they lack the ability to evaluate the NARM study and that it should therefore be deemed unreliable. And again, it is not clear what additional information the SDARS seek. The record shows that the survey was commissioned by an independent group for its own business purposes, conducted over the internet in March 2007, and that it incorporated the responses of 3,136 consumers, including 326 who listened to satellite radio. Wind WRT at 20-21, SX Trial Ex. 129. The survey showed that satellite radio users were substantially less likely to purchase other forms of music, and that 85% of them attributed this to the fact that "they were satisfied listening to the music on satellite radio." Wind WRT at 20-21, SX Trial Ex. 129. What the SDARS claim is mysterious is all too clear: the NARM survey shows that satellite radio is substitutional.

118. Finally, the SDARS' criticisms of the Mantis survey simply restate what they have erroneously claimed before. As Mr. Mantis explained at length, his survey was not leading, and in fact reported a substitution effect consistent with what the SDARS have presented to the FCC. SX RFOF at ¶¶ 118-30. Moreover, Dr. Hauser specifically rejected the argument the

SDARS are making when he said that respondents would not be led to select certain features in his survey just because the survey named them. 8/21/07 Tr. at 272:15-20. (Hauser) (arguing that his "survey is self-correcting" because respondents "could have given [the suggested option] zero"). The cases that the SDARS cite do not impugn the Mantis survey. As Mr. Mantis explained, the form and wording of the survey is standard fare for pre/post tests used to determine consumer behavior. SX RFOF at ¶ 120. The control question Mr. Mantis used contained an inarguably neutral follow-up prompt that the SDARS have consistently ignored. SX RFOF at ¶ 121. And the interpretative rule that Mr. Mantis used -- only counting an answer where satellite radio was the *sole* reason given for the change -- ensured that he properly captured the causal effect. SX RFOF at ¶ 122. None of the cases the SDARS cite involves any, let alone all, of these elements.

Respectfully submitted,

By 

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CERTIFICATE OF SERVICE

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