Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
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**

TESTIMONY OF

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SONY BMG MUSIC ENTERTAINMENT

PUBLIC VERSION

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DIRECT TESTIMONY OF MARK EISENBERG

I am submitting this testimony to discuss the types of contracts that owners of sound recording copyrights make in the unregulated marketplace and the value of sound recordings as reflected in those contracts. Such market data points have substantial probative value in setting the rates under 17 U.S.C. § 801(b)(1) for certain uses of sound recordings by the satellite radio companies, XM and Sirius ("SDARS"), and by the other "over-TV" services known as the pre-existing services ("PES").

BACKGROUND AND QUALIFICATIONS

I am currently Executive Vice President, Business and Legal Affairs, Global Digital Business Group, at SONY BMG MUSIC ENTERTAINMENT ("SONY BMG"). SONY BMG is a joint venture that owns and controls the recorded music business formerly owned by Sony Music Entertainment Inc. ("Sony Music") and Bertelsmann AG. I have held this position at SONY BMG since the formation of the joint venture between Sony Music and BMG in 2004. In this position, I oversee the worldwide distribution[1] and digital distribution activities of SONY BMG's various music and other intellectual property assets across a wide array of digital distribution platforms and outlets. I am also directly involved in the formulation of SONY BMG's policies and procedures regarding new technologies. I work closely with SoundExchange on a variety of issues, including the negotiation of rates and terms for statutory licenses under Sections 112 and 114 of the Copyright Act. I also work with trade organizations such as IFPI and RIAA in a variety of contexts, including new technologies, and interact with

[1] For convenience, I use the term "license" broadly, to include the distribution right for content regardless of business model (*e.g.*, whether the consumers are purchasing content on an "a la carte" basis through a download store or on an integrated listening experience basis through an "all you can eat" subscription service).

SONY BMG's marketing and online sales departments worldwide on myriad label and artist issues as they relate to digital distribution.

Prior to the formation of SONY BMG, I served as Senior Vice President, Business Affairs, New Technology and Business Development of Sony Music Entertainment Inc. From 2000 to 2001, I served as Senior Vice President and General Counsel, 550 Digital Media Ventures, a venture capital firm started by Sony Music to make strategic investments in companies engaged in technologies, services, and marketing related to digital platforms and media. From 1998 to 2000, I was Vice President, Business Affairs, New Technology and Business Development, Sony Music, and prior to that, from 1996 to 1998, I was Director, Business Affairs, Sony Music. I originally joined Sony Music in 1994 as Counsel in the Sony Music Law Department. I began my career in 1988 as an associate with Willkie Farr & Gallagher, subsequently moving to the entertainment law firm of Gold Farrell & Marks where I worked in copyright, music and litigation matters. I earned a Bachelor of Arts degree in 1985 from Brandeis University, graduating summa cum laude, Phi Beta Kappa. I earned a Juris Doctor degree from the New York University School of Law in 1988.

BACKGROUND ON SONY BMG

SONY BMG is a global recorded music joint venture that was formed in August, 2004. The joint venture is 50% owned by Bertelsmann AG and 50% owned by Sony Corporation of America. SONY BMG encompasses some of the most influential and successful record labels in the world, which are home to a wide array of both local and international artists, including Arista (Dido, Whitney Houston, Sarah McLachlan, and Santana); Columbia Records (Aerosmith, Tony Bennett, Beyonce, Bob Dylan, Destiny's Child, Dixie Chicks, John Mayer, Jessica Simpson, Bruce Springsteen, Barbra Streisand, System of a Down, and Train); Epic Records (Anastacia, Good Charlotte, Incubus, Los Lonely Boys, Modest Mouse, and Jennifer Lopez); Jive (R. Kelly, Britney Spears, and Justin Timberlake); J Records (Alicia Keys, Annie Lennox, Maroon 5, and Rod Stewart); LaFace (OutKast, Pink, and Usher); RCA Records (Christina Aguilera, Dave Matthews Band, Avril Lavigne, and Velvet Revolver); RLG-Nashville (Kenny Chesney, Alan Jackson, and Martina McBride); Sony Music Nashville (Buddy Jewell, Montgomery Gentry, Travis Tritt, and Gretchen Wilson); Sony Classical (Yo-Yo Ma, Joshua Bell, composer John Williams, and Robert Downey, Jr.); BMG UK (Westlife, Will Young); BMG Japan (Kazumasa Oda); BMG Ricordi (Eros Ramazzotti); and Sony Music International (Adriano Celentano, Celine Dion, La Oreja de Van Gogh, George Michael, Sade, Shakira, Julio Iglesias, Leonard Cohen, Delta Goodrem, Bic Runga, and Jay Chou), among many others.

In addition, SONY BMG is the home of a broad variety of archival recordings, including masterworks from such all-time greats as Miles Davis, The Byrds, John Denver, Johnny Cash, Robert Johnson, Janis Joplin, Barry Manilow, Louis Armstrong, Dolly Parton, Elvis Presley, Mahalia Jackson, Vladimir Horowitz, Glenn Gould, Laura Nyro, Lou Reed, and Stevie Ray Vaughan.

DEVELOPMENT OF THE DIGITAL DISTRIBUTION MARKET

The recording industry today is experiencing an unprecedented transformation. We are quickly evolving from what used to be a packaged goods industry into a digital business, and the challenges associated with this fundamental change in the industry cannot be overstated. It is well known that the last several years have not been particularly good for the industry. The sales of our physical products (most particularly CDs) have languished, and while the digital business is now taking shape and delivering substantial revenues, our total sales are still down from 2000.

Historically, SONY BMG's revenues worldwide have principally derived from the sale and distribution of pre-manufactured physical products, such as vinyl LPs, cassette tapes, compact discs, VHS tapes, and DVDs. Unlike other copyright-based music businesses, such as music publishing, which has long enjoyed a performance right and the revenue stream flowing therefrom, the recorded music industry was historically entirely dependent on revenues derived from the sales of packaged goods.

In the late 1990s, music began to be distributed over the Internet -- in most cases illegally. In the years that followed, the record industry was faced with widespread digital piracy over file-sharing networks, such as Napster (no relation to the current licensed service of the same name), with other forms of piracy, such as physical piracy through the use of CD burning technology, and with new business challenges caused by the transformation of the legitimate marketplace from physical to digital. Since 2000, the shipments of physical products -- and consequently, SONY BMG's core source of revenues -- have declined, with industry wide shipments declining by more than 25%. And as the industry continues its transition to digital delivery, the traditional "brick and mortar" physical market will continue to contract in the years to come.

Eventually, however, legitimate digital distribution platforms began to take hold and now are promising sources of significant future revenue. iTunes, for example, began in 2003 and marked the beginning of a new stage in the development of digital distribution models, which are numerous and increasing with each passing day. The distribution platforms include satellite radio, cable and satellite television networks, the Internet, and private data-communications networks, including cellular telephone network operators. The products -- available on some or all of the above-mentioned distribution platforms -- range from single-track downloads to streaming music videos to ringtones. Consumer demand for experiencing music through these differentiated products and alternative distribution platforms is growing by leaps and bounds and has ripened into an increasingly important source of revenue for SONY BMG. In every market worldwide, digital revenues as a proportion of the company's overall revenues are increasing.

It is clear from the above that while our traditional physical products will still be an important part of our overall business for years to come, it is the digital exploitation of music where our future will be made or lost.

LICENSING AND DISTRIBUTION PRACTICES FOR DIGITAL MUSIC

Overview of Digital Licensing and Distribution Philosophy

SONY BMG owns or controls the digital distribution rights to an immense catalog of intellectual property across a wide array of functionalities and distribution platforms. These incorporate a wide range of business models, including, by way of illustration, satellite radio; services delivering music over cable and satellite television; online "on demand" subscription services; online permanent download services; interactive and non-interactive online and wireless "radio" services; services operated by "mobile" carriers and content aggregators selling myriad digital products and services online and/or "over the air" of a cell phone carrier's network (such as master ringtones, MIDI ringtones, ringback tones, full-length video downloads, full length audio downloads and graphics); online streaming of "sound clips"; digital jukeboxes; and CD-burning kiosks. SONY BMG is constantly approached both by potential new entrants in the market exploring opportunities to provide digital music services, and by existing distribution partners seeking to extend, renew, and/or expand distribution arrangements that are already in place.

In deciding whether to make our catalog available for distribution in a particular circumstance, SONY BMG considers and balances a host of factors and considerations. Those include the value that consumers derive from the particular service or distribution platform, especially for services that offer "anytime, anywhere" access, such as wireless and satellite-delivered services and the possible substitution effect that one service may have on other paid uses of sound recordings. I discuss these in more detail below.

Impact of Portability and Wireless Devices

Although each of the above-listed factors and considerations plays a significant role in our "distribution" activities, in recent years, a key factor in shaping the economic terms for our potential digital distribution opportunities has been whether the proposed service can be accessed by end users "anytime, anywhere," through lightweight, hand-held, "portable devices" (as contrasted with being accessible only within the more limiting environment of a fixed-line personal computer resident in the home). The ease and convenience of wireless-enabled cellular phones, which function as "portable" audio and audiovisual music players, combined with the ubiquity of wireless networks have resulted in significant value to consumers interested in listening to music, and thus to SONY BMG.

As the Board may already be aware, the legislative history of the DPRSRA and the DMCA are rife with references to the eventual development of a "celestial jukebox" -- a giant "server in the sky" where consumers can access the digital content that they want, whenever they want it, wherever they are geographically. SONY BMG started selling master ringtones in the United States in July 2003, making it the first major record company to do so. Through its distribution arrangements, SONY BMG has made available more than a dozen different categories of mobile products for distribution, including master ringtones, voice ringers, ringback tones, full-length audio, music videos, mobile radio, mobile TV, artist images and music news. For SONY BMG, the long anticipated "celestial jukebox" is here and now.

As more fully laid out below, SONY BMG's content as delivered via wireless networks yields healthy premiums compared to the revenues our content yields on tethered platforms (such as personal computers). For example, carriers and mobile content aggregators have offered us wholesale rates reflecting more than [[redacted]][2] for single-track permanent downloads delivered OTA over a cell phone network, as compared with existing online wholesale pricing. In fact, even excerpts of our sound recordings known as "ringtones" -- which are not more than 30 seconds in length -- and "ringbacks" -- for which a purchaser's rights are only temporary in nature (expiring as early as 3 months after the consumer's purchase) -- [[redacted]]

The increased value of our sound recordings when delivered wirelessly and the resulting premium that our sound recordings command in negotiated marketplace agreements are particularly instructive for determining the statutory rate for satellite radio. Like the portable and wireless services discussed above, satellite radio can be received anytime, anywhere. Whether in the car with one of the many "plug-and-play" devices, or with the newer completely wireless handheld receivers, which allow subscribers to receive satellite radio transmissions anywhere

[2] The information in this testimony that has been marked as restricted is proprietary and commercially sensitive information that is not generally known to the public.

and without being tethered to a PC or anything else, consumers are enjoying satellite radio portably and wirelessly. It follows that SONY BMG is entitled to increased compensation for this added value through the statutory rate just as it would insist on and receive in the open market.

Concerns of Substitution Versus Promotion

As I mentioned above, one of the factors that weighs heavily in our decision about how we price our content in the digital marketplace is the extent to which the service at issue is likely to substitute for purchases of recorded music. With minor exceptions, virtually all digital services are substitutional to some extent. Simply put, they are ways in which consumers choose to receive, listen to and, in most instances, pay for music. A consumer's decision to receive his or her music from one or more digital services means, in most cases, that he or she will in turn purchase less music in traditional physical media. As a result, where a digital delivery service substitutes for other paid uses of recorded music (either for CDs or for other digital services from which we earn market-based royalties), it is imperative that the applicable royalty structure be sufficiently high so as to compensate for our otherwise resulting loss of income.

The flip side of substitution is promotion -- the notion that any one of these digital services might introduce consumers to more music and, in turn, actually cause consumers to purchase more CDs or downloads than they otherwise would. What matters at the end of the day, of course, is the net effect: whether a service on the whole is more substitutional than promotional or more promotional than substitutional. Two points, explained below, are critical to understand here. First, in the digital arena, our practice has been to charge a fair, undiscounted price for our music, even if a service might have *some* or even a net promotional effect. Second, I have seen no evidence that digital services, including satellite radio and the other "over-TV" services at issue here, are net promotional. Rather, they appear to be deeply substitutional.

Fair Compensation for Promotional Uses

The evolution from a "packaged media" consumer experience (*i.e.*, manufactured CDs) to consumption by means of digital distribution has led to significant structural changes within SONY BMG. Through the creation of a new business unit -- the Global Digital Business Group -- SONY BMG has sought to maximize the company's digital revenues for all its intellectual properties across all new media platforms.

In response to the changing marketplace, SONY BMG has changed how it views its traditional promotional and marketing activities. In the past, when recorded music revenues were derived almost entirely from physical product sales, SONY BMG relied on, among other things, giving away free, though limited, access to certain, specifically targeted new sound recordings, with the hope of increasing incremental sales of the company's core product -- *i.e.*, a full-length album in the CD format or in other media. However, in the era of digital distribution, where full-length album sales are being cannibalized by other types of consumption including satellite radio, it has become increasingly important to transition away from the practice of providing "free" access to content in the digital space and to move towards ensuring that SONY BMG is compensated for each exploitation of its content, even if a particular exploitation could have the potential to indirectly generate incremental product sales for the artist concerned. Our digital media marketing and promotional activities are increasingly designed to accomplish these dual, complementary objectives of providing maximum exposure for our artists' work and simultaneously monetizing each promotional opportunity.

The sum of these institutional changes within SONY BMG is that SONY BMG does not discount broad licenses to its entire catalog based on the potential for causing incremental sales in another market. Rather, SONY BMG seeks a fair return (and under 17 U.S.C. § 801(1)(B) is, indeed, entitled to a fair return) in each and every market for each and every exploitation, instead of hoping for collateral, indirect sales under the guise of "promotion." Indeed, even when SONY BMG licenses its catalog for use by a commercial distributor who does nothing other than provide clips of music to consumers when they are considering purchasing a CD or digital download -- a use that clearly promotes sales of sound recordings -- SONY BMG often is compensated in the range of [[redacted]] of the service's revenues because these sound clip services have built their business on the commercial exploitation of our sound recordings.

The SDARS and PES Services Are Not Promotional

When it suits their immediate business interests, the satellite radio companies frequently compare themselves to terrestrial (AM/FM) radio and claim that their services drive consumers to purchase particular sound recordings or CDs. We have not yet seen any palpable evidence of that. Nor would I expect to. **Indeed, alleged customer testimonials that XM posts on its own website are strategically deployed to market just the opposite conclusion, "*No more need to ever buy another CD.*"**[3] The fact is that there is an array of reasons why exposure on satellite radio substitutes for other types of consumption of music and is not an effective means of inducing sales of physical products, let alone digital music. In the following, I discuss briefly some of the reasons why this is so.

The claims of the satellite radio industry simply miss the point of the types of promotion record companies do with respect to terrestrial radio. The industry has learned from decades of experience that the playing of a sound recording on terrestrial radio (what we call a "spin") does not by itself have significant promotional value. Rather, the value of radio promotion for a

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[3] *See* http://testimonials.xmradio.com/ (last visited Oct. 27, 2006) (emphasis added), SX Ex. 006 DP.

particular recording is achieved when the spins in conjunction with other marketing efforts amount to a "call to action" or, in marketing terms, have an "impact" on the target demographic.

Experience has taught the industry that, when done in a particular way and only in a particular way, spins on terrestrial radio can be an effective part of a localized campaign to promote a particular new release and to turn it into a hit. First, to make an impact on the market, the spins must be part of what is called a "power rotation." That is, the new release being promoted must be played over and over again at peak listening hours. Second, these power rotation spins must be coordinated with other aspects of a multi-faceted local marketing campaign. Such campaigns must include disc jockey ("DJ") chatter where the local DJ, who has a relationship with the listeners, talks up the new release as something good that the listeners will like. In addition, these campaigns typically are coordinated with local appearances by the artist that are advertised on the radio, and with other promotional activities such as concert ticket and merchandise give-aways. Only in this way does terrestrial radio help create the necessary frenzy among the target audience to "break" a new release and turn it into a hit record. Third, a record company can only "promote" a small subset of its catalog at any one time. The idea that any distribution channel -- terrestrial radio, satellite radio, or any other -- can simultaneously promote sales of every artist and album at the same time is ludicrous. The reality is that the coordinated promotional efforts record companies undertake occur for a tiny fraction of sound recordings at any one time.

Satellite radio, by contrast, shares none of these characteristics. Except for the few dedicated "top hits" channels on XM and Sirius (which largely play the songs that already are at the top of the hit list and contribute little to getting them there in the first place) the SDARS pride themselves on having long playlists, *i.e.*, not playing the same song multiple times within a day. These infrequent spins -- far from the proven "power rotation" model -- provide little or no promotional value to the record companies. In addition, the satellite services have far less DJ chatter that touts any new releases. And, though they might feature a particular artist in any number of ways, they rarely, if ever given their diffuse national audience, take part in any localized campaigns that are coordinated with local concert appearances or other promotional activities. The same, of course, is true of the pre-existing, "over-TV" services such as MusicChoice and Muzak. At bottom, we have seen no evidence of these services having any positive impact on sales of recorded music.

Rather, as discussed above, there is every indication that they are significantly substitutional. Unlike terrestrial radio, which is free, a subscription to satellite radio costs between \$120 and \$155 a year, in addition to the cost of purchasing a proprietary XM or Sirius radio and paying to have it activated. Where consumers have decided to spend that kind of money to receive their music in a particular digital format, they obviously will have less money in their entertainment budgets to spend on CDs, digital downloads, or the many paid subscription services from which we earn respectable royalties.

Similarly, unlike terrestrial radio, satellite radio offers scores of channels in narrowly tailored genres that meet the tastes of virtually anyone who enjoys music. Enthusiastic fans of a particular song or artist will of course continue to buy recorded music so that they can hear their favorite songs over and over again. But for millions of music listeners, the listening experience is less specific. They simply want to have a variety of music playing in the car, for example, or at the office or during dinner. Or they have a range of tastes and might prefer one genre such as country, but at times, might also be in the mood for classical, jazz, blues or light rock and roll -- things that are not always easy to find on terrestrial radio in a given location. For these people (who already are spending significant sums of money to receive satellite radio in the car, in their homes, or with them where ever they go) satellite radio is the perfect substitute for many of the CDs they otherwise might buy.

As I have described, where all evidence and logic (not to mention the service's own website) point to a service as having a pronounced substitutional effect, we take that effect into account very seriously when negotiating a fair price for our content in the open market.

Recognizing Value in Marketplace Agreements Beyond the Monetary Royalty

In addition to the rates themselves (discussed below), there are many other terms in SONY BMG's marketplace agreements that augment the agreements' value to SONY BMG and that are critical to measuring the value of our content in the marketplace. Because these terms, or "deal points," as they often are called, are not always contained in statutory licenses, it is important to understand that, absent such deal points, looking only to the rates obtained in the marketplace would significantly *under*value our content. Accordingly, to the extent that marketplace rates are considered, as they should be, in determining the rates in this proceeding under 17 U.S.C. § 801(b)(1), it is essential to bear in mind that the rates themselves reflect only a portion of the value reflected by any one agreement as a whole. Without these additional deal points in our agreements, we unquestionably would demand higher rates in our marketplace agreements.

Such deal points include the following:

(a) **Available repertoire; Windowing; Holdbacks.** SONY BMG would exercise discretion over the titles of repertoire that may be made available on a distributor-by-distributor basis, and with respect to the repertoire that is made available, exercise discretion over the timing that those titles may be made available by those distributors and through specific channels.

(b) **Syndication and Sublicensing.** SONY BMG would restrict the ability of the distributor to syndicate the service under branding or trademarks owned or controlled by yet other third parties, whether on a "private label," "co-brand" or other basis.

(c) **Distribution Channels.** SONY BMG would restrict the distribution channels (*e.g.*, restricting distribution solely to Internet, OTA, cable, or public facilities, etc.) through which the service is made available to end users.

(d) **Electronics Devices.** SONY BMG would specify the particular types of electronics devices (or service eligibility criteria) through which the service may be accessed via a particular distribution channel.

(e) **Marketing and Promotional Opportunities.** SONY BMG would require the distributor to undertake a number of commitments that are designed to be of mutual benefit to SONY BMG and the distributor.

(f) **Security.** SONY BMG would retain approval rights over the end-to-end security of a given distribution platform to avoid a wide variety of types of unlawful reproduction and distribution.

(g) **Financial Audit Rights/Accounting Standards.** SONY BMG would maintain the right to examine the relevant books and records of the distributor for purposes of verifying the accuracy of accountings.

(h) **Technical Audit Rights.** SONY BMG would maintain the right to conduct on-site examinations of the distributor's systems, servers and server logs for purposes of observing and verifying the security of SONY BMG's intellectual property and the accuracy of the service's transaction data and reports sent to SONY BMG.

(i) **Electronic Reporting.** In order to facilitate the cooperation and development of specific marketing initiatives with SONY BMG's labels, artists and products, SONY BMG would require the distributor to deliver weekly information reports in conformity with an electronic reporting specification and monthly royalty reporting. Such reports can be automatically uploaded into SONY BMG's internal systems without labor-intensive manual compilations, restatements and adjustments.

(j) **Remedies.** SONY BMG would retain the right to terminate the license and seek damages in the event of a material breach of the distributor's obligations to SONY BMG.

In virtually every one of its marketplace agreements, SONY BMG receives either a significant non-refundable but recoupable advance payment or, alternatively, a significant non-refundable but recoupable minimum monthly revenue guarantee.

Over the last year, we have seen an explosion in the number of requests for catalog licenses to digitally distribute our intellectual property. Given the number of requests and limited resources we have to do deals, SONY BMG is committed to pursuing only deals that offer substantial economic upside and a reasonable chance of success in the marketplace.

Examples of SONY BMG New Media Agreements

Set forth below are the principal economic terms contained in a number of representative non-statutory agreements for the digital distribution of SONY BMG products. These terms, we believe, are quite instructive in gauging the fair value of our music.

Online "On Demand" Streaming and Conditional Download Services for Audio Materials

SONY BMG has several commercial distribution arrangements with services that provide online, "on demand" streaming and conditional download services. Large webcasters such as AOL, Yahoo!, and Real Networks provide such on demand services, either directly or through third-party "white label" distributors.

Pursuant to these deals, end users can select particular tracks from SONY BMG's audio catalog for "on demand" playback in one of three (3) basic forms: (a) on demand streams; (b) non-portable conditional downloads (*i.e.*, downloads that are "tethered" to a PC and expire or "time out" at the end of the consumer's subscription to the service); and (c) portable conditional downloads (*i.e.*, conditional downloads that are transferable from a PC to portable devices that are compatible with commercially available software).

With each of these basic forms, the resulting programming that is delivered to the end user consists of the particular tracks that are specifically requested by that user for playback. Users can construct their own "playlists" around these tracks, and generally create a music experience tailored to suit the specific preferences of the user. Many on demand services recognize that users frequently do not know the identities of the exact sound recordings that may satisfy a particular desire, mood or preference at a given moment, so rather than rely on the user to "pull" those specific tracks, the services "push" suggested playlists to the user based on general user inputs and preferences.

Generally speaking, these on demand subscription services bifurcate into two distinct consumer offerings: (i) a "tethered" on demand subscription service offering, which consists of on demand streams and non-portable conditional downloads that are playable only on a PC (*i.e.*, the music is "tethered" to the PC, and therefore largely restricted to the home or work environment), and (ii) a "portable" on demand subscription offering, which consists of each of the individual components of the "tethered" offering, plus the added functionality of portable conditional downloads that can be rendered for playback on secure, lightweight portable devices "on the go" (*i.e.*, the music can be enjoyed "anytime, anywhere" whether inside the home or outside, by means of a portable device, such as portable MP3-type digital audio players).

For these and other types of subscription services, SONY BMG typically has structured the license fees payable for online on demand subscription services as the greater of the following calculations:

[[redacted]

[redacted]][4]

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[4] For technological reasons, a per play or "per performance" rate would not make sense in the context of the current proceeding because the services at issue do not, and may not be able to, track the number of times that their many transmissions are received by a subscriber. That, however, in no way limits the importance of a greater-of rate structure in the proceedings. [[redacted]]

[[redacted]]

The purpose of this greater-of-three royalty calculation is to make certain that SONY BMG is fairly compensated, no matter how the distributor may choose to exploit SONY BMG's sound recordings.

SONY BMG's recent deals (either new service launches or renewals of existing deals) with online on-demand music subscription services are representative of how these rates are applied in practice. In its most recent deals, SONY BMG receives monthly accountings for royalties determined and computed as follows:

(a) **For "tethered" subscription offerings.** [[redacted]]

(b) **For "portable" subscription offerings (which include "tethered" access to SONY BMG repertoire).** [[redacted]]

Wireless Services

The market for music services that can be received directly over a wireless device such as a cell phone, without a fixed-line computer, is evolving. This market is already generating considerable revenue, as consumers are willing to pay a premium for the ability to access content from anywhere via wireless devices. A similar phenomenon can be seen with satellite radio, where people are willing to pay substantial subscription fees for preprogrammed radio (some but not all of which is commercial free) that is accessible in the car and, with recently available devices, anywhere by means of a handheld portable device.

We already have evidence of the greater value of music in this distribution channel in the market for ringtones. Ringtones are short clips of music that can be used as cell phone ringers. Mastertones refer to ringtones that are clips of actual sound recordings, whose copyrights are owned by SONY BMG and other record labels. Consumers are willing to pay approximately $2.50 for mastertones -- much more than they will pay for downloads of entire songs (a single track being about $0.99 on iTunes).

SONY BMG treats the market for wireless music services completely differently from other distribution channels, with different pricing and royalty agreements. [[redacted]]. SONY BMG charges [[redacted]] for "ringback" tones, which allow users to cause a particular sound recording clip to play on another's cell phone instead of a conventional "ring" sound when placing a call.

While the market for wireless full-length audio downloads is just beginning, SONY BMG has recently entered into agreements in this area. With a wireless download service, a consumer can, over a high-speed data network, download a full track directly to the handset, thus truly making music available anytime, anywhere. SONY BMG has required distributors to pay [[redacted]]. That represents a more than [[redacted]] premium over the price that SONY BMG receives for downloads to personal computers delivered via the Internet. [[redacted]]

Video Streaming

SONY BMG has entered into such agreements for video streaming services that offer videos selected by viewers (so-called "on demand" or "pulled" streams) as well as pre-programmed plays (so-called "pushed" streams). Because audiovisual exhibitions are not subject to a statutory license, the content providers and distributors negotiate rates for both interactive and non-interactive video streaming. [[redacted]]

Although music videos are viewed by some as "promotional" for the sale of recorded music product (CDs, DVDs and downloads), the marketplace has recognized the intrinsic value of the audiovisual content itself, both for generating lucrative ad dollars and in creating "stickiness" for visitors of a given website. Thus, in addition to the promotional value that a given video might bring for a particular release, SONY BMG has negotiated substantial multimillion dollar deals for online exhibition rights to its video catalog. SONY BMG has already entered into agreements that guarantee, in the aggregate, [[redacted]

[redacted] The advances are merely a down payment, recoupable against a recurring revenue share generated from each video play, ranging from the pro rata share of an introductory rate of 30% to the current standard of 50% of the advertising and sponsorship revenues generated.

In addition, SONY BMG's video agreements provide additional non-monetary consideration. We receive guaranteed promotional consideration (separate and apart from any intrinsic promotional value which may be associated with simply having the video streamed) and preserve holdback rights for purposes of pursuing "windowing" strategies. Moreover, in recognition of the premium that consumers pay -- and services receive -- for wireless functionality, SONY BMG expressly prohibits services from streaming its videos to mobile or cellular networks absent a separately negotiated video agreement which expressly grants rights in such a distribution channel (for which additional consideration would be required).

Online Distribution of Permanent Audio Downloads

SONY BMG's general approach to distributing permanent downloads is to sell them on a "wholesale" sales model, similar in many respects to the way physical goods such as CDs and DVDs are sold for distribution through normal retail channels. [[redacted]]

[[redacted]

[redacted] In general, SONY BMG's revenue splits for digital download service providers are between [[redacted]] and [[redacted]]

[[redacted]]

[[redacted]]

I declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge and belief.

Mark Eisenberg

Date: 10/29/06

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Exhibits Sponsored by Mark Eisenberg

Exhibit No.	Description
SX Ex. 006 DP	[Redacted]
SX Ex. 104 DR	[Redacted]
SX Ex. 107 DR	[Redacted]