SX Exhibit 002 DP

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**

MOTION BY SOUNDEXCHANGE FOR REFERRAL OF NOVEL MATERIAL QUESTION OF SUBSTANTIVE LAW CONCERNING THE PREEXISTING SUBSCRIPTION SERVICE COMPULSORY LICENSE

Pursuant to 17 U.S.C. § 802(f)(1)(B) and 37 C.F.R. § 354.2, SoundExchange, Inc. ("SoundExchange"), hereby respectfully moves the Copyright Royalty Board to refer the following novel and material question of substantive copyright law to the Register:

> Can an entity that purchases less than all of the assets of a preexisting subscription service and disclaims successor liability to the preexisting subscription service enjoy the benefits that Congress grandfathered for only those preexisting services that were in existence and making transmissions to the public on a specified date that pre-dates the purchaser's acquisition?

INTRODUCTION AND SUMMARY

In the Digital Millennium Copyright Act ("DMCA"), Congress defined the contours of the compulsory licenses governed by 17 U.S.C. § 114 and § 112 for services making non-interactive digital audio transmissions. In so doing, Congress established the "willing buyer/willing seller" standard as the standard governing rates and terms for virtually all services making such transmissions, including "new subscription services" and "eligible nonsubscription transmission services."

The sole exception to this framework is a small group of preexisting services, to whom Congress gave the benefit of a grandfathering provision, which permitted those services to operate under rates and terms established under the then current standard, set forth in 17 U.S.C. § 801(b)(1). These preexisting services are divided into two categories – "preexisting" subscription services ("PES") and "preexisting" satellite digital audio radio services ("SDARS")[1] Congress not only has limited the beneficiaries of this special treatment to those entities either actually in existence and making transmissions prior to July 31, 1998 (or, in the case of the SDARS, those who were in receipt of a license issued by the Federal Communications Commission ("FCC") as of that date), but also has specifically identified those licensees in the legislative history of the DMCA. As Congress has explained, its sole purpose in grandfathering the PES was "to prevent disruption of the existing operations by such services." *See* H.R. CONF. REP. NO. 105-796 at 80-81 (1993) ("Conf. Rep.") reprinted in 1998 U.S.C.C.A.N. 639, 656-57. Congress thus has sought only to benefit those entities that had invested in digital audio transmission services in reliance on the preexisting rate standard. With respect to every other service making digital audio transmissions under the compulsory license – whether in existence or subsequently established – Congress has specified that the willing buyer/willing seller standard would apply.

In February 2005, one of the specifically identified PES – DMX Music, Inc. ("DMX") – filed a chapter 11 petition in the United States Bankruptcy Court for the District of Delaware. THP Capstar Acquisition Corp. ("Capstar") purchased a portion (but not all) of DMX's assets from the bankruptcy estate. In doing so, it: (1) denied that

[1] For purposes of this motion, the compulsory license under which the PES operate will be referred to as the "PES Compulsory License."

it was a successor to DMX; (2) specifically excluded the PES Compulsory License from the list of obligations it was assuming; and (3) disclaimed any responsibility for the approximately $2.6 million in statutory royalties that DMX owed to SoundExchange.

But after purchasing those assets and denying DMX's liabilities, Capstar has reversed its legal course before the Board and the Copyright Office. In direct contravention to the statements it made to the Bankruptcy Court, Capstar filed a Notice of Use of Sound Recordings Under Statutory License with the Copyright Office, claiming that it was DMX, seeking to enter the market and operate its own new subscription services under the DMX name, and purporting to possess the benefits of the grandfather provision of the DMCA.

By claiming eligibility for the PES Compulsory License, Capstar has thus injected a novel and material question of copyright law into this proceeding: can an entity that purchases less than all of the assets of a PES and disclaims successor liability to the PES enjoy the benefits that Congress grandfathered for only those services that were in existence and making transmissions to the public on a specified date that pre-dates the purchaser's acquisition of only some of the assets of the PES, thereby giving the purchaser the opportunity to pay royalties at a rate that would not be available to any other competitor newly entering the market or to the vast majority of other services making digital audio transmissions of sound recordings?

While the question is novel, SoundExchange believes that the Register will resolve the question easily. When creating a special license for the PES, Congress specifically stated that eligibility for the PES Compulsory License would be limited to the three specific business *entities* already in operation. The purpose of the

grandfathering provision was to protect the three companies' operations from disruption, *see* CONF. REP. at 80-81 reprinted in 1998 U.S.C.C.A.N. at 656-57, not to establish a freely alienable property right to a more favorable compulsory license than new market entrants. Therefore, one cannot claim eligibility for the PES Compulsory License simply based on the purchase of some of the assets of a PES – especially where the purchaser has denied successor liability to avoid payment of previously incurred compulsory license royalties. Indeed, when previously presented with a "grandfathering" question in the context of the cable compulsory license, the Copyright Royalty Tribunal and the Copyright Office refused to allow cable systems to use a limited grandfathering provision (based on FCC rules) as a permanent license to circumvent the otherwise binding provisions of Section 111 of the Copyright Act. *See Compulsory License for Cable Systems*, 49 Fed. Reg. 14,944, 14,951 (April 16, 1984).

Finally, even if the Board were to decide that this question is not novel and material and thus does not require referral to the Copyright Office, the specific facts of Capstar's purchase of a portion of DMX's assets in bankruptcy lead to the conclusion that Capstar does not qualify as a PES. In DMX's bankruptcy proceeding, Capstar refused to accept any of DMX's past royalty obligations, and specifically denied that it was acquiring DMX's interest in the Section 114(d)(2)(B) compulsory license. *See infra* at p. 18-21. Moreover, the order entered by the Bankruptcy Court approving the sale of assets to Capstar specifically provides that the PES Compulsory License is not being transferred and that Capstar is not DMX's successor. Thus, Capstar's claim to the PES license can only be described as an effort to have its cake and eat it too. Under those facts, Capstar should be excluded from participating in the current proceeding for lack of a significant

interest in the adjustment of the rates and terms for the PES Compulsory License, and Capstar must pay the royalties that are established for new subscription services. *See* 17 U.S.C. § 803(b)(2)(C); 37 C.F.R. § 351.1(c).

BACKGROUND

I. THE PREEXISTING SERVICES

Congress established the digital performance right in sound recordings in the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"). Pub. L. No. 104-39, 109 Stat. 336 (Nov. 1, 1995). Three years later, Congress enacted the Digital Millennium Copyright Act ("DMCA"), Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998), to clarify the scope of the statutory licenses established in the DPRA and to establish a free market rate standard – the willing buyer/willing seller standard – as the basis for the rates to be paid to copyright owners and performers. 17 U.S.C. § 114(f)(2)(B). In the DMCA, however, Congress specified that five specific "preexisting" entities which had either been offering services prior to the enactment of the DMCA or obtained certain licenses from the FCC would be grandfathered: three PES and two SDARS. The benefit of being grandfathered is that, rather than having rates set according to the willing buyer/willing seller standard that is applied to all other types of digital music services, the grandfathered services operate pursuant to rates and terms set under a different rate standard, set forth in 17 U.S.C. § 801(b)(1).

Congress defined the PES very narrowly. Under the DMCA, a service is eligible for such treatment as a PES only if it was

> a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, *which was in existence and was making such transmissions* to the public for a fee on or before July 31, 1998

17 U.S.C. § 114(j)(11) (emphasis added). Unless a subscription service qualifies as a PES under Section 114(j)(11), it is considered a "new subscription service" eligible for a license under Section 114(d)(2)(C) only and subject to the rates and terms set pursuant to Section 114(f)(2). *See* 17 U.S.C. § 114(d)(2)(C), (j)(8).

The legislative history specifically identifies the entities eligible to be a PES. The Conference Report to the DMCA states that:

> There [were] only three such [PES] services that exist[ed on July 31, 1998]: DMX (operated by TCI Music), Music Choice (operated by Digital Cable Radio Associates), and the DiSH Network (operated by Muzak)[2]

CONF. REP. at 81, reprinted in 1998 U.S.C.C.A.N. at 657 (footnotes added). The DMCA's legislative history also explains the purpose for creating this limited category of preexisting licensees:

> The purpose of distinguishing preexisting subscription services making transmissions in the same medium as on July 31, 1998, was to prevent disruption of the existing operations by such services.

See id. at 80-81, reprinted in 1998 U.S.C.C.A.N. at 656-57.

II. DMX'S BANKRUPTCY AND CAPSTAR'S PURCHASE

DMX had been operating services pursuant to the PES Compulsory License since July 1, 1998. In addition to its operation under the PES Compulsory License, DMX was also making digital audio transmissions as a "business establishment service" ("BES"). When operating as a BES, DMX did not benefit from the grandfathering provision and thus paid royalties (for the making of ephemeral phonorecords used to facilitate certain

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[2] As the CRB knows, there is a current dispute as to whether Muzak, which has been providing service as a PES over several different transmission media, or the DiSH Network, owned by EchoStar Communications Corp., which has never claimed to be a PES or to be liable for any royalties under the statute, should be deemed the PES for the purposes of Section 114(j)(11). *See, e.g.*, Motion for SoundExchange Requesting Referral of Novel Material Question of Substantive Law, filed in Docket No. 2005-5 (filed Jan. 4, 2006); *see* Exhibit 8 (Muzak Initial Notice of Use).

exempt transmissions) pursuant to rates and terms set under the willing buyer/willing seller standard.[3]

On February 14, 2005, DMX, as well as a number of related entities (collectively referred to herein as "DMX"), filed for bankruptcy in the U.S. Bankruptcy Court for the District of Delaware. At the time of the filing, DMX owed SoundExchange approximately $2.6 million in statutory royalties and late fees pursuant to the PES Compulsory License and its license to make ephemeral phonorecords as a BES under 17 U.S.C. § 112(e) (the "BES Compulsory License"). *See* Exhibit 1. That same day, DMX filed a motion to sell "substantially all" of its assets "free of any liens, claims and encumbrances" pursuant to the bankruptcy laws. *See* Exhibit 2, at 1 (DMX's Omnibus Reply to the Objections of Creditors to the Sale of its Assets).

SoundExchange, as the designated agent for sound recording copyright owners and artists, objected to DMX's motion before the Bankruptcy Court, arguing that DMX could not assign the PES and BES Compulsory Licenses in the course of selling its assets. *See* Exhibit 3 (SoundExchange Objection). DMX responded by *denying any intent to assign the licenses*:

> SoundExchange also provides [sic] statutory licenses to Debtors. SoundExchange also objects to the assumption and assignment of its licenses. *Debtors, however, do not propose to assume and assign the Sound Exchange [sic] licenses.* This objection is therefore irrelevant.

Exhibit 2, at 7 (emphasis added).[4] In open court, counsel for DMX stated that:

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[3] Entities that receive the benefit of the grandfathering provision for those of their services that pre-dated the DMCA often operate other services that do not benefit from the grandfathering provision. For example, Sirius and XM are grandfathered for certain of their satellite transmissions, but must pay royalties set pursuant to the willing buyer/willing seller standard when they make transmissions over the Internet.

[4] DMX's counsel refers to SoundExchange as "providing" the PES and BES statutory licenses to DMX. However, SoundExchange only collects and distributes royalties under those licenses. Congress "provides" the compulsory licenses through legislation.

> [SoundExchange] is an entity, Your Honor, with which the debtors have a statutory license, . . . SoundExchange object[s] that we cannot assign their statutory license, and *we never intended to do so*. So that aspect of the objection, I believe, is resolved.

See Exhibit 4, at 47 (excerpt of transcript from May 10, 2005 hearing) (emphasis added).

Capstar purchased most, but not all, of DMX's assets in the bankruptcy proceeding. In the asset purchase agreement effectuating the sale, Capstar and DMX specifically excluded the PES and BES Compulsory Licenses from the list of assets being acquired by Capstar. *See* Exhibit 5 (Asset Purchase Agreement, Schedule of Excluded Contracts). Capstar also denied that it was DMX's successor in interest. Moreover, Capstar did not acquire any equity interest in DMX. Rather, the Sale Order entered by the Bankruptcy Court provides that the compulsory licenses relied upon by DMX were not among the assets Capstar purchased and that "Capstar is a newly formed entity unaffiliated with [DMX] or any of the equity interest holders." *See* Exhibit 6, at 2 (Sale Order).[5]

Capstar filed a Notice of Use of Sound Recordings under Statutory License document with the Copyright Office on June 3, 2005, stating that it was claiming use of sound recordings both as a PES and as a new subscription service licensee "to the extent" that Capstar was not eligible for the PES Compulsory License. *See* Exhibit 7 (Notice of Use). On February 8, 2006, Capstar filed a Notice of Intent to Participate in the 2006 CRB rate adjustment proceeding, claiming that "DMX Music is a pre-existing subscription service that expects to provide services that utilize the license referenced in

[5] Indeed, while SoundExchange's claim to approximately $2.6 million in royalties was approved by the bankruptcy court as a legitimate claim, *see* Exhibit 6, at no time has Capstar accepted responsibility for that claim, at all times arguing that it is not a successor to DMX.

this Notice, and DMX Music will be the subject of [sic] the rate established in this Proceeding." *See* Capstar Notice of Intent to Participate.

SoundExchange has disputed Capstar's claim to the PES Compulsory License directly in correspondence to Capstar and its counsel. *See* Exhibit 8 (copies of letters). Furthermore, SoundExchange has refused to accept Capstar's attempts to make payments to SoundExchange pursuant to the PES Compulsory License royalty rate, and instead has reserved the rights of copyright owners and artists to receive royalties pursuant to the compulsory license for new subscription services.

ARGUMENT

I. THE QUESTION PRESENTED IS A NOVEL AND MATERIAL QUESTION OF SUBSTANTIVE LAW

Section 802(f)(1)(B)(i) of the Copyright Act provides that if a "novel material question of substantive law . . . is presented, the Copyright Royalty Judges shall request a decision of the Register of Copyrights, in writing, to resolve such novel question." 17 U.S.C. § 802(f)(1)(B)(i). A "novel" question is "a question of law that has not been determined in the prior decisions, determinations, and rulings under the Copyright Act of the Copyright Royalty Board, the Librarian of Congress, the Register of Copyrights, the Copyright Arbitration Royalty Panels . . . or the former Copyright Royalty Tribunal." 37 C.F.R. § 354.2(a).

Whether the purchaser of only some of the assets of a PES that disclaims successor liability to the PES can qualify for the grandfathered PES Compulsory License is a novel material question of law that has not previously been addressed by any of the decision makers identified in 37 C.F.R. § 354.2(a). Under the Copyright Royalty and Distribution Reform Act of 2004 ("CRDRA"), Pub. L. No. 108-419, 118 Stat. 2341 (Nov.

30, 2004), such questions must be referred to the Register. Such a referral would be consistent with the Register's longstanding practice of addressing the applicability of a compulsory license to a class of licensees or a licensee in particular. *See, e.g., Public Performance of Sound Recordings: Definition of a Service*, 65 Fed. Reg. 77,292 (Dec. 11, 2000) (ruling that Internet simulcasts of radio broadcasts were subject to the digital performance right in sound recordings and the compulsory license of Section (d)(1)(A) 114(d)(2)(C)); *Cable Compulsory License: Definition of Cable System*, 57 Fed. Reg. 3,284 (Jan. 29, 1992) (ruling that satellite carriers were not "cable systems" and thus ineligible for the Section 111 cable compulsory license). *Cf. Compulsory License for Cable Systems*, 49 Fed. Reg. 14,944 (April 16, 1984) (denying the ability of cable systems to substitute new signals for grandfathered signals pursuant to the cable compulsory license of § 111).

Finally, the question presented herein must be decided in order for the CRB to determine the proper rate standard to be applied to Capstar's service. As noted above, the DMCA creates two different standards for establishing royalty rates for compulsory licenses, *compare* 17 U.S.C. § 801(b)(1) *with* 17 U.S.C. § 114(f)(2)(B), despite the fact that the competing services may be functionally very similar to consumers and use sound recordings in nearly identical ways. This statutory imbalance should exist only so long as the three PES continue to exist in their grandfathered form. Congress did not create a perpetual, freely alienable property right to differential treatment. Rather, once the entity that received the grandfathered treatment ceases to exist and/or ceases to offer the grandfathered services, the new service should be placed on the same footing as all other

competitors. As discussed below, that is even more true here, where the new entity expressly disclaimed that it was the successor of the grandfathered service.

II. THE PES COMPULSORY LICENSE CANNOT BE TRANSFERRED FROM A GRANDFATHERED ENTITY TO ANOTHER ENTITY, EITHER THROUGH BANKRUPTCY OR OTHER SALE

Congress's clear intent in grandfathering a finite number of PES, expressed in the text of the DMCA and its legislative history, was not to create a permanent, alienable property right owned by a class of services entitled to different licensing terms. Thus, Capstar could not "acquire" the right to grandfathered status as a PES by purchasing some of DMX's assets.

A. The Register And The Board Should Construe The PES Compulsory License Narrowly

Two fundamental principles of statutory construction compel a very narrow interpretation of the grandfather provision that benefits the PES.

First, as the Register, the courts, and Congress have stated repeatedly, compulsory licenses are derogations of the rights of copyright owners, and thus should be narrowly construed. See, e.g., *Fame Publ'g. Co. v. Ala. Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir. 1975); *Duchess Music Corp. v. Stern*, 458 F.2d 1305, 1309 (9th Cir. 1972); *Compulsory License for Cable Systems*, 49 Fed. Reg. 14,944, 14951 (Apr. 16, 1984); S. Rep. No. 106-42 at 13 (1999) ("S. Rep.") ("As with all compulsory licenses, these explicit limitations are consistent with the general rule that, because compulsory licenses are in derogation of the exclusive rights granted under the Copyright Act, they should be interpreted narrowly."). This general rule is based on the principle that compulsory licenses are government intrusions on the marketplace, and Congress, the courts and the Copyright Office should act to minimize the impact of those licenses "on the broader

market in which the affected property rights and industries operate." S. REP. NO. 106-42 at 10.

The practical import of this rule of construction is that the PES Compulsory License should be interpreted in such a way to restrict the perpetuation or expansion of that license. That is especially true here, where the PES Compulsory License perpetuates a rate standard that Congress has rejected for all new services that make digital audio transmissions. Moreover, in this circumstance, where DMX filed for bankruptcy, the PES Compulsory License is not only an intrusion into copyright owners' ability to receive fair market royalties, but also an intrusion into the marketplace *among* digital audio services. New subscription services, who pay royalties pursuant to the fair market value standard of Section 114(f)(2)(B), are potentially at a competitive disadvantage to the PES that may pay below fair market value royalties.[6] As such, the PES Compulsory License is a particularly deep "government intrusion" on the marketplace that should be confined as narrowly as possible.

Second, even outside the context of compulsory licenses, grandfathering provisions are to be strictly and narrowly construed. Recognizing that such provisions are exceptions to an otherwise general rule established by Congress, courts have routinely rejected attempts by litigants to squeeze themselves within the grandfathering provision in order to gain some advantage. *See United States v. Allan Drug Corp.*, 357 F.2d 713, 718 (10th Cir. 1966) ("Since we are dealing with a Grandfather Clause exception, we must construe it strictly against one who invokes it."); *Durovic v. Richardson*, 479 F.2d

[6] In the only fully litigated proceeding to establish royalty rates for PES, the Librarian determined that the Section 801(b)(1) standard does not require a free market royalty rate. *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 63 Fed. Reg. 25,394, 25,399-400 (May 8, 1998). Although the standard in Section 801(b)(1) does not require a fair market value royalty rate, it also does not prohibit a fair market rate.

242, 250 & n. 6 (7th Cir. 1973); *Citizens For a Better Env. v. Deukmejian*, No. C89-2044, 1990 WL 371772, at *7 (N.D. Cal. 1990). This rule is simply a particular application of the fundamental rule of statutory construction that "exceptions from a general policy which a law embodies should be strictly construed." *Spokane & Inland Empire R.R. Co. v. United States*, 241 U.S. 344, 350 (1916). This fundamental rule of statutory construction applies "with special force" with respect to grandfather clauses. *Wilderness Watch v. United States Forest Service*, 143 F. Supp. 2d 1186, 1206 (D. Mont. 2000).

These two canons of construction, when applied to the DMCA, compel the conclusion that the PES Compulsory License must benefit only those specific entities operating pursuant to such licenses at the time the DMCA was passed. Any other result would expand the PES Compulsory License in contravention of Congress' stated will.

B. The Text And Legislative History Of The DMCA Demonstrate That Purchasers Of Some Of The Assets Of A PES Are Ineligible For The PES Compulsory License

The text and legislative history of the DMCA compel the conclusion that Capstar cannot lay claim to status as a PES. Congress clearly expressed its intent to limit the PES Compulsory License to the three preexisting *entities* that were making digital audio transmissions as of July 31, 1998. Congress made no provision for the transfer or other assignment of those licenses, meaning that the licenses are inextricably tied to the existence of the three specifically identified licensees.

The Copyright Act defines the PES in ways that presuppose that a PES is a corporate entity. Section 114(j)(11) speaks of a service as something that is *in existence* and *making transmissions* as of July 31, 1998. 17 U.S.C. § 114(j)(11).[7] Capstar was

[7] That conclusion is reinforced by other portions of the DMCA. Section 114(f)(1)(A), which discusses the setting of rates and terms for the grandfathered services, specifically refers to the PES as litigating *parties*. *See* 17 U.S.C.

neither in existence nor making transmissions in 1998 – facts that cannot be altered by any set of assets that Capstar might acquire. It thus cannot benefit from the grandfathering provision established by Congress in the DMCA.

The conclusion that the grandfather provision is limited to the corporate entities named in the legislative history is consistent with Congress's stated purpose of creating those licenses. In the Conference Report to the DMCA, the conferees made it explicit that the grandfather provision had the limited purpose of preventing the "disruption of the existing operations by such services." CONF. REP. 81 reprinted in 1998 U.S.C.C.A.N at 657. By specifically naming the services themselves, Congress limited the universe of possible "preexisting subscription services" to DMX, Music Choice, and Muzak -- not the successive owners of various assets and trade names of DMX, Music Choice, and Muzak. By filing for bankruptcy, selling its assets and going out of business, whatever business expectancy DMX may have had was extinguished in the process – taking with it Congress's stated reason for providing it with a license that did not expressly require fair market value compensation.

There is no policy rationale for allowing Capstar to benefit from grandfathering. Capstar did not rely on the rate standard that existed prior to the DMCA when entering the market; rather, it made its investment decisions and committed capital just as every other entity making digital audio transmissions did. It said as much in the DMX bankruptcy proceeding when it maintained that it was not a successor to DMX. To treat Capstar differently because it bought its computer servers and other equipment from

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§114(f)(1)(A). ("Any copyright owners of sound recordings, preexisting subscription services, or preexisting satellite digital audio services *may submit to the Librarian of Congress* licenses covering such subscription transmissions....) (emphasis added). It would be an absurd interpretation of the PES Compulsory License to hold that what Capstar purchased from DMX's bankruptcy – a collection of assets and the DMX trade name – could make a filing with the Librarian or enter into a license agreement.

DMX rather than from a computer hardware vendor (as most other webcasters did) makes no sense generally and is not compelled in any way by the DMCA.

Indeed, as shown by the conduct of Capstar in the bankruptcy proceeding, the distinction between the acquisition of one of the PES as an *entity* and the acquisition of the *assets* of the same service is quite meaningful. If Capstar had acquired DMX as an entity (*i.e.*, by acquiring the stock of DMX), it would have had the responsibility of assuming DMX's compulsory license obligations, thus ensuring the payment of royalties to sound recording copyright owners and, in some instances, performers. Instead, by purchasing the assets of DMX, Capstar has left $2.6 million in unpaid liability for statutory royalties behind. Capstar cannot have its cake and eat it to – avoiding the liability DMX owes SoundExchange, yet claiming the benefit of a grandfathered license.

Finally, any other interpretation of the DMCA would be inconsistent with the manner in which copyright licenses are traditionally treated in bankruptcy. The courts have uniformly held that non-exclusive copyright licenses are not assignable in bankruptcy. *See In re Patient Educ. Media, Inc.*, 210 B.R. 237 (Bankr. S.D.N.Y. 1997). In *Patient Education Media*, the issue was whether the debtor could transfer its non-exclusive license to use a copyrighted work over the objection of the copyright owner. *See id.* at 239. Reviewing the law of several circuits, the court noted that a non-exclusive license does not transfer any rights of ownership, which remain with the licensor. *See id.* at 240 (citing *MacLean Assocs., Inc. v. William M. Mercer-Meidinger-Hansen, Inc.*, 952 F.2d 769, 778-79 (3d Cir. 1991); *Effects Assocs., Inc. v. Cohen,* 908 F.2d 555, 558 (9th Cir. 1990); *Steege v. AT&T (In re Superior Toy & Mfg. Co.)*, 183 B.R. 826, 833 (Bankr. N.D. Ill.1995); *accord* David Nimmer, 3 NIMMER ON COPYRIGHT § 10.02[A], at 10-23).

Accordingly, the court held that a non-exclusive license cannot be assigned to a third party without the consent of the copyright owner, noting that, consistent with 11 U.S.C. § 365(f) of the federal bankruptcy code, the "federal policy designed to protect the limited monopoly of copyright owners and restrict unauthorized use [of copyrighted works]" outweighed the general goal of maximizing the assets available to creditors. *See id.* at 242-43. The Ninth Circuit has expressly held that the same principles apply to statutory licenses, as well as voluntary ones. *See Harris v. Emus Records Corp.*, 734 F.2d 1329, 1333 (9th Cir. 1984). Nothing in the DMCA suggests that Congress intended to alter these generally applicable rules by making non-exclusive compulsory licenses into freely alienable property.

C. Copyright Office Precedent Supports Narrow Interpretation Of Grandfathering Provisions Of Compulsory Licenses

While the question presented by this Motion is novel, decisions of the Copyright Office and the Copyright Royalty Tribunal counsel in favor of interpreting grandfathering provisions in compulsory licenses restrictively.

The Copyright Office and Copyright Royalty Tribunal interpreted a grandfathering provision in the cable compulsory license in *Compulsory License for Cable Systems*, 49 Fed. Reg. 14,944 (April 16, 1984). As discussed in that Order, the cable compulsory license includes a provision that grandfathers the ability of cable systems to retransmit distant television signals that they had carried as of March 31, 1972, and that they would have otherwise been prohibited to carry under the FCC's regulations. *See id.*, at 14,951. Cable systems were allowed to pay for those grandfathered signals at the below-market statutory royalty rate of Section 111(d)(1)(B). In 1980, the FCC revised its regulations to allow for essentially unlimited carriage of

distant signals, which triggered a provision in Section 801 of the Copyright Act that allowed the Copyright Royalty Tribunal to set *free market value* royalty rates for the newly allowed signals. *See id.* at 14,944-45. Those rates were set in a 1982 Copyright Royalty Tribunal rate adjustment proceeding. *See id.* at 14,945.

Not surprisingly, cable systems (just as Capstar does here) preferred paying the below-market statutory royalty rates over the new free market royalty rates, and pursued a variety of methods for carrying signals at the below-market statutory rates. Among other things, they sought a ruling from the Copyright Office that they could substitute carriage of newly permitted distant signals (otherwise subject to the free market royalty rate) for grandfathered signals and pay for the substituted signals at the statutory rate. *See id.* at 14,951.

The Copyright Office, after consulting with the Copyright Royalty Tribunal, refused to allow cable systems to pay for substituted signals at the below-market rates for the grandfathered signals. *See id.* Noting the need to construe the compulsory license narrowly, the Copyright Office recognized that the FCC had specifically identified the actual signals to be grandfathered, not a set *number* of signals. *See id.* Accordingly, once a grandfathered signal was dropped, the right to pay the below-market statutory rate was lost, and the cable system would have to pay for carriage of any substituted signal at the fair market value rate. *See id.*

The Copyright Office's 1984 Order is instructive to the question presented here. Similar to the cable systems, Capstar is attempting to avoid the general rules applicable to virtually all other entities making digital audio transmission by claiming the benefits of a grandfathering provision. The statutory framework is also similar. As in the cable

context, the PES Compulsory License concerns *specifically identified* grandfathered subscription services. *See* CONF. REP. at 81 reprinted in 1998 U.S.C.A.A.N. at 657. The two potential results are also the same. As in the cable context, the choice here is whether to allow a licensee to treat a grandfather clause as an open-ended entitlement to a (potentially) below-market rate instead of being subject to a willing buyer/willing seller rate established to reflect fair market value that applies to virtually every other licensee. In the cable context, the Copyright Office construed the grandfathering provision narrowly, limiting it to the specifically identified signals so as not to perpetuate the derogation of the copyright owner's right to fair market compensation. The Register and the Board should follow that result in resolving the question presented in this Motion.

III. IN ANY CASE, CAPSTAR CANNOT BENEFIT FROM THE PES COMPULSORY LICENSE WHEN IT REFUSED TO ACCEPT THE SUCCESSOR LIABILITY OF DMX

Finally, even if the DMCA itself does not preclude a transfer of the rights of a PES, nonetheless Capstar cannot benefit from the DMCA's grandfather provision. Capstar itself – in assertions made to the bankruptcy court – has disclaimed both the liabilities of and benefits of DMX's license under the DMCA. It cannot represent to the bankruptcy court one thing – in order to be relieved of DMX's outstanding liability – while at the same time represent to the Copyright Office and this tribunal the opposite – in order to avoid being subject to the willing buyer/willing seller standard like virtually all of its competitors.

A. Capstar Is Estopped From Asserting Eligibility For the PES Compulsory License After It Denied That It Was DMX's Successor

Capstar is precluded from claiming eligibility for the PES Compulsory License because of the conflicting position it took in DMX's bankruptcy proceeding. In that

bankruptcy proceeding, Capstar went to great lengths to deny that it was DMX's successor to avoid the consequences of such a designation – i.e., the liabilities that would accrue to Capstar. Now, in this proceeding, Capstar claims that it is a successor to DMX in every way and entitled to the PES Compulsory License. Judicial estoppel precludes Capstar from succeeding on both of its conflicting positions. *See, e.g., Wang Lab., Inc. v. Applied Computer Sci., Inc.*, 958 F.2d 355, 358 (Fed. Cir. 1992).

In DMX's bankruptcy proceeding, Capstar's counsel stated in unequivocal terms:

> It will come as no great surprise to the Court that this – that obtaining these assets free and clear from any lien[,] claim[,] encumbrance or other interest and also getting [a finding] of no successor liability is a central condition set forth in an [asset purchase agreement]. . . .
>
> I'd be happy to proffer the testimony of my client to the – which would be the effect that if we do not have these findings [of no successor liability] . . . we will not be in a position to close this transaction.

Exhibit 3, at 58-59. The Order approving the sale of portions of DMX's assets to Capstar specifically states that Capstar "is not a successor of or to any of the Debtors." Exhibit 4, at 4. This provision was included at Capstar's insistence.

In this proceeding, and in its Notice of Use filed with the Copyright Office, Capstar has now claimed that it *is* DMX, the preexisting subscription service entitled to the PES Compulsory License. *See* Capstar Notice of Intent to Participate; Exhibit 7 (Notice of Use). By doing so, Capstar thus claims the right to pay royalties pursuant to the PES Compulsory License royalty rate, without the accompanying burden of paying DMX's unpaid royalties under the PES and BES Compulsory Licenses or being subject to an infringement suit for nonpayment of those royalties. *See* 17 U.S.C. § 114(f)(4)(B) (providing infringement liability for nonpayment of royalties).

Capstar cannot have its cake (avoiding $2.6 million in compulsory license royalties) and eat it, too (avoid being subject to the fair market value royalty applicable to new subscription services). Under basic principles of estoppel, Capstar cannot successfully argue a position before the bankruptcy court and then argue a contrary position in a subsequent proceeding where its interests have changed. *See Davis v. Wakelee,* 156 U.S. 680, 689 (1895); *Wang Lab., Inc.*, 958 F.2d at 358. Judicial estoppel is designed to prevent the perversion of the judicial process and, as such, is intended to protect tribunals, not simply other litigants. *See, e.g., Wang Lab., Inc.,* 958 F.2d at 359.

Allowing Capstar to benefit from the PES Compulsory License where it had previously denied responsibility for the burdens of that license would be manifestly unjust. Sound recording copyright owners and artists would bear the full burden of DMX's failure to pay its statutory royalty obligations, while Capstar would receive the entire benefit of operating under a rate standard that can result in below-market rates. As a result, DMX should be estopped from claiming eligibility for the PES Compulsory License and should be dismissed from this proceeding for lack of a substantial interest. *See Adjustment of Rates and Terms for Preexisting Subscription and Satellite Digital Audio Radio Services*, 71 Fed. Reg. 1455 (Jan. 9, 2006) (requiring potential participants in this proceeding to show that they have a substantial interest in the rates and terms of the PES Compulsory License pursuant to 37 C.F.R. § 351.1(b)).

B. Capstar Specifically Did Not Purchase DMX As An Entity Nor Was It Assigned DMX's PES Compulsory License

Even if the PES Compulsory License were freely transferable and could be sold along with the assets of a PES, Capstar did not acquire DMX's PES Compulsory License in the DMX bankruptcy. Because it did not purchase any equity in DMX, did not

specifically purchase the DMX "service," and specifically disclaimed assuming or being assigned the "RIAA/SoundExchange" license, Capstar cannot not claim that it is a PES.

Rather than the assets purchased, it is actually the assets that were not purchased that primarily matter for this Motion:

- In its Chapter 11 liquidation proceeding, DMX did not sell all its assets;
- Schedule 2.02(f) of the asset purchase agreement between DMX and Capstar *expressly excludes* from the contracts acquired by Capstar "all of [DMX's] contracts and arrangements with and licenses from . . . RIAA/SoundExchange." *See* Exhibit 7 (Schedule 2.02(f)). SoundExchange provided no voluntary licenses to DMX, meaning that reference could *only* refer to the PES and BES Compulsory Licenses;
- In the list of assets being transferred to Capstar, there is no mention of the transfer of the "DMX service" or a "preexisting subscription service" or a "PES Compulsory License";
- A significant number of contracts with customers, licenses with ASCAP and BMI, and licenses with copyright owners such as Universal Music Group and Capital Records were not acquired by Capstar in the sale;
- Capstar did not seek to acquire, nor did acquire, DMX's equity or any other ownership interest in DMX; and
- The Sale Order states that the PES Compulsory License is not being transferred to Capstar.

Given what Capstar did *not* acquire, what it expressly *excluded* from its purchase of DMX's assets in bankruptcy, and what it expressly disclaimed in Court, it cannot be said that, even if eligibility for the PES Compulsory License can be acquired by assignment, Capstar purchased that eligibility.

CONCLUSION

For the aforementioned reasons, the Copyright Royalty Board should refer the question presented by this motion to the Register as a novel and material question of substantive law. If the Board does not refer the question, then it should conclude that, based on the facts presented, Capstar is ineligible for the PES Compulsory License and therefore lacks a substantial interest to participate in this proceeding and should be stricken from the proceeding pursuant to 17 U.S.C. § 803(b)(2)(C).

Respectfully submitted,

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Date: May 4, 2006

CERTIFICATE OF SERVICE

I, Jared O. Freedman, hereby certify that a copy of the foregoing MOTION BY SOUNDEXCHANGE FOR REFERRAL OF NOVEL MATERIAL QUESTION OF SUBSTANTIVE LAW CONCERNING THE PREEXISTING SUBSCRIPTION SERVICE COMPULSORY LICENSE has been served this 4th day of May, 2006 by overnight mail to the following persons:

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UNITED STATES BANKRUPTCY COURT FOR THE	DISTRICT OF DELAWARE	**AMENDED PROOF OF CLAIM**
Name of Debtor: DMX MUSIC, INC.	Case No. 05-10431-MFW	
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor (The person or entity to whom the debtor owes money or property): SoundExchange, Inc. for itself and on behalf of the Recording Industry Association Of America	☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. ☐ Check box if you have never received any notices from the bankruptcy court in this case. ☐ Check box if the address differs from the address on the envelope sent to you by the court.	FILED OCT 13 2005 By Omni Management Group, Claims Agent For U.S. Bankruptcy Court District of Delaware
Name and addresses where notices should be sent: **David B Stratton, Esq.** **Pepper Hamilton LLP** **1313 Market Street, Suite 5100** **PO Box 1709** **Wilmington, DE 19899-1709** Telephone Number: (302) 777-6500 with a copy to: **Gary R. Greenstein, Esq.** **SoundExchange, Inc.** **1330 Connecticut Ave., N.W., Suite 330** **Washington, DC 20036** **(Tel) 202-828-0126**		THIS SPACE IS FOR COURT USE ONLY
Account or other number by which creditor identifies debtor: N/A	Check here ☐ replaces if this claim ☐x amends a previously filed claim, dated: 9/12/2005.	

1. Basis for Claim

☐ Goods sold
☐ Services performed
☐ Money loaned
☐ Personal injury/wrongful death
☐ Taxes
X Other **(See Rider A attached hereto)**

☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
☐ Wages, salaries, and compensation (fill out below)
Your SS #: _____ _____ _____
Unpaid compensation for services performed
from _____ to _____
(date) (date)

2. Date debt was incurred: (See Rider A attached hereto)

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed: $2,609,802.83 **(See Rider A attached hereto)**
If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below.

X Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. SECURED CLAIM.

Check this box if your claim is secured by collateral (including a right of setoff)

Brief Description of Collateral:
☐ Real Estate ☐ Motor Vehicle

Value of Collateral: $

Amount of arrearage and other charges

6. Unsecured Priority Claim.

☐ Check this box if you have an unsecured priority claim Amount entitled to priority
$ _____
Specify the priority of the claim:_____
☐ Wages, salaries, or commissions (up to $4,650),* carried within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. §507(a)(3)
☐ Contributions to an employee benefit plan - 11 U.S.C. §507(a)(4)
☐ Up to $2,100* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. §507(a)(6)
☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. §507(a)(7)
☐ Taxes or penalties owed to governmental units - 11 U.S.C. §507(a)(8).
☐ Other - Specify applicable paragraph of 11 U.S.C. §507(a) __
** Amounts are subject to adjustment on 4/1/01 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

7. **Credits:** The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.
8. **Supporting Documents:** *Attach copies of supporting documents,* such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien.
9. **Date - Stamped Copy:** To *receive* an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

THIS SPACE FOR COURT USE ONLY

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):
October 12, 2005	By: David B. Stratton David B. Stratton, Esquire; Counsel for SoundExchange, Inc.

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§152 a

EXHIBIT
1

RIDER A TO SOUNDEXCHANGE, INC.
AMENDED PROOF OF CLAIM

This Amended Proof of Claim amends claim numbers 754 and 757 that were timely filed on September 12, 2005. Pursuant to the provisions of 17 U.S.C. §§ 112 and114, DMX, Inc. ("DMX") was obligated to pay royalties to SoundExchange, Inc. ("SX") for the making of digital audio transmissions and ephemeral phonorecords of sound recordings during the operation of a Preexisting Subscription Service ("PES") and Business Establishment Services ("BES"). Notwithstanding this statutory obligation, which was a condition precedent to avoiding liability for copyright infringement, DMX failed to file reports or pay royalties with respect to its PES or BES services for the following periods:

PES: December 1, 2004 through and including February 13, 2005

BES: January 1, 2003 through and including February 13, 2005

Based on statements of account recently provided by DMX, SX has calculated the amount of the statutory royalties due plus late fees to be $2,609,802.83. The underlying numbers used to calculate that liability cannot be disclosed pursuant to Copyright Office regulations. SX has requested additional information from DMX concerning its revenues from statutory activities. SX reserves the right to further amend its claim to more accurately reflect the amount of unpaid royalties and other amounts due to it once it has obtained the additional information that it has requested.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
MAXIDE ACQUISITION, INC., et al.,[1]	)	Case No. 05-10429 (MFW)
	)	(Jointly Administered)
Debtors.	)	

[Re Docket Nos.: 299, 300, 302, 303, 307, 308, & 309]

DEBTORS' MOTION FOR LEAVE TO FILE OMNIBUS REPLY OF DEBTORS IN POSSESSION TO CERTAIN LIMITED OBJECTIONS TO DEBTORS' MOTION TO SELL SUBSTANTIALLY ALL OF THEIR ASSETS AND FOR RELATED RELIEF

On February 14, 2005, the above-captioned debtors and debtors-in-possession filed that certain *Motion of the Debtors for an Order: (I) Approving Sale By Debtors of Substantially All of Their Operating Assets Free and Clear of All Liens, Claims, Encumbrances and Other Interests Pursuant to Sections 363(b), (f) and (m) of the Bankruptcy Code, (II) Assuming and Assigning Certain Executory Contracts and Unexpired Leases; and (III) Granting Related Relief [Filed: 2/14/05] (Docket No. 20)* (the "Sale Motion"). Pursuant to the Sale Motion, the Debtors seek to sell substantially all of their assets. The objection deadline for the Sale Motion was May 4, 2005.

In response to the Sale Motion, the Debtors have received 107 formal and informal objections. In particular, objections to the relief sought in the Sale Motion were filed by:

(1) American Society of Composers, Authors and Publishers [Docket No. 299] ("ASCAP" and the "ASCAP Objection");

[1] The Debtors consist of the following entities: Maxide Acquisition, Inc., a Delaware corporation; AEI Music Network, Inc., a Washington corporation; DMX Music, Inc., a Delaware corporation; and Tempo Sound, Inc., an Oklahoma corporation.

EXHIBIT 2

(2) Broadcast Music, Inc. [Docket No. 309] ("BMI" and the "BMI Objection");

(3) UMG Recordings, Inc. [Docket No. 303] ("UMG" and the "UMG Objection");

(4) The Harry Fox Agency, Inc. [Docket No. 302] ("Harry Fox" and the "Harry Fox Objection");

(5) Capitol Records, Inc., d/b/a EMI Music North America [Docket No. 308] ("Capitol" and the "Capitol Objection");

(6) Sound Exchange, Inc. [Docket No. 307] ("Sound Exchange" and the "Sound Exchange Objection"); and

(7) The Official Committee of Unsecured Creditors [Docket No. 300] (the "Committee" and the "Committee Objection").

By way of this motion (the "Motion") and pursuant to Del. Bankr. L.R. 9006-1(d), the Debtors seek leave from the Court to file the *Omnibus Reply of the Debtors in Possession to Certain Limited Objections to Debtors' Motion to Sell Substantially All of Their Assets and for Related Relief* (the "Reply") A true and correct copy of the Reply is attached hereto and incorporated herein as Exhibit A.

The Debtors seeks to file the Reply in order to respond to certain issues raised in the above-noted objections (the "Objections") concerning successor liability, and other matters, for which the Debtors believe a response is appropriate. The Debtors believe that the Reply will aid the Court in adjudicating the Objections and help ensure that the current state of the law in the Third Circuit on successor liability is before the Court and on the record.

WHEREFORE, the Debtors respectfully request entry of an order granting the Motion and authorizing the filing of the Reply.

Dated: May 6, 2005

PACHULSKI, STANG, ZIEHL, YOUNG, JONES & WEINTRAUB P.C.

Laura Davis Jones (Bar No. 2436)
Richard M. Pachulski (CA Bar No. 90073)
Brad R. Godshall (CA Bar No. 105438)
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Telephone: (302) 652-4100
Facsimile: (302) 652-4400
Counsel for Debtors and Debtors in Possession

SO ORDERED this _____ day of May, 2005

The Honorable Mary F. Walrath
Chief Judge, United States Bankruptcy Court for the District of Delaware

EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
MAXIDE ACQUISITION, INC., et al.,[1]	)	Case No. 05-10429 (MFW)
	)	(Jointly Administered)
Debtors.	)	

[Re Docket Nos.: 299, 300, 302, 303, 307, 308, & 309]

OMNIBUS REPLY OF DEBTORS IN POSSESSION TO CERTAIN LIMITED OBJECTIONS TO DEBTORS' MOTION TO SELL SUBSTANTIALLY ALL OF THEIR ASSETS AND FOR RELATED RELIEF

Debtors in possession Maxide Acquisition, Inc., et al. (the "Debtors") hereby respectfully submit this omnibus reply to the following objections to Debtors' Motion to Sell Substantially All of Their Assets and for Related Relief (the "Sale Motion"):

(1) American Society of Composers, Authors and Publishers [Docket No. 299] ("ASCAP" and the "ASCAP Objection");

(2) Broadcast Music, Inc. [Docket No. 309] ("BMI" and the "BMI Objection");

(3) UMG Recordings, Inc. [Docket No. 303] ("UMG" and the "UMG Objection");

(4) The Harry Fox Agency, Inc. [Docket No. 302] ("Harry Fox" and the "Harry Fox Objection");

1 The Debtors consist of the following entities: Maxide Acquisition, Inc., a Delaware corporation; AEI Music Network, Inc., a Washington corporation; DMX Music, Inc., a Delaware corporation; and Tempo Sound, Inc., an Oklahoma corporation.

(5) Capitol Records, Inc., d/b/a EMI Music North America [Docket No. 308] ("Capitol" and the "Capitol Objection");

(6) Sound Exchange, Inc. [Docket No. 307] ("Sound Exchange" and the "Sound Exchange Objection"); and

(7) The Official Committee of Unsecured Creditors [Docket No. 300] (the "Committee" and the "Committee Objection").[2]

In reply to the foregoing objections, Debtors respectfully represent as follows:

The ASCAP Objection

1. The ASCAP Objection requests that the Court eviscerate paragraph 16 of the proposed Sale Order ("Paragraph 16" and the "Proposed Order"). Paragraph 16 generally provides that the "Successful Bidder" for Debtors' assets will not have successor liability for obligations owing by the Debtors. ASCAP proposes that the Court include in the Sale Order language that expressly preserves ASCAP's right to assert at a later date that any Successful Bidder has successor liability to ASCAP, notwithstanding Paragraph 16. See ASCAP Objection at p. 6. The ASCAP Objection is meritless and should be overruled for the reasons set forth below.

2. Bankruptcy Courts regularly protect asset purchasers from creditor claims based on theories of "successor liability."[3] The justification behind this protection is obvious: If

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[2] Debtors have also received dozens of informal letters and "letter objections" to the Sale Motion that are not addressed in this reply memorandum. Debtors will address the matters raised by these various other informal "objections" at the hearing on the Sale Motion.

[3] See, e.g., P.K.R. Centers, Inc., v. Commonwealth of Va. (In re P.K.R. Convalescent Centers, Inc.), 189 B.R. 90 (Bankr. E.D. Va. 1995); see also Wood v. CLC Corp. (In re CLC Corp.), 110 B.R. 335, 339 (Bankr. M.D. Tenn. 1990); Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit), 75 B.R. 944 (Bankr. N.D. Ohio 1987); American Living Systems v. Benapfel (In re All Am. Of Ashburn, Inc.), 56 B.R. 186, 189-90 (Bankr. N.D. Ga. 1986), aff'd 805 F.2d 1515 (11th Cir. 1986).

sales free and clear are not allowed and enforced, creditors will be encouraged to pursue more lucrative non-bankruptcy remedies against the debtor's successor, thereby attempting effectively to obtain a priority over other similarly situated creditors. Such creditor maneuvering, if permitted, would inevitably result in reduced prices offered for estate assets. Allowing successor liability actions therefore would thwart the underlying purpose of the Bankruptcy Code, which is to maximize the value of estate assets for equitable distribution to all creditors. See In re Trans World Airlines, Inc., No. 01-0056 (PJW), 2001 WL 1820325, at *3 (Bankr. D. Del. March 27, 2001); WBQ Partnership v. Commonwealth of Va. (In re WBQ Partnership), 189 B.R. 97, 99 (Bankr. E.D. Va. 1995).

3. Statutory authority also exists for granting "successor liability" protection to a buyer of estate assets. Section 363 permits sales free and clear of "interests" in property. In In re Trans World Airlines, Inc., 322 F.3d 283 (3d Cir. 2003) ("TWA"), the Third Circuit ruled that the phrase "any interest in such property" as used in section 363(f) encompasses not only in rem interests in property, such as liens, but also interests which are connected to or arise from the property being sold. The Third Circuit rejected the argument that the phrase "interest in property" is limited to in rem interests, in part because to equate interest in property with only in rem interests would be inconsistent with section 363(f)(3) which, by its language, contemplates that a lien is but one type of interest. The Third Circuit also adopted the view that because the claims in question were both subject to monetary valuation, the creditors could be compelled to accept a money satisfaction of their interests and thus the property could be sold free and clear under section 363(f)(5). As indicated above, the Third Circuit also noted that the Code's priority scheme supported its conclusion, stating that "in the context of a bankruptcy, these claims are, by

their nature, general unsecured claims and, as such, are accorded low priority. To allow the claimants to assert successor liability claims against American while limiting other creditors' recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code's priority scheme." TWA, 322 F.3d at 292.[4]

4. ASCAP fails to mention TWA in the course of making its objection. (ASCAP apparently recognizes that there is no general legal impediment to this Court protecting the Successful Bidder from successor liability.) Instead, ASCAP argues that ASCAP should be carved out from Paragraph 16, because Paragraph 16 allegedly "infringes on the jurisdiction of the New York Court" that administers a consent decree (in respect of long-standing alleged anti-trust violations by ASCAP and BMI) (the "Consent Decree" and the "New York Court"). Specifically, ASCAP argues that:

> "ASCAP may in the future wish to assert that it is not obligated to issue new licenses to THP (or any other successful bidder) because such party is a successor to the Debtors. . . . Entry of the Proposed Order, as drafted, may impair ASCAP's ability to make this and other similar assertions in the New York Court and, accordingly, would deprive the New York Court of the power to interpret and enforce . . . [the Consent Decree] with respect to these disputes."

ASCAP Objection at ¶ 5.

5. ASCAP's position is meritless for three reasons:

a. First, ASCAP's "argument" that Paragraph 16 "may impair" ASCAP's ability sometime in the future to assert a successor liability claim against the

[4] In an unpublished opinion, the Eighth Circuit has agreed with the Third Circuit's analysis. Cibulka v. Trans World Airlines, Inc., No.03-1992, 2004 WL 87695 (8th Cir. Jan. 21, 2004).

Successful Bidder is not "an argument" at all – it is simply a complaint that Paragraph 16 provides what it provides. Paragraph 16 obviously "may impair" ASCAP's ability to make a successor liability argument – that is the very purpose of the provision (as endorsed by TWA, et al.).

b. Second, there is no logical reason why an alleged anti-trust violator that has been forced to operate under a consent decree should be granted a special exemption from a successor liability limitation. The Consent Decree was obviously formulated to protect customers and potential customers of ASCAP (and objecting party BMI) from what the Department of Justice perceived to be anticompetitive conduct. ASCAP now argues that, because of the fortuity of being forced to enter into a Consent Decree, it should uniquely be entitled to attempt to extract monies from the Successful Bidder on a "successor liability" theory. This is illogical and inappropriate under TWA.

c. Third and finally, Paragraph 16 does not impact upon the proper administration of the Consent Decree. The Consent Decree (which is attached to the ASCAP Objection) makes no mention of the concept of "successor liability." The Consent Decree contains no restriction on the jurisdiction of any other court to enter an order that might have relevance to an issue that might be adjudicated some day pertaining to the Consent Decree. ASCAP's suggestion that Paragraph 16 somehow constitutes some sort of material intrusion or impairment of the New York District Court's jurisdiction therefore is groundless. ASCAP's position amounts to an argument that this Court is prohibited from issuing any order on any issue that might create precedent in a hypothetical future litigation relating to the Consent Decree. ASCAP cites no authority for such a proposition. TWA also suggests no such limitation on the

Bankruptcy Court's authority to limit successor liability.[5] ASCAP's position therefore has no basis.

The BMI Objection

6. Like ASCAP, BMI is a music licensing agency operating under the Consent Decree. BMI makes the same meritless "successor liability" objection made by ASCAP. See BMI Objection at p. 7. BMI also goes one step further: BMI asks the Court to render the successor liability issue moot by requiring Debtors to assume and assign the BMI licenses to the Successful Bidder. BMI argues that this is necessary because, unless the BMI licenses are assumed, the effect would be "to treat BMI songwriters, composers and music publishers less favorably than other music licensors by dispensing with contract assumption requirements." Id. at p. 9.

7. BMI is attempting to rewrite the Bankruptcy Code. Debtors do propose to assume and assign other music license agreements to the Successful Bidder. Assumption and rejection decisions were/are driven by the Debtors' [and Successful Bidder's] business judgment. There is a sound business judgment basis for each such decision. The prepetition delinquencies alleged by BMI are substantial, making assumption of the BMI licenses economically unfeasible.[6] The "discrimination" of which BMI complains is simply the effect of the business analysis at the heart of every assumption or rejection decision.[7] This objection is therefore also meritless.

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5 TWA involved EEOC claims. The Third Circuit issued its opinion notwithstanding that the successor liability restriction might limit issues that might later be adjudicated by the EEOC or the National Labor Relations Board.

6 Debtors do believe BMI's assertion of amounts owing is extremely overstated.

7 BMI's argument therefore is meaningless.

The UMG, Harry Fox and Capitol Objections

8. Harry Fox is a music licensing agency which is not subject to the Consent Decree. UMG and Capitol are record companies. Debtors hold music licensing rights with each of these entities pursuant to executory license agreements.[8]

9. Each of these entities nonetheless objects to the assumption and assignment of their licensing agreement, asserting that assignment over their objection is not permissible under the Copyright Act (and therefore under Bankruptcy Code § 365(c)(i)). See UMG Objection at p. 2; Harry Fox Objection at p. 4; Capitol Objection at p. 3. The objections are presumably an attempt to use § 365(c)(i) to attempt to leverage the renegotiation of the existing licensing agreements, notwithstanding Debtors' longstanding performance under those agreements.

10. In any event, Debtors will not seek to assume and assign the respective license agreements of UMG, Harry Fox and Capitol over the objection of those parties. Debtors hope to reach consensual agreements with these objectors prior to the hearing on the Sale Motion.

Sound Exchange Objection

11. Sound Exchange also provides statutory licenses to the Debtors. Sound Exchange also objects to the assumption and assignment of its licenses. Debtors, however, do not propose to assume and assign the Sound Exchange licenses. This objection is therefore irrelevant. Sound Exchange also objects to the sale on the following grounds:

---

[8] As UMG points out in the UMG Objection, the UMG license terminated by its stated written terms in 2001. The parties have nonetheless continued to operate under the license since that time.

a. The Debtors may not sell, assign or transfer any ephemeral phonorecords created pursuant to the Sound Exchange license;

b. Any purchaser of the Debtors' assets will not be entitled to enjoy the benefits of a "preexisting subscription service"; and

c. The Debtors must be required to maintain all books and records relating to the payment of royalties and the making of transmissions pursuant to federal regulations. Sound Exchange Objection at p. 20.

12. Debtors will agree that they will not transfer any "ephemeral phonorecords" to the extent prohibited by law. Sound Exchange's second argument is simply irrelevant – nothing in the Sale Order attempts to adjudicate what rate the Successful Bidder is entitled to demand. With respect to Sound Exchange's "document control" objection, the Asset Purchase Agreement gives Debtors access to their books and records for two years. If Sound Exchange so desires, Debtors will make copies of all records which Sound Exchange deems necessary and maintain those records for three years, at Sound Exchange's cost and expense.

The Committee Objection

13. Finally, the Committee has filed an objection in respect of two points: the distribution of sale proceeds and releases required by THP Capstar which the Committee believes are inappropriate.

14. Debtors' lending group will address the proceeds distribution issue. Debtors would simply point out, however, that the consensually negotiated debtor in possession financing order (to which the Committee agreed) contains proceeds distribution provisions in

favor of the lenders. The Committee's current position appears inconsistent with those provisions.

15. The releases ("Releases") at issue are the release by the estates of (i) subsidiaries of the Debtors (the equity in which is being acquired by the Successful Bidder), (ii) parties who hold "Assumed Liabilities" under the Asset Purchase Agreement, (iii) counterparties to "Assumed Contracts" under the Asset Purchase Agreement, and (iv) officers, directors, employees or agents of any Debtor that are employed by the Successful Bidder immediately following the closing. In respect of items (ii) and (iii) above, the Releases do not apply to claims that are unrelated to the applicable Assumed Contract or Assumed Liability.

16. The Releases are contained in the Sale Order because they are required by Debtors' stalking horse bidder – THP Capstar. The necessity of certain of the Releases is obvious. It is unrealistic, for example, to expect a party to buy the equity in non-debtor subsidiaries if the Debtors could then promptly sue the acquired companies on pre-existing claims. No logically-thinking purchaser would enter into such a transaction. Similarly, to the extent a buyer is assuming liabilities, the buyer naturally would want to ensure that such liabilities would not subsequently increase by reason of the estates' assertion of pre-existing claims. Similarly, the assertion of claims by the estates relating to Assumed Contracts would logically lead to potential additional liability that the purchaser would have to address under such contracts.

17. THP Capstar's demand for releases of retained employees is admittedly less standard. THP Capstar's thinking was presumably that it does not want hired employees distracted by future litigation threats. THP Capstar therefore requires the Release. The Release

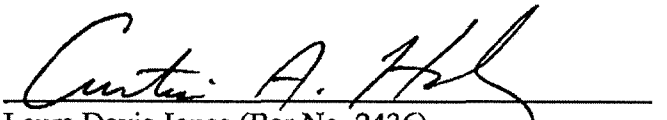
must simply be considered a "cost" of the transaction. (The employee release was not required (and is not required) by the Debtors.)[9]

18. Finally, the Debtors would point out that the Releases have been in the Sale Order since the commencement of these cases. The Committee has had significant time to ascertain any perceived value of the released claims. The Debtors are not aware of any meaningful, valid claims that are being released. The value of any claims that have yet to be uncovered by the Committee therefore should not be an impediment to approving the sale at this time.

19. For the foregoing reasons, Debtors respectfully request that the objections be overruled where indicated above.

Dated: May 6, 2005

PACHULSKI, STANG, ZIEHL, YOUNG, JONES & WEINTRAUB P.C.



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Counsel for Debtors and Debtors in Possession

9 Debtors would also point out that, as of the date hereof, none of Debtors' directors or executive officers has been offered any employment by THP Capstar.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	
	:	Chapter 7
MAXIDE ACQUISITION, INC., *et al.*,	:	
	:	Case No. 05-10429(MFW)
		Jointly Administered
Debtors.	:	**Objection Deadline: 5/4/05 @ 4:00 p.m.**
		Hearing Date: 5/10/05 @ 1:00 p.m.
	:	

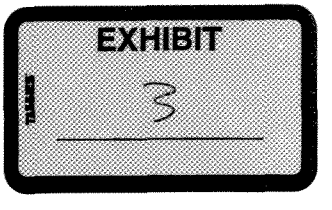
OBJECTION OF SOUNDEXCHANGE, INC., TO THE DEBTORS' MOTION FOR, *INTER ALIA*, APPROVAL OF THE SALE OF SUBSTANTIALLY ALL OF THEIR OPERATING ASSETS AND OTHER RELIEF
(RELATED TO DOCKET NOS. 16, 150 & 260)

SoundExchange, Inc. ("SoundExchange"), hereby objects to the Debtors' motion (the "Motion") seeking, *inter alia*, this Court's approval of the sale of substantially all of the Debtors' operating assets, and in support thereof states as follows:

I. INTRODUCTION

1. As more fully set forth below, SoundExchange, a non-profit Delaware corporation, is the sole "Designated Agent" authorized by the United States Copyright Office to receive statements of account, royalty payments and reports of use from entities, such as the Debtors, that make digital audio transmissions of sound recordings[1] under the statutory licenses

[1] A sound recording is defined in the Copyright Act as "a work that result[s] from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." 17 U.S.C. § 101. A sound recording is distinct from a musical work, which refers to a composition – the notes and lyrics – which may be incorporated into a sound recording. For example, when Songwriter writes song X, which is later recorded by Artists A and B, each of A and B's recordings of song X is a distinct copyrighted sound recording, but the underlying musical work is the same in both recordings.



set forth in Section 114 of the Copyright Act, 17 U.S.C. § 114[2](d)(2) (the "Digital Transmission License"), and that make ephemeral phonorecords[3] of sound recordings (*i.e.*, server copies) under the statutory license set forth in Section 112 of the Copyright Act, 17 U.S.C. § 112(e) (the "Ephemeral Recording License").

2. SoundExchange is obligated by law to distribute the royalties it receives from entities making transmissions under a Digital Transmission License, net of its costs for royalty collection, distribution, enforcement and rate establishment, as follows: 50% to the sound recording copyright owner, 45% to the featured recording artist, 2½% to an independent administrator of a fund established for the benefit of nonfeatured vocalists and 2½% to an independent administrator of a fund for the benefit of nonfeatured musicians. 17 U.S.C. § 114(g)(3)(A)-(D).

3. DMX Music, Inc. ("DMX"), a debtor herein, has operated or sought to operate under the Digital Transmission and Ephemeral Recording Licenses for certain of its activities. In lieu of obtaining statutory licenses and complying with all of the requirements thereof, DMX would have to obtain consensual copyright licenses from the individual copyright owners of the sound recordings it reproduces and transmits in order to avoid liability for copyright infringement.

4. SoundExchange objects to the sale of substantially all of the Debtors' operating assets on the following grounds:

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[2] Copies of relevant statutes and regulations are attached hereto as Exhibit A.

[3] "Phonorecords" are defined in the Copyright Act as "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed." 17 U.S.C. § 101. When a sound recording on a Compact Disc is copied to a computer hard driver or server, the reproduction of each individual sound recording on that hard drive is a separate phonorecord.

a. the Debtors may not sell, assign or transfer any ephemeral phonorecords created pursuant to a statutory license obtained under 17 U.S.C. § 112, or created without a consensual license to do so;

b. the Debtors may not sell, assign or transfer non-exclusive, compulsory copyright licenses pursuant to 17 U.S.C. §§ 112 and 114;

c. any purchaser of the Debtors' assets will not be entitled to enjoy the benefits of a "preexisting subscription service," a class of statutory licensee expressly limited by Congress, and pay the statutory royalties available to such services, unless that purchaser independently satisfies the statutory requirements to be a preexisting subscription service; and

d. the Debtors must be required to maintain all books and records relating to the payment of royalties and the making of transmissions pursuant to 37 C.F.R. §§ 260.4(f), 262.4(i), 270.2(i), and 270.3(c)(6), to enable SoundExchange to conduct audits pursuant to 37 C.F.R. §§ 260.5(b) & 262.6(b), to verify the royalty payments that were or should have been made by the Debtors, as well as to preserve evidence necessary for any infringement action brought by the copyright owners of the sound recordings reproduced or transmitted by Debtors.

II. STATUTORY LICENSING

A. Licenses to Make Digital Transmissions and Ephemeral Phonorecords

5. In response to, *inter alia*, the ease and anonymity in copying sound recordings over the Internet and other electronic media, Congress passed the Digital Performance Right in Sound Recordings Act of 1995 (the "DPRA"). Pub. L. No. 104-39, 109 Stat. 336 (Nov. 1, 1995). The DPRA created for the first time an exclusive right for copyright owners of sound recordings, subject to certain limitations, to perform publicly the sound recordings by means of certain digital audio transmissions. One of the limitations on the new performance right was the creation of a new statutory license, which would permit nonexempt, noninteractive digital subscription services to publicly perform copyrighted sound recordings via such transmissions upon meeting the requirements for the statutory license.

6. An entity making certain types of digital transmissions to business establishments was exempted from the requirement of obtaining a license – statutory or consensual – to do so. The exempt transmissions are:

> transmission[s] to a business establishment for use in the ordinary course of its business: [p]rovided, [t]hat the business recipient does not retransmit the transmission outside of its premises or the immediately surrounding vicinity, and that the transmission does not exceed the sound recording performance complement.

109 Stat. at 338 (codified at 17 U.S.C. § 114(d)(1)(C)(iv)). Services that make exempt transmissions to a business establishment are generally referred to as Business Establishment Services.

7. Although Business Establishment Services are exempt from liability for any digital audio *transmissions* made pursuant to the exemption set forth in Section 114(d)(1)(C)(iv), 17 U.S.C. § 114(d)(1)(C)(iv), they are not exempt from the licensing requirements for the making of ephemeral phonorecords of sound recordings, and are subject to infringement liability if they do so without a license. The statutory license set forth in Section 112(e) of the Copyright Act grants Business Establishment Services a statutory license to make multiple ephemeral phonorecords of copyrighted sound recordings to facilitate their exempt transmissions provided that the conditions of the license, including the payment of royalties, are satisfied. 17 U.S.C. § 112(e). If a Business Establishment Service does not wish to operate under the Ephemeral Recording License created in Section 112(e), then it may seek consensual copyright licenses from each individual copyright owner of the sound recordings it reproduces.[4]

8. The scope of the DPRA's statutory license was expanded with the passage of the Digital Millennium Copyright Act of 1998 (the "DMCA"), Pub. L. No. 105-304, 112 Stat.

[4] On information and belief, DMX has obtained consensual copyright licenses to make phonorecords of sound recordings for certain of its activities that are not eligible for statutory licensing.

2860 (Oct. 28, 1998), to cover certain nonsubscription transmissions and certain transmissions by preexisting satellite digital audio radio services. These new categories of services would also be permitted to perform publicly a sound recording in accordance with the terms and rates of the statutory license.

9. The DMCA also divided the services that were covered by the DPRA's statutory license into two groups. Under the DMCA, those digital subscription services that were in existence and making transmissions on or before July 31, 1998 became known as "Preexisting Subscription Services," while digital subscription services that were launched subsequent to July 31, 1998 would be identified as "New Subscription Services." See 17 U.S.C. § 114(j)(11) & (8). As a result, following passage of the DMCA, there were four broad categories of services eligible for Digital Transmission and Ephemeral Recording Licenses: eligible nonsubscription transmission services; new subscription services; preexisting subscription services; and preexisting satellite digital audio radio services. The fifth category of services, Business Establishment Services, did not require a Digital Transmission License but could obtain an Ephemeral Recording License.

10. DMX has attempted to operate certain of its consumer activities as a Preexisting Subscription Service and certain of its commercial activities as a Business Establishment Service. Its Preexisting Subscription Service activities cover those instances where it provides audio-only music channels to digital cable systems and satellite televisions systems serving residential subscribers. Its Business Establishment Service activities involve certain of the services it provides to commercial establishments.

11. Upon information and belief, certain of the Debtors' commercial activities are eligible for the statutory Business Establishment Service Exemption, and therefore do not

require a Digital Transmission License in order for the Debtors to perform publicly sound recordings via digital transmissions. If the Debtors' Business Establishment Service activities involve the making of multiple ephemeral phonorecords of sound recordings, the service will need a license for such phonorecords – either a consensual license or the Ephemeral Recording License. In the absence of such a license, Debtors may be subject to liability for copyright infringement.

12. The Debtors' digital transmissions to satellite and cable television systems, which are part of their consumer activities, do not qualify for the statutory Business Establishment Service Exemption, and, in order to avoid liability by copyright infringement, such transmissions and any ephemeral phonorecords created to facilitate such transmissions, must either be made pursuant to consensual licensing agreements from individual sound recording copyright owners or under the Digital Transmission and Ephemeral Recording Licenses.

B. Preexisting Subscription Services Receive Preferential Rates On Digital Transmission and Ephemeral Recording Licenses.

13. Section 114(j)(11) of the Copyright Act defines a Preexisting Subscription Service as:

> a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998 . . .

17 U.S.C. § 114(j)(11).

14. In the absence of voluntarily negotiated rates, the royalty rates to be paid by Preexisting Subscription Services operating under the Digital Transmission License are established to achieve the objectives set forth in Section 801(b)(1) of the Copyright Act. 17 U.S.C. § 801(b)(1). The Section 801(b)(1) standard does not require Preexisting Subscription

Services to pay royalty rates that would have been paid in the free market between a willing buyer and a willing seller and has resulted in below-market royalty rates being paid by the Preexisting Subscription Services. *Compare* 17 U.S.C. § 801(b)(1) (requiring rates set for Preexisting Subscription Services to, *inter alia*, "minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices"), *with* 17 U.S.C. § 114(f)(2)(B) (requiring rates for other services to "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller"); see also Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 63 FR 25,394, 25,399 (May 8, 1998) (codified at 37 C.F.R. § 260.1 *et seq.*). Only five of the more than one thousand services that have elected to operate under the Digital Transmission Licenses are eligible by law for the below-market standard: three services that qualify as Preexisting Subscription Services and two services that qualify as preexisting satellite digital audio radio services.

15. Upon information and belief, the Debtors' consumer service is one of the three services that satisfies the statutory requirements for a Preexisting Subscription Service, and would therefore be entitled to below-market royalty rates.

C. Reporting Requirements and Audit Rights

COMMERCIAL DIVISION

16. The royalty rates and other non-payment obligations owed by a service making exempt transmissions to a business establishment (i.e., a service that does not require a Digital Transmission License but operates under an Ephemeral Recording License), are set forth in 37 C.F.R. § 262.1 *et seq.* To the extent the Debtors hold or held an Ephemeral Recording

License to facilitate exempt transmissions to business establishments,[5] such license would be governed by this regulation (the "Commercial Ephemeral Recording License").

17. Section 262.4(a) requires a Business Establishment Service availing itself of a Commercial Ephemeral Recording License to make the required royalty payments for the making of multiple ephemeral phonorecords to the Designated Agent, SoundExchange. 37 C.F.R. § 262.4(a). In addition to the payment of any royalties that may be due, a Business Establishment Service must, within 45-days after the end of each month during which it is operating under a Commercial Ephemeral Recording License, deliver to SoundExchange a statement of account containing the information set forth in Section 262.4(f), which must include, *inter alia*, "[s]uch information as is necessary to calculate the accompanying royalty payment, or if no payment is owed for the month, to calculate any portion of the minimum fee recouped during the month." 37 C.F.R. § 262.4(f).

18. Under existing regulations, only the Designated Agent, SoundExchange, may conduct an audit of a Business Establishment Service, upon reasonable notice and during reasonable business hours, once a year during any given calendar year, for any or all of the prior 3 calendar years. 37 C.F.R. § 262.6(b).

19. A Business Establishment Service is required to retain its books and records relating to the payment, collection and distribution of royalty payments for a period of not less than 3 years. 37 C.F.R. § 262.4(i). It must also use commercially reasonable efforts to

---

[5] Sections 112 and 114 of the Copyright Act, and the regulations promulgated thereunder, require a statutory licensee to comply with certain conditions. *See* 17 U.S.C. § 112(e)(1)(A)-(D). If a statutory licensee fails to comply with the conditions of the license, then it may be subject to liability for infringement to each copyright owner whose recordings it reproduced. SoundExchange is the Designated Agent responsible for collecting the royalty payments owed by certain statutory licensees pursuant to the statutory licenses created by Section 112 and 114 of the Copyright Act. Nothing in this Objection shall constitute a waiver of, or any other bar to or restriction upon, the rights of the copyright owners to assert that the Debtors did not properly obtain and retain necessary licenses, and to seek damages for infringement.

obtain or to provide access to any relevant books and records maintained by third parties for the purpose of any audit conducted by the Designated Agent. 37 C.F.R. § 262.6(d).

CONSUMER DIVISION

20. The royalty rates and other obligations owed by Preexisting Subscription Services for their enjoyment of the benefits of the Digital Transmission and Ephemeral Recording Licenses are set forth in 37 C.F.R. § 260.1 *et seq.* To the extent the Debtors hold or held Digital Transmission and Ephemeral Recording Licenses in connection with their consumer division,[6] such licenses would be governed by this regulation (the Digital Transmission and Ephemeral Recording Licenses held by a Preexisting Subscription Service, collectively, the "PES License", and the holder thereof, the "PES Licensee").

21. A PES Licensee must submit monthly statements of account to the Designated Agent, SoundExchange, which includes information that is necessary to verify the accompanying royalty payment. 37 C.F.R. § 260.4(b) & (c).

22. An interested party, defined as, *inter alia*, an individual copyright owner entitled to receive royalty payments or the Designated Agent, may audit the PES Licensee, for the purpose of verifying the royalty payments made by such Licensee, once during any given calendar year. 37 C.R.F. § 260.5(b).

23. A PES Licensee must maintain its books and records relating to the royalty payments, in accordance with generally accepted accounting principles, for a period of three years. 37 C.F.R. § 260.4(f).

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[6] See footnote 5.

D. SoundExchange

24. SoundExchange is the sole entity designated in Copyright Office regulations to collect royalty payments directly from holders of Digital Transmission and Ephemeral Recording Licensees, including from Business Establishment Services and from Preexisting Subscription Services. SoundExchange is further obligated to distribute those royalties to the sound recording copyright owners and performers entitled by statute to such royalties. SoundExchange has the right under federal regulations to audit statutory licensees to verify the amount of the royalties owed pursuant to a Digital Transmission or Ephemeral Recording License. *See* 37 C.F.R. §§ 262.6 & 260.5.

III. ARGUMENT

A. The Debtors May Not Sell, Transfer or Assign Ephemeral Phonorecords Created Pursuant to the Ephemeral Recording License.

25. The ephemeral phonorecords authorized to be made and used pursuant to the Ephemeral Recording License are intended **solely to facilitate the digital audio transmission** of a sound recording transmitted to the public under the limitation on exclusive rights specified by Section 114(d)(1)(C)(iv) of the Copyright Act, 17 U.S.C. § 114(d)(1)(C)(iv) (Business Establishment Service transmissions) or under a statutory license in accordance with Section 114(f) of the Copyright Act, 17 U.S.C. § 114(f). 17 U.S.C. § 112(e)(1). The Ephemeral Recording License does not grant a licensee the right to create *and sell* the ephemeral phonorecords.

26. When Congress granted the statutory license to create copies of copyrighted sound recordings, it provided explicit limitations on the rights obtained by the Ephemeral Recording Licensee. Pursuant to Section 112, an entity "is entitled to a statutory license, . . . if the following conditions are satisfied":

> (A) **The [ephemeral phonorecord] is retained and used solely by the transmitting organization that made it**, and no further [ephemeral phonorecords] are reproduced from it.
>
> (B) The [ephemeral phonorecord] is used solely for the transmitting organization's own transmissions originating in the United States under a statutory license in accordance with section 114(f) or the limitation on exclusive rights specified by section 114(d)(1)(C)(iv).
>
> (C) Unless preserved exclusively for purposes of archival preservation, **the [ephemeral phonorecord] is destroyed within 6 months from the date the sound recording was first transmitted to the public** using the [ephemeral phonorecord].

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

27. Thus, the grant of an Ephemeral Recording License does not give a Licensee any right to sell, transfer or assign any of the ephemeral phonorecords it made. Furthermore, the holder of the Ephemeral Recording License must destroy each ephemeral phonorecord of a sound recording within 6 months from the first transmission of the sound recording using the ephemeral phonorecord, unless it is being preserved solely for archival preservation. *See id.;* 37 C.F.R. §§ 260.1 & 262.1.

28. To the extent the Debtors held Ephemeral Recording Licenses,[7] they never had the right to sell, transfer and assign any of the ephemeral phonorecords they made. The Ephemeral Recording License grants only the right to make and use, for a limited time period, ephemeral phonorecords.

29. Upon information and belief, the Debtors have not been destroying their ephemeral phonorecords within 6 months of the initial transmissions made from such ephemeral phonorecords. To the extent the Debtors continue to have ephemeral phonorecords that were

[7] Nothing in this Objection shall constitute an admission that the Debtors had properly complied with the necessary regulations for obtaining Ephemeral Recording Licenses for any or all of the sound recordings for which they have made ephemeral phonorecords.

used to initiate transmissions more than 6 months ago, and are not being kept solely for archival purposes, such phonorecords are infringing upon the copyright owners' rights.

30. "To the extent that [a property] interest is limited in the hands of the debtor, it is equally limited in the hands of the estate...." *In re Southwest Citizens Org. for Poverty Elim.*, 91 B.R. 278, 281 (Bankr. D.N.J. 1988) (*citing* 124 Cong.Rec. H11096 (daily ed. Sept. 28, 1978)). The Debtors' property interest in the ephemeral phonorecords as of the date the bankruptcy cases were commenced did not include the right to sell, transfer or assign the ephemeral phonorecords. Therefore, the estates' interests in the ephemeral phonorecords are likewise limited, and the estates do not have the power to sell the ephemeral phonorecords.

31. Section 363(f) of the Bankruptcy Code further prohibits the transfer of any of the ephemeral phonorecords made by the Debtors. This section provides:

> The trustee may sell property . . . free and clear of any interest in such property of an entity other than the estate, only if –
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

32. Applicable nonbankruptcy law – 17 U.S.C. § 112(e) – prohibits the sale and transfer of the ephemeral phonorecords made pursuant to an Ephemeral Recording License. The Debtors have not obtained the consent of the thousands of copyright owners whose

recordings they have reproduced for the sale of the ephemeral phonorecords, and the copyright owners cannot be forced to accept a money satisfaction in lieu of their right to enjoin or otherwise prevent any acts of infringement with respect to their copyright interests. *See* 17 U.S.C. § 502 (copyright holder may obtain injunction enjoining infringing activities).

33. Bankruptcy courts refuse to authorize the unlicensed sale of copyrighted works. In *Audiofidelity Enterprises, Inc. v. Conrad Music (In Re Audiofidelity Enterprises, Inc.)*, 103 B.R. 544 (Bankr. D.N.J. 1989), the court refused to authorize the sale of records containing copyrighted works where, prior to the filing of the bankruptcy case, the debtor had entered into a consent judgment, which made specific findings that the debtor had infringed the copyright owners' rights, and that permanently enjoined the debtor from selling the infringing records. Rather, the *Audiofidelity* court ordered that the records be destroyed, even though the inventory was valued at $300,000. *Id.* at 548.

34. In *In re Pilz Compact Disc, Inc.*, 229 B.R. 630 (Bankr. E.D.Pa. 1999), the bankruptcy court permitted the chapter 7 trustee to abandon the debtor's phonorecords, finding that the trustee would not be able to sell the records without infringing the copyright owners' rights.

35. In *Sony Music Entertainment, Inc. v. The Clark Entertainment Group, Inc. (In re The Clark Entertainment Group, Inc.)*, 183 B.R. 73 (Bankr. D.N.J. 1995), the debtor lawfully owned sound recordings, but did not have the right to make copies of the sound recordings for sale and distribution. The court refused to authorize the debtor to sell the sound recordings to a purchaser who would copy and distribute the recordings. However, the court recognized that the debtor could lawfully sell the rights it owned in the sound recordings, *i.e.* the right to possession and use.

36. Therefore, this Court should not permit the Debtors to sell any ephemeral phonorecords in violation of the express terms of the requirements and conditions of Ephemeral Recording Licenses. Any such sale would constitute copyright infringement. In addition, to the extent the Debtors have ephemeral phonorecords that were required to be destroyed, these phonorecords already constitute infringing articles, to which the Debtors have no right even to maintain or use for their own purposes.

37. Finally, the purchaser of the Debtors' assets will be unable to utilize the Debtors' ephemeral phonorecords absent the consent of thousands of individual copyright owners. The purchaser will be unable to obtain an Ephemeral Recording License in its own right for the use of Debtors' ephemeral phonorecords because it will fail to meet each of the requirements for such license, including, *inter alia*, the requirement that it retain and use *only* those ephemeral phonorecords *that it made.*

38. Therefore, SoundExchange respectfully requests that this Court deny the Motion to the extent that it seeks to sell, assign or transfer any ephemeral phonorecords made by the Debtors pursuant to an Ephemeral Recording License.

B. The Debtors May Not Assume and Assign Any Digital Transmission or Ephemeral Recording License.

39. The Debtors have informed SoundExchange that they do not intend to transfer any of their Digital Transmission or Ephemeral Recording Licenses. To the extent that the actual purchase agreement or sale order for which the Debtors seek approval contemplates the sale or assignment of such licenses, however, SoundExchange objects thereto.

40. Courts in the Third Circuit follow the general rule that copyright licenses are executory contracts within the meaning of Section 365(c). *In re Golden Books*, 269 B.R.

300, 308 (Bankr. D. Del. 2001); *In re Access Beyond Tech, Inc.*, 237 B.R. 32, 43 (Bankr. D. Del. 1999); *In re Valley Media*, 279 B.R. 105, 135 (Bankr. D. Del. 2002).

41. A contract is executory if the obligations of the debtor and the non-debtor party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the other from performing. *In re Columbia Gas Sys.*, 50 F.3d 233, 239 (3d Cir.1995); *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 38-39 (3d Cir.1989); *In re Sunterra Corp.*, 361 F.3d 257, 264 (4th Cir.2004).

42. Applying this definition of executory contracts, courts generally have found intellectual property licenses, including copyright licenses, to be "executory" within the meaning of section 365(c) because the licensor must refrain from suing the licensee, and the licensee has payment and reporting obligations. *See e.g., In re Valley Media*, 279 B.R. at 135.

43. Absent the consent of the non-debtor party to such contract, Section 365 prohibits the assumption or assignment of an executory contract if applicable non-bankruptcy law prohibits such assignment. 11 U.S.C. § 365(c)(1).

44. Sections 112 and 114 of the Copyright Act do not permit the compulsory licenses granted thereunder to be assigned. *See* 17 U.S.C. §§ 112 & 114. Furthermore, federal law prohibits the assignment of non-exclusive copyright licenses. *In re Valley Media*, 279 B.R. at 136; *Allman v. Capricorn Records*, 42 Fed. Appx. 82, 2002 WL 1579899 *1 (9th Cir. 2002); *In Neva, Inc. v. Christian Duplications Int'l., Inc.*, 743 F.Supp.1533, 1545-46 (M.D. Fla. 1990) (determining that a copyright license agreement that did not include a restriction on the transfer of ownership nevertheless could not be assigned because the licensee merely received a license in the sound recordings and had no right to resell, sublicense, or assign its rights in the license).

45. Therefore, absent the consent of each holder of a copyright pertaining to any Digital Transmission or Ephemeral Recording License held by the Debtors, the Debtors may not assume or assign such license. *See Harris v. Emus Records Corp.*, 734 F.2d 1329, 1333 (9th Cir. 1984) ("It has been held that a copyright licensee is a "bare licensee . . . without any right to assign its privilege.") (*citing Ilyin v. Avon Publications, Inc.*, 144 F. Supp. 368, 372 (S.D.N.Y. 1956), *and Mills Music, Inc. v. Cromwell Music, Inc.*, 126 F. Supp. 54 (S.D.N.Y. 1954)); M. Nimmer, Nimmer on Copyright § 10.01[c][4] (1983) ("a licensee . . . had no right to re-sell or sublicense the rights acquired unless he has been expressly authorized to do so.").

46. To the extent the Debtors are seeking authorization to transfer any Digital Transmission or Ephemeral Recording License, SoundExchange requests that this Court deny such request.

C. Any Purchaser of the Debtors' Assets Will Not Be Entitled to the Debtors' Preexisting Subscription Service Rate.

47. DMX is one of only three services that qualifies as a Preexisting Subscription Service for certain of its transmissions, and therefore the royalty rates it pays on its PES Licenses are more favorable than the rates set for services that do not qualify as a Preexisting Subscription Service.

48. As discussed above, the PES Licenses cannot be (and according to representations made by the Debtors, will not be) assumed and assigned to the potential purchaser.

49. Any purchaser of the Debtors' assets, to the extent it seeks statutory licenses to make ephemeral phonorecords or digital audio transmissions of sound recordings under Sections 112 and 114 of the Copyright Act, cannot qualify as a Preexisting Subscription Service merely because it has purchased the Debtors' assets. Absent meeting the statutory

requirements for a Preexisting Subscription Service in its own right, such purchaser will be required to pay royalty rates established for new subscription services, assuming the transmissions are only available on a subscription basis.

50. To qualify as a Preexisting Subscription Service, the purchaser of the Debtors' assets must be "a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998 . . ." 17 U.S.C. § 114(j)(11).

51. SoundExchange requests that, to the extent the Debtors seek to transfer to the purchaser any alleged right to pay the Preexisting Subscription Service royalty rate, this Court deny such request.

D. The Debtors and the Purchaser Are Required To Maintain Their Books And Records Pursuant to Applicable Federal Regulations.

52. The Debtors have engaged in the public performance of sound recordings via digital audio transmissions during the past three calendar years, and, upon information and belief, have created ephemeral phonorecords to facilitate such transmissions. Based upon SoundExchange's present knowledge of the Debtors' structure, the Debtors were required to obtain licenses for such activities, other than exempt transmissions to business establishments (which do not require a Digital Transmission License). The Debtors had a statutory right to Digital Transmission and Ephemeral Recording Licenses only upon meeting and continuing to comply with the statutory and regulatory requirements.

53. The Debtors have made royalty payments to SoundExchange, as the Designated Agent, for certain of its activities for which it could have obtained Digital Transmission and/or Ephemeral Recording Licenses.[8]

54. Pursuant to the regulations governing such compulsory licenses, the Debtors must maintain their books and records relating to the royalty payments for a period of no less than three years. *See* 37 C.F.R. § 262.4(f) & 262.4(i).

55. To the extent the Debtors seek authority to sell, transfer and assign its books and records relating to the royalty payments made or otherwise owing for the three-year period preceding the sale, such sale and transfer would violate federal regulations governing Digital Transmission and Ephemeral Recording Licenses.

56. Therefore, SoundExchange respectfully requests that this Court require the Debtors to retain and maintain copies of all books and records relating to the royalty payments made or otherwise owing for the three-year period preceding the sale.

57. In addition, the Debtor must use commercially reasonable efforts to obtain or provide access to any relevant books and records maintained by third parties. 37 C.F.R. § 262.6(d).

58. Therefore, SoundExchange respectfully requests that any order approving the sale of such books and records of the Debtors require the purchaser thereof to maintain such books and records for a period of not less than 3 years, and to provide reasonable access to the

[8] Upon information and belief, the Debtors have failed to pay all of the required royalty amounts. To the extent the failure to make such royalty payments does not render the Debtors liable for infringement, SoundExchange will assert claims, as the Designated Agent, for such unpaid royalty payments. The individual copyright owners whose works were reproduced or transmitted may, however, elect to file and assert infringement claims against the Debtors. In connection with any claims or other rights that SoundExchange may assert on behalf of its constituents, Sound Exchange hereby reserves the right to audit the Debtors or to take discovery of the Debtors in a manner, and to the extent, permitted by law.

Debtors in connection with any audit undertaken by SoundExchange, or any other interested party, in connection with any Digital Transmission or Ephemeral Recording License.

59. This is especially critical in the present case, where the Debtors failed to make any royalty payments pursuant to their purported Ephemeral Recording License in connection with their Business Establishment Service activities for the period January 1, 2003 through February 13, 2005.[9] SoundExchange must be able to audit the Debtors' books and records to determine the amount of the pre-petition unpaid royalty payments the Debtors are obligated to pay to it, for the benefit of the copyright owners and performing artists. 37 C.F.R. §262.6(b).

60. In addition, the pleadings and statements filed in the present bankruptcy proceeding have raised concerns that the amount of royalty payments paid by the Debtors in connection with their purported PES License were for less than the amount actually owing to SoundExchange as the Designated Agent under Copyright Office regulations. SoundExchange must be able to audit the Debtors books and records to determine the amount of any unpaid royalties. 37 C.F.R. § 260.5(b).

61. The individual copyright owners may assert claims against the Debtors for copyright infringement, asserting that the Debtors never obtained, or failed to maintain, the necessary Digital Transmission and Ephemeral Recording Licenses. The maintenance and retention of the Debtors' books and records will be necessary to pursue such claims.

---

[9] Section 112(e)(7)(A) of the Copyright Act provides that "[a]ny person who wishes to make a phonorecords of a sound recording under a statutory license in accordance with this subsection may do so *without infringing the exclusive right of the copyright owner of the sound recording* under section 106(1) (i) by complying with such notice requirements as the Librarian of Congress shall prescribe by regulation and *by paying royalty fees* in accordance with this subsection . . ." 17 U.S.C. § 112(e)(7)(A) (emphasis added).

WHEREFORE, SoundExchange respectfully requests that this Court enter an order:

(a) prohibiting the Debtors from selling, transferring or assigning any ephemeral phonorecords that they made, and currently, lawfully retain, pursuant to a purported Ephemeral Recording License;

(b) prohibiting the Debtors from selling, transferring or assigning any ephemeral phonorecords that they were and are required to destroy pursuant to the express requirements of any purported Ephemeral Recording License;

(c) prohibiting the Debtors from selling, transferring or assigning any unlicensed ephemeral phonorecords, to the extent such phonorecords were made without a license, statutory or otherwise, to make such recordings;

(d) prohibiting the Debtors from assuming,assigning, selling or transferring any Digital Transmission or Ephemeral Recording Licenses they hold;

(e) prohibiting the Debtors from selling, transferring, or assigning to a purchaser any purported right to pay the Preexisting Subscription Service royalty rate for any digital audio transmissions of sound recordings or the making of any ephemeral phonorecords under Sections 114 and 112 of the Copyright Act, respectively;

(f) requiring the Debtors to retain and maintain the originals, or a complete copy, of all books and records relating to any royalty payments paid or owing pursuant to any Digital Transmission or Ephemeral Recording License held by the Debtors, for the three-year period preceding the sale;

(g) requiring the ultimate purchaser(s) of the Debtors' assets to maintain and make reasonably available all of the Debtors' books and records received by such purchaser(s)

relating to any royalty payments paid or owing pursuant to any Digital Transmission or Ephemeral Recording License, for the three-year period preceding the sale; and

(h) granting such other and further relief as the Court deems just.

Dated: May 4, 2005

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	Case No. 05-10429
MAXIDE ACQUISITION, INC.,	824 Market Street Wilmington, Delaware 19801
Debtors.	May 10, 2005 1:32 p.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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EXHIBIT
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preferences against these employees, in which case, I'd like to know what they are, and how much they are, and what is being paid for them because that will go to the issue of the allocation of the sale proceeds as well. So, on this record, I don't think I can approve that aspect of it. Do we have another issue?

MR. GODSHALL: Well, Your Honor, in that event, I guess, the buyer, Capstar, is going to have a decision, and I think it make sense to go through the rest of the objections, so we can decide -- determine if there are other decisions and other key points that Capstar is going to have to assess.

THE COURT: All right.

MR. GODSHALL: Your Honor -- next, Your Honor, we take up the objection of Sound Exchange. Sound Exchange is an entity, Your Honor, with which the debtors have a statutory license, with respect to Afemerol Phono Records. Their objection has four pieces, Your Honor. First, they object that we cannot assign their statutory license, and we never intended to do so. So, that aspect of the objection, I believe, is resolved.

Second, Your Honor, Sound Exchange objected that we could not transfer Afemoral Phono Records without the consent of Copyright Holders, which means we will have to destroy property, and the buyer will have to create it, unless licenses are obtained.

Your Honor, we have agreed on language to put into the order on that subject. So, I believe that aspect of the objection is also resolved.

THE COURT: Okay.

MR. GODSHALL: All right. The third aspect of the Sound Exchange objection was a request that this Court issue findings or rulings concerning the amount of the rate that can be charged to Capstar. I believe Sound Exchange -- well, I believe that aspect of the objection is being withdrawn. I think Sound Exchange was only asking for that in reaction to a thought that we were asking for some other ruling, and I think that aspect -- I believe that aspect of the objection is withdrawn.

Which leads us, then, to the fourth aspect of the objection, Your Honor, which is records retention. Your Honor, under the asset purchase agreement, the debtor has access to its books and records for the purpose of administering this estate for two years. It's my understanding that under the -- under the statutes, the debtor has an obligation to maintain records going back three years, concerning its use of the statutory license.

Your Honor, we think the issue before Your Honor is whether or not this agreement is in violation of law. We don't think it is. We have two years to obtain access to, and if necessary, I suppose, if the law requires, provide to Sound

Exchange, whatever documents they need. Under the APA, the buyer is not permitted to destroy those records, and we will rely on our access --

THE COURT: Ever?

MR. GODSHALL: Not until after the two year period, Your Honor.

THE COURT: Thank you. All right.

MR. GODSHALL: Yes. And, so, Your Honor, as far as we're concerned, this agreement is in compliance with law, and that should end the issue. I think Sound Exchange wants something more. I believe they want affirmative covenants from the buyer, that the buyer will maintain, for their benefit, the record, or something to that effect but, Your Honor, that shouldn't be the issue here today. The issue is whether this agreement is in accordance with law. It puts us in violation of law. I don't think Sound Exchange suggests it does. So, to require us to put -- to require the inclusion in the order of affirmative obligations going far beyond the agreement just because they have a concern that someday they might want records, and someone might violate the law and not give those records to them, we think is an inappropriate request, but we think that's, sort of, the nature of the objection here.

THE COURT: Let me hear from Sound Exchange.

MR. STRATTON: Good afternoon, Your Honor. David Stratton for Sound Exchange. Your Honor, Mr. Godshall, I

think, got most of it right, with respect to the issues that we have resolved. I think it might be helpful to explain -- put this in a context a little bit so you can understand why we're concerned about the issues that we've raised. The debtor, Your Honor, as you probably already know, operated, or at least purported to operate under certain copyright licenses granted by the Federal Copyright Act. Sound Exchange, for it's part, is a non-profit cooperation that's authorized by the copyright office to receive royalties on behalf of the copyright owners, and to receive statements of account, which are, sort of, a reconciliation of what's due, and also to conduct audits of the businesses who are entitled to these statutory licenses so that it could be determined whether or not the royalties that had been paid were proper or properly calculated.

As Mr. Godshall indicated, we had filed an objection that raised four issues. Two of them have been resolved with language that I understand the bank, and the buyer, and the debtors have agreed to include in the sale order, which, specifically, says a couple of things. One, that the licenses provided for in Sections 1112 and 1114 of the Copyright Act, were not being transferred to the buyer.

And, two, the Afemoral Phono Records -- if I had about 20 minutes, I'd try to explain what that is, but it's really not important. I think it buys a bunch of CD's. It won't be transferred to the buyer, unless the copyright owners

to those recordings consent, which means the owners of the copyright, and the buyers -- and they've already indicated they're willing to do this, will sit down and work out an arrangement, or not, under which the transfer will take place. If no arrangement is made, they're not being transferred as part of this asset purchase agreement.

Which leaves us with one issue, which is the record keeping issue. Federal regulations specifically impose an obligation on this licensee to maintain records, which would permit Sound Exchange to conduct audits of its operations going back not less than three years. So, to say there is no obligation and that the asset purchase agreement is not inconsistent with any law is not correct. There is an affirmative obligation, created by federal law, which the bankruptcy code, as near as I can read it, doesn't eviscerate or obviate.

And this isn't just a theoretical concern. It's a real concern, because for the more than two years prior to the filing of this bankruptcy, the debtor was not paying certain of its royalties, and we believe the debtor was not calculating and paying other royalties properly. So, this is an issue which, in fact, we had already teed up, if you will, by issuing a notice of our intent to audit prior to the filing.

Now, the debtor, in our discussions, in our effort to resolve this, basically, says, the asset purchase agreement

says what it says. If they ask for records, we're comfortable in relying on our ability to gain access. But, that doesn't really solve the problem from our perspective, and then here's why. There's no affirmative obligation that is owed to Sound Exchange, on the buyer's part, to maintain the records. There's no affirmative obligation on the debtor's part, or the buyer's part to permit Sound Exchange access to those records. So, what we're looking at, potentially, Your Honor, and our concern is, nobody -- it wasn't my problem. I didn't maintain the records. That's the debtor's problem. If you want to pursue a claim against the debtor, pursue a claim against the debtor. That's the buyer speaking.

Or, we ask for access. We ask to conduct an audit, and we're then faced with an expensive process of pursuing discovery through this Court to, essentially, chasing our tails around trying to get access to records, which, by federal law, we're entitled to.

So, what's the solution. Well, the debtor's solution is, the agreement says what it says. We'll deal with the problem later on, which doesn't really solve our problem. I have two suggestions to the Court, neither of which, I think, creates an unreasonable obligation on the debtor's part or the buyer's part, the first of which would be to, as a condition to approving the sale, simply require the buyer to do what it's going to do anyhow, which is to maintain -- we hope it will do,

excuse me, maintain these records, and to permit us direct access to them in accordance with federal regulation.

Alternative, require that the debtor provide us access with the records, notwithstanding that they've been sold. The debtor has the means to accomplish that through it's asset purchase agreement, to which we are not a party, and that the buyer agreed to cooperate in providing the debtor access in response to requests we may make for information, or for records.

Now, the debtor may say, well, how do we know that's going to be a reasonable request? How do we know you're not going to ask for the sun and the moon and the stars? And the answer is, if they think it's unreasonable, they'll tell us, and they won't give us access, and we'll either have to agree on what's reasonable, or we'll come back to court. But, to simply say, it's not a problem, go away, doesn't recognize our rights under federal law.

THE COURT: Are you seeking any extension of the two year maintaining the records?

MR. STRATTON: Your Honor, I can check with my client, but I don't believe we are.

THE COURT: All right. Response?

MR. GODSHALL: Your Honor, counsel asserts that we have an obligation to maintain these records under federal law and, therefore, wants that obligation built into our sale

order. Of course, there are thousands of federal laws that this company operates under, and none of those are built into this sale order.

THE COURT: Well, but none of them are being, potentially, affected by the sale order, are they? The debtor's ability to perform? At least not that I've heard.

MR. GODSHALL: Right. But, and I think that's the issue for Your Honor. Does this purchase agreement give us the ability to perform, and it does. And what counsel wants is more. What counsel wants is for you to build into the order, right now, affirmative obligations that we have no ability -- Your Honor has no ability to assess in terms of reasonableness because they haven't asked for anything yet. Counsel said he didn't want to, you know, go on a wild goose chase here. Your Honor -- respectfully, this is all a wild goose chase. I mean, this is a case, Your Honor, that's going to result in a distribution to unsecured creditors of less than ten cents. Perhaps less than five cents, because the bank's deficiency claim is so enormous, and their secured claim is so enormous. And, yet, counsel is up here, suggesting, you know, a document production exercise, you know, that -- of a grand scale, and he wants Your Honor to, basically, order us to comply with it, you know, sight unseen, in terms of what documents they're requesting and on what terms as leverage. As leverage against us, as leverage against the buyer, because Sound Exchange has

to go and negotiate with this buyer going forward. All we're suggesting, Your Honor, is that this asset purchase agreement gives us the ability to perform. There's no reason to think that the buyer is going to breach its obligations under the agreement, anymore than there was a reason to think that we would breach our obligations under the statute before the sale closes.

I mean, to take counsel's argument to the extreme, they should have been running in here on the first day of the case, and getting Your Honor to order that we not destroy our records because of our statutory obligation. They, apparently, had faith that we wouldn't destroy them pre-sale, and there's no reason -- there's no more reason to think the buyer is going to destroy them post-sale. So, the agreement lets us perform --

THE COURT: But the buyer has no obligation to Sound Exchange?

MR. GODSHALL: But they have an obligation to us, and we will sue them if they breach it. And if we're liable to sound exchange for some amount of money because we -- we don't have access to those records because Capstar destroyed them, you know, we will seek redress against Capstar. Why in the world Capstar would expose themselves to that kind of liability is anyone's guess. I think there's absolutely no reason to think that those documents are less safe, post-closing, than

pre-closing. And all I'm urging Your Honor to do is not to impose on us some sort of obligation, in a vacuum, before we know what they demand, and the context in which they demand it. Because that could be a tremendous burden on this estate, that's going to be imposed on us for nothing more than to gain leverage, because there's no economic rationale for conducting the audit they're talking about.

MR. STRATTON: Your Honor, David Stratton again. The debtor raises the specter of abusive conduct by my client without any basis, in fact, for that contention. We haven't made a request, today, putting aside the request for notice -- or the notice of audit, for a particular set of documents. So, to say, we're going to engage in a document production on a grant scale is, at best, hyperbole.

What we want to know is that the records will be maintained, and if the debtor wants to assume the obligation to -- or the risk that they be maintained, that's fine, and that we will have access to them if and when we're entitled to, or we just decide to, as provided by federal law, that's all.

THE COURT: Well, why would you -- what about the order suggests you won't?

MR. STRATTON: Your Honor, the debtor won't have the records in its possession, and the buyer has no -- we have no contract with the buyer.

THE COURT: Yeah, but they have an obligation to the

debtor to let the debtor have access to it.

MR. STRATTON: And suppose the buyer says to the -- the debtor says to the buyer, Sound Exchange wants access to the records, and the buyer says, no?

THE COURT: Then the debtor goes in and he gets them and produces them to you under 2004.

MR. STRATTON: Your Honor, but then we're drawn into litigation over our right to access.

THE COURT: What litigation?

MR. STRATTON: The debtor has to come to this court, or we have to come to this court --

THE COURT: You file a 2004 motion. Under the regulations, I'm entitled to the following documents. What's the litigation?

MR. STRATTON: Your Honor, we could do it that way, or we could deal with it in the sale order to, simply, say --

THE COURT: How would you do it in the absence of a bankruptcy, when the debtor said, I'm not giving them to you?

MR. STRATTON: Your Honor, in the absence of a bankruptcy?

THE COURT: Right. How would you get the records from the debtor?

MR. STRATTON: We would file -- as we have, we would issue a notice of our intent to conduct an audit.

THE COURT: They don't let you in the door?

MR. STRATTON: And -- no, we'd agree on a time and a place for the audit, and they'd let us in.

THE COURT: Or they don't.

MR. STRATTON: Then we go to the, I guess, the D.C. Circuit Court and get a mandatory injunction. But --

THE COURT: Isn't Rule 2004 the same? You consult with the debtor regarding the documents you want, they consent to it, and produce them, or you file a motion here.

MR. STRATTON: What --

THE COURT: In fact, it's probably easier for you to do it that way, then outside of bankruptcy.

MR. STRATTON: That's fine, Your Honor. But, then, how does that deal with the issue of maintaining the records?

THE COURT: The buyer has an obligation to maintain the records for two years.

MR. STRATTON: That's the debtor's contention, but first, I would -- I need to verify that and, secondly, I'm not sure --

THE COURT: Let me hear the buyer verify that on the record?

MR. STRATTON: That's fine, Your Honor. I suppose we can go that way, but let's make it clear that if we are unable to get access to the records, and those records are destroyed, it may very well be our position that that gives rise to administrative claims in this estate. So, that nobody thinks

that this is just a bit of a joke, and that sound exchange can be ignored. If the records aren't there when we want to go look at them, then it's because the buyer's destroyed them, then we'll be back in this Court asserting claims.

THE COURT: All right. Let me hear from the buyer that the buyer is obligated to maintain the debtor's books and records for the two years.

MR. DEHNEY: Your Honor, Robert Dehney again. Section 17.15 of the asset purchase agreement provides that we will maintain the records for two years. It lays the protocol where the debtor will request documents, and we will make them available. We confirm our understanding that's two years that we maintain the records.

THE COURT: Okay. All right. Then I'll overrule the remaining objection of Sound Exchange then.

MR. GODSHALL: Your Honor, for the record, the agreed upon language that we need to add into an amended purchase order concerning the other aspects of the Sound Exchange objection, I'll just read it. The paragraph provides, "Notwithstanding anything herein to the contrary to purchase assets, an assumed contract shall not include any licenses under 17 USC Section symbols 112(e) or 114, or any Afemoral Phono Records created pursuant to a statutory license under 17 USC Section symbol 112(e) without the consent of the copyright owners."

Your Honor, that leaves the BMI and Ascap objections.

(Pause)

MR. GODSHALL: Your Honor, the BMI and Ascap objections both raise a common point, which is that the buyer has requested that it, essentially, be immunized from successor liability. That immunity is contained in Paragraph 16 of the sale order. Your Honor, we believe under the Third Circuit's decision under TWA, this Court's authority to issue that immunization from successor liability is clear as a general matter. We have over 40,000 creditors in this case. Ascap and BMI both argue that they, alone, among those 40,000 plus creditors, should be extracted from that provision, and they should be free to make successor liability claims against the buyer. The reason given by both is a somewhat unique reason. Their contention is, Your Honor, because they are operating under a consent decree, which they entered into under coercion imposed by the Department of Justice for anti-trust violations. Because of that, they should have the unique ability to assert successor liability claims against the buyer when no other creditor does.

Their argument -- they make, I think, Your Honor -- I think you can box them into two different arguments as to why this, apparently, is the case. The first argument they make, Your Honor, is that it would intrude on the jurisdiction of the Court administering the consent degree for Your Honor to hold

that there be no successor liability. Your Honor, that argument is made in the face of the consent decree, which is attached, I believe, to the Ascap objection. That consent decree, Your Honor, does not attempt to create in the Court administering the consent decree, exclusive jurisdiction to enter all orders and make all findings which, some day, some how, might have some relevance in some rate proceeding before the District Court. You can find no such provisions in the consent decree.

Your Honor, you also can find no mention, whatever, of the concept of successor liability in the consent decree. So, any argument that that District Court, in New York, that administers the consent decree, has the unique and exclusive ability to make successor liability findings is, again, nowhere to be found in the decree. So, Your Honor, we think that the argument that it would intrude on the jurisdiction of the District Court has no merit, as made by each entity.

The other argument that is made, Your Honor, I think is that it would, somehow, discriminate against Ascap and BMI if their contracts were not to be assumed, or if they were unable to make successor liability arguments in the District Court, because it would be unfavorable, in terms of treatment to them. I can't quite articulate it, as compared to the treatment being given to other licensees of music to DMX. I think the argument, Your Honor, is that since other music

licenses are being assumed, and cure payments being made to those entities, it is somehow unfair that because their operating under a consent decree, and have to give a license to the new buyer, that we not, in essence, give them an avenue to get their alleged arrearages cured as well.

I think there are two responses to that argument, Your Honor. The first one is, maybe they should get a different consent decree. It's not our problem that they are operating under a consent decree that gives the buyer the right to get a license from them, but it's, certainly, within our business judgment to exercise assumption and rejection decisions.

The other point to make on the discrimination argument, Your Honor, is that even if it wasn't a proper exercise of our business judgment not to assume these licenses, the other licensing agencies, as Your Honor is aware, because we dealt with them an hour ago, are objecting to the assumption of their licenses. So, it is hardly an act of discrimination by the debtor to reject those licenses as well, and to attempt to preclude BMI and Ascap from making successor liability arguments as against our buyer, just like every other creditor is precluded from doing.

THE COURT: All right. Let me hear from either BMI or Ascap.

MS. THOMPSON: Good afternoon, Your Honor. Christina Thompson of Connolly, Bowe, Lodge and Hutz, here on behalf of

sale order, and determining any --

THE COURT: Don't read so fast. I don't see exclusive anywhere in that paragraph. Am I missing it?

MS. BOOTH: I apologize, Your Honor. If that's the Court's position, we'll go with that.

THE COURT: All right. Does the buyer agree?

MR. GODSHALL: Well, Your Honor, it's not there, no exclusive jurisdiction.

THE COURT: All right. You can't be heard because you're not talking into a microphone.

MR. GODSHALL: Your Honor, the word exclusive does not appear in Paragraph 3.

THE COURT: Okay.

THE COURT: Let me hear from the buyer.

MR. HEATH: Good afternoon, Your Honor. May it please the Court again. Paul Heath, on behalf of THP Capstar. It will come as no great surprise to the Court that this -- that obtaining these assets free and clear of any lien claim incumbrance or other interest and also getting to find of no successor liability is a central condition set forth in an EPA. I'm sure that's no surprise to the Court, and those are the -- I think this -- what we're asking for is very standard in, quite frankly, every jurisdiction in the United States. It's, specifically, allowed, under the Third Circuit's ruling in TWA. And, make no mistake, we will, if in time it comes to a

litigation in front of the rate court whether or not, you know, we are successor to the debtor or whether or not the fact that the debtor didn't pay them amounts, and they weren't able to collect those from the debtor that those should be imposed on us, which, in essence, allows them to collect their claim against us. We, most certainly, will be waiving the order that we would -- were seeking to obtain from this Court. And, you know, Your Honor, if you would like me to, I'd be happy to proffer the testimony of my client to the -- which would be the effect that if we do not have these findings, and I think this will be of no great surprise to the Court, you know, that's not something we're willing to -- we will not be in a position to close this transaction. So, it's a -- you know, just a free and clear, and no successor findings are central to this transaction. That's the whole reason it's being enacted through a Chapter 11 case, Your Honor.

THE COURT: You are not, though, asking that I determine that, by virtue of Paragraph 17 that anybody has to license anything to you under any consent decree entered by another Court?

MR. HEATH: That's correct, Your Honor. But we are -- we are asking that we are not a successor to the debtor here. Asking for that finding.

THE COURT: All right.

MR. HEATH: Your Honor, would you like me to proffer

the testimony of my client?

THE COURT: Yes, please.

MR. HEATH: Your Honor, again, I would like to proffer the testimony of Mr. John Collin. As stated to the Court earlier, if Mr. Collin was called to the stand, and asked to testify, he would, again, advise the Court that he is the president of THP Capstar, the proposed purchaser here.

He would further testify that, in discussions with his counsel, that one of the specifically negotiated provisions of this was the free and clear nature of the sale, and also the finding of no successor liability.

Mr. Collin, further, testified that those provisions are contained within -- and those requirements are contained within the terms of the purchase agreement, and he would further testify that those were the findings, including the entry of the sale order, and form of substance reasonably satisfactory to the buyer, our closing conditions, and that absent, you know, satisfactory findings in the debtor's -- in favor of THP Capstar, that THP Capstar would not be prepared to go forward with this transaction. And that would be the proffer of Mr. Collin, Your Honor.

THE COURT: All right. Does anybody wish to cross examine Mr. Collin?

(Pause)

THE COURT: All right. I'll accept the proffered

testify.

MS. BOOTH: Your Honor, I apologize. I was just trying to turn the microphone so that I could be heard. If I could have just a moment to confer with my client before you accept the proffer?

MR. LUBELL: And I want it to be clear, Your Honor, there will be the successor liability provisions in the order. What we are asking for is the provision that simply says that you have not, in this order, dictated to BMI or the BMI rate court what conditions they may consider in issuing new licenses, or the terms and rates that may be imposed with respect to those new licenses.

THE COURT: I'm not sure I'd go that far, but I would be willing to state that nothing in the order shall be determined -- shall be considered a determination as to whether or not the successful bidder is entitled to any license under any consent order.

MR. LUBELL: Okay. Well, that would be fine.

THE COURT: I'm not making that determination.

MR. LUBELL: Okay. And, the terms are rates. It's not a determination of that, obviously. That's all we're asking for, Your Honor.

MS. BOOTH: Your Honor, Rebecca Booth on behalf of Ascap. With the addition of the fac that the Court's not making a determination of the terms or the rates of the new

licenses, as well as our obligation to issue them. I think Ascap would be fine with that language as well.

MR. GODSHALL: Your Honor, I think Ascap and BMI are really dancing around the issue. When they say that they don't want anything in this order to be deemed to be an imposition on the Court, I mean, that's the whole nature of a successor liability limitation. Whatever the effect of that is, it is, Your Honor. But the buyer wants a successor liability immunization against all creditors. Now, what the effect is down the road in some litigation with some other creditor, that's for some other court to decide. But, this language that they're asking for --

THE COURT: Well, what about the language I suggest, that I am not making a determination that they have any obligation to give a license, or what the rate or terms of that license shall be?

MR. LEVY: Your Honor, Rick Levy on behalf of the bank. If I may make one suggestion? I think the concern that Mr. Godshall is expressing --

THE COURT: Could you please step closer.

MR. LEVY: I'm sorry. Rick Levy on behalf of the bank. I think the concern that's being expressed is, if you say nothing in this order affects -- constitutes a determination of whether or not they're entitled to a license under the consent decree, when they apply separately for that,

the concern is that if Ascap and BMI -- and they, clearly, will do this, if you include that language in the order, they'll take the position that the language that Your Honor would insert overrides 363(f), with respect to cutting of successor liability claims. Because, they'll say that sentence that you just added is a -- prevents Capstar, when they seek a new license, from using the 363(f) language as a basis for defending against a claim by Ascap or BMI that because the debtor failed to pay its royalty obligations, that Capstar is prevented from getting a license.

One suggestion I would have to deal with that problem is you could include language that says, nothing in this order entitles Capstar to a license, because you're not ruling on that.

THE COURT: Well, then why does it say -- why --

MR. LEVY: But your order -- but your order is going to have an effect on what happens in the rate proceeding, because Ascap and BMI, it will not be entitled to assert, as a basis for imposing any particular rate, or whether or not to issue a license based on the fact that the debtor didn't pay its royal fee obligations. And, that -- it's clearly -- your order is going to have an effect in that proceeding.

THE COURT: Yes, but I'm not making a determination or ruling.

MR. LEVY: Can I just say, one way or the other, but

your order is going to extinguish successor liability.

THE COURT: No, it won't. Excuse me. Yes it will. It won't extinguish that claim of the buyers. All right.

MR. LEVY: Or you leave the order silent on that. The concern is that if you add language, they are going to take the position that that narrows the scope of 363(f).

THE COURT: Well, then just say that it's not narrowing the effect of successor liability, or Section 363. But, I'm not ruling on the effect of the consent decree. So, I think we can fashion language that says that.

MR. LEVY: So, what -- All right. What would you propose to add? I'm a little concerned that the buyer isn't going to be in a position -- that they're going to be uncomfortable with the language as restricting --

THE COURT: This order is not a determination of whether BMI or Ascap have any obligation to issue a license to them, and under what terms or rates they would have to issue the license.

MR. LEVY: But doesn't that restrict their ability to invoke the free and clear language that's elsewhere in the order?

THE COURT: No. No. I'm just not making a determination whether they have to issue a license, and under what terms. I'm not determining the effect of the consent decree.

MR. LEVY: Would Your Honor be willing to include language in addition to that, that allows Capstar or any other party to use -- to invoke any of the provisions -- any of the other provisions in the sale order in the other rate proceeding?

THE COURT: Say that again for me. Every time you turn around you fade out, and I can't hear you.

MR. LEVY: Yeah. And I'm sorry.

(Pause)

MR. GODSHALL: Your Honor, we can do our best to try to whittle language, or cobble language together here. The problem is that no matter what language we add, the buyer is going to be concerned that it will be used in a way to go to the District Court and say, this language limits the scope of Paragraph 17 of the order.

THE COURT: So, come up with language that doesn't?

MR. GODSHALL: I don't --

THE COURT: I am not deciding -- so, it's clear. I am not deciding the effect of these consent --

MR. GODSHALL: And I think that is clear to every person in the courtroom, Your Honor, but if --

THE COURT: So, why can't we put language in that says that? They're going to get the transcript, so you might as well make it clearer.

MR. GODSHALL: But, Your Honor, If you look at -- the

language of Paragraph 17, all it says is that the buyer isn't the successor, and there's no successor liability.

THE COURT: Okay.

MR. GODSHALL: I mean, again, we've got 45,000 creditors in this estate and there's no exceptions in the sale order saying, notwithstanding this -- you know, somebody else, if they go into some court, someday --

THE COURT: The other 42 -- 43,998 creditors didn't object.

MR. GODSHALL: Right. But, just so -- the question is whether this objection is appropriate, and whether this language is necessary for this order to be given effect, and to be fair to the creditors. And, Your Honor, it is. If you look at Paragraph 17, which is the only language of this order that is of relevance to this dispute, it's plain vanilla successor liability language.

THE COURT: Their fear is that the buyer is going to say, I decided. Under the consent decree they have the license. I did not decide that.

MR. GODSHALL: And, Your Honor, they can take that transcript to the -- of this hearing to the Court and do whatever they want with it, but --

THE COURT: Well, why can't you put it in the order?

MR. GODSHALL: Because, again, I'm sure the buyer is going to be fearful that that language will be used to try to

eviscerate what was given to them in Paragraph 17, and we can try to put that language together, but that's what we're trying to avoid, and that's a big problem here.

THE COURT: Well --

MR. LEVY: Because that -- what it comes down to, the language you would insert still does not limit the provision -- the free and clear language, and the no successor liability language elsewhere in the order.

THE COURT: Right.

MR. LEVY: I mean, I guess if we draft -- if we add your language, but make clear -- with a proviso that that doesn't limit the scope or effectiveness of a free and clear and no successor liability languages elsewhere, maybe, you know --

MR. LUBELL: Your Honor, they have the right to make these arguments to the Court. If the Court decides we're correct, we'll be back here. We'll be fighting about cure claims. If the Court rules against us, we will know how to operate in the future in terms of, you know, how much credit to extend, when to terminate a license, and you know, I think Capstar just has to be careful what they wish for in terms of taking on this litigation.

MR. LEVY: Your Honor, if we may just take a recess to see if we can work on language or, at least, propose different versions of it.

THE COURT: All right.

MR. LEVY: And see if we can resolve it that way.

THE COURT: All right.

MR. STRATTON: Your Honor, one comment, and no I'm not going to weigh into this issue. Going back to the Sound Exchange objections, debtor's counsel indicated that we had withdrawn the objection with respect to the rate that the buyer might be entitled to. Actually, we're not going forward on it, but we're not withdrawing it in the sense that we're -- it's being adjudicated due to non-prosecution. And the reason for that is, simply, that nothing -- according to the buyer's reply, filed, I guess, on Friday, nothing in the sale order attempts to adjudicate what rate the successful bidder is entitled to under its statutory licenses. So, since the issue isn't being brought to the Court by the debtors, we don't need it decided, and we can leave the record that way. I just wanted to clean that up.

THE COURT: Thank you.

MR. STRATTON: Thank you.

THE COURT: All right. Let's take a short recess then.

(Tape Off)

COURT OFFICER: All rise. You may be seated.

THE COURT: Where are we?

MR. GODSHALL: Your Honor, with respect to the Ascap

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
MAXIDE ACQUISITION, INC., et al.,[1]	)	Case No. 05-10429 (MFW)
	)	(Jointly Administered)
Debtors.	)	
		(Re: Docket No. 20)

ORDER: (I) APPROVING SALE BY DEBTORS OF SUBSTANTIALLY ALL OF THEIR OPERATING ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS PURSUANT TO SECTIONS 363(b), (f) AND (m) OF THE BANKRUPTCY CODE, (II) ASSUMING AND ASSIGNING CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (III) GRANTING RELATED RELIEF

This matter coming before the Court on the "*Motion Of The Debtors For An Order: (I) Approving Sale By Debtors Of Substantially All Of Their Operating Assets Free And Clear Of All Liens, Claims, Encumbrances and Other Interests Pursuant To Sections 363(b), (f) And (m) Of The Bankruptcy Code, (II) Assuming And Assigning Certain Executory Contracts And Unexpired Leases, And (III) Granting Related Relief*" (the "Sale Motion")[2], filed by the above-captioned debtors and debtors in possession (collectively, the "Debtors" or the "Sellers"); the Court having reviewed the Sale Motion and having heard the statements of counsel regarding the relief requested in the Sale Motion and having considered the evidence proffered in support of the relief requested in the Sale Motion at a hearing before the Court (the "Sale Hearing"); the

1 The Debtors consist of the following entities: Maxide Acquisition, Inc., a Delaware corporation; AEI Music Network, Inc., a Washington corporation; DMX Music, Inc., a Delaware corporation; and TEMPO Sound, Inc., a Oklahoma corporation

2 Capitalized terms not otherwise defined herein shall have the meanings set forth in the Final APA (as defined below).

DOCKET # 357

DATE 5-11-05

EXHIBIT 5

(1) Authorizing Debtors To Incur Post-Petition Secured Indebtedness, (2) Granting Security Interests And Priority Claims Pursuant To 11 U.S.C. § 364, (3) Granting Adequate Protection, (4) Modifying Automatic Stay And (5) Setting Final Hearing, entered by this Court on February 14, 2005 (or subsequent final order) (the "DIP Order") are in full force and effect and all sale proceeds of the Purchased Assets payable to the Debtors under the Final APA shall be subject to and treated in accordance with the DIP Order.

29. Nothwistanding anything herein to the contrary, the executory contracts and unexpired leases set forth on Exhibit C to this Sale Order shall not be assumed and assigned to the Purchaser.

30. Notwithstanding anything herein to the contrary, the Purchased Assets and Assumed Contracts shall not include any licenses under 17 U.S.C. §§ 112(e) or 114, or any ephemeral phonorecords created pursuant to a statutory license under 17 U.S.C. § 112(e) without the consent of the copyright owners.

31. Notwithstanding any provision to the contrary in this Order, the Asset Purchase Agreement or any other related sale documents, to the extent that Debtors cannot obtain the necessary consents (i.e. the Japan Required Consent and the New Zealand Required Consent) to have the stock of DMX Music Japan and SKY DMX Music Limited transferred to THP Capstar prior to the sale closing date as set forth in the Asset Purchase Agreement (collectively "The Japan and New Zealand Contracts"), The Japan and New Zealand Contracts shall not be assumed or assigned to THP Capstar, and shall be deemed rejected as of that date.

32. All of the sale proceeds from the Sale other than $12 million (the "Retained Sale Proceeds" and all sale proceeds other than the Retained Sale Proceeds, including

EXHIBIT C

Excluded Contracts

1. All of Sellers' contracts and arrangements with and licenses from (i) American Society of Composers, Authors and Publishers ("ASCAP"), (ii) Broadcast Music, Inc., and (iii) RIAA/SoundExchange, including, without limitation, the Letter Agreement dated June 14, 2000 between American Society of Composers, Authors and Publishers and AEI Music Network, Inc.

2. The following employment agreements:

   a. Employment Offer Letter dated January 23, 2004 by and between Simon Bexon and DMX Music, Inc.

   b. Employment Offer Letter dated January 23, 2004 by and between Timothy Seaton and DMX Music, Inc.

   c. Employment Agreement dated February 10, 2004 by and between Nick Wilson and Maxide Acquisition, Inc.

   d. Employment Agreement dated May 1, 2003 by and between Wynne Roberts and Maxide Acquisition, Inc.

   e. Employment Agreement dated May 1, 2003 by and between Barry Knittel and Maxide Acquisition, Inc.

   f. Employment Agreement dated May 1, 2004 by and between Mark D. Rozells and Maxide Acquisition, Inc.

   g. Employment Agreement dated August 16, 2004 by and between Robert D. Baxter and Maxide Acquisition, Inc.

3. The following real property leases:

   a. Industrial Multi-Tenant Lease dated October 6, 1999, as amended or extended, by and between AMB Property, L.P. and DMX Music, Inc., formerly known as DMX, LLC, for premises in Orlando, Florida.

   b. Lease, as amended or extended, by and between AMB Institutional Alliance Fund I, L.P., and DMX Music, Inc., for premises in Concord, California.

   c. Lease Agreement, as amended or extended, by and between Church Street Partners LLC and DMX Music, Inc., for premises in Concord, North Carolina.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
MAXIDE ACQUISITION, INC., et al.,[1]	)	Case No. 05-10429 (MFW)
	)	(Jointly Administered)
Debtors.	)	
		(Re: Docket No. 20)

ORDER: (I) APPROVING SALE BY DEBTORS OF SUBSTANTIALLY ALL OF THEIR OPERATING ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS PURSUANT TO SECTIONS 363(b), (f) AND (m) OF THE BANKRUPTCY CODE, (II) ASSUMING AND ASSIGNING CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (III) GRANTING RELATED RELIEF

This matter coming before the Court on the "*Motion Of The Debtors For An Order: (I) Approving Sale By Debtors Of Substantially All Of Their Operating Assets Free And Clear Of All Liens, Claims, Encumbrances and Other Interests Pursuant To Sections 363(b), (f) And (m) Of The Bankruptcy Code, (II) Assuming And Assigning Certain Executory Contracts And Unexpired Leases, And (III) Granting Related Relief*" (the "Sale Motion")[2], filed by the above-captioned debtors and debtors in possession (collectively, the "Debtors" or the "Sellers"); the Court having reviewed the Sale Motion and having heard the statements of counsel regarding the relief requested in the Sale Motion and having considered the evidence proffered in support of the relief requested in the Sale Motion at a hearing before the Court (the "Sale Hearing"); the

1 The Debtors consist of the following entities: Maxide Acquisition, Inc., a Delaware corporation; AEI Music Network, Inc., a Washington corporation; DMX Music, Inc., a Delaware corporation; and TEMPO Sound, Inc., a Oklahoma corporation

2 Capitalized terms not otherwise defined herein shall have the meanings set forth in the Final APA (as defined below).

EXHIBIT 6

DOCKET # 357

DATE 5-10-05

Court finding that, inter alia, (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; (b) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (c) venue of these chapter 11 cases in this district is proper pursuant to 28 U.S.C. §§1408 and 1409; and (d) notice of the Sale Motion and the Sale Hearing was sufficient under the circumstances, the Court having determined that the legal and factual bases set forth in the Sale Motion and in the record at the Sale Hearing establish just cause for the relief granted herein and it appearing that the relief requested is in the best interest of the Debtors' estates, their creditors and other parties in interest;

A. The Debtors filed petitions for relief under chapter 11 of the Bankruptcy Code on February 14, 2005 (the "Petition Date") thereby commencing these jointly administered cases (the "Chapter 11 Cases").

B. On February 14, 2005, the Debtors also filed the Sale Motion.

C. All parties expressing interest in bidding on all or any portion of the Purchased Assets were provided sufficient information by the Debtors to make an informed judgment as to whether to bid on all or any portion of the Purchased Assets.

D. A Sale Auction of the Purchased Assets was held on May 9, 2005, at 1:00 p.m. Eastern time at the offices of Pachulski Stang Ziehl Young Jones & Weintraub P.C., 919 N. Market Street 17th Floor, Wilmington, Delaware. At the conclusion of such Sale Auction, THP Capstar Inc., a Delaware corporation (together with its assigns and designees the "Purchaser") was selected to be the Purchaser of the Purchased Assets (the "Proposed Sale"). Purchaser is a newly formed entity unaffiliated with the Debtors or any of their equity interest holders.

Adequate notice and opportunity to bid at the Sale Auction was provided by the Debtors to all creditors and parties in interest.

E. There has been an adequate notice and opportunity for creditors and all parties in interest to appear and be heard on the Sale Motion.

F. Based upon the representations tendered and evidence presented at the Sale Hearing, the Debtors have articulated reasonable business judgment and have demonstrated good faith for seeking a prompt sale of the Purchased Assets. The Court finds that a prompt sale of the Purchased Assets is required if the Debtors and their estates are to obtain maximum value from the Purchased Assets. Consummation of the Proposed Sale will result in the maximization of the value of the Debtors' estates. The Court further finds that approval of the Proposed Sale is in the best interests of the Debtors' estates and their creditors and, after consideration of all salient factors, there are good and sufficient business justifications for the Proposed Sale contemplated by the Sale Motion, outside of the context of a plan of reorganization or liquidation, and that the required standard of a "sound business purpose" has been established.

G. Due and adequate notice and an opportunity to be heard in accordance with all applicable laws, the Overbid Procedures Order and the Final APA (as defined below) were given to all creditors and interested parties in the Chapter 11 Cases and any and all other affected or interested parties, including, but not limited to, all federal and state environmental and taxing authorities.

H. Based upon the representations tendered and evidence presented, the Purchaser is a good faith purchaser for value within the meaning of section 363(m) of the Bankruptcy Code and is entitled to all protections thereof. The Court finds that the negotiations with the Purchaser

of the applicable asset purchase agreement and all exhibits and schedules thereto (as heretofore modified or amended, collectively, the "Final APA")[3] and all actions of the parties to the Final APA with respect to the Proposed Sale were at arms' length and in good faith. Further, there is no evidence of the existence of any agreement among potential bidders to control the bidding process or the Purchase Price that would permit the Final APA or the transactions contemplated thereby to be voided under § 363(n) of the Bankruptcy Code. The terms of the Proposed Sale are fair, and the Purchase Price represents the highest and otherwise best offer for the Purchased Assets and constitutes reasonably equivalent value for the Purchased Assets.

I. The provisions of sections 365(b) and 365(f) of the Bankruptcy Code have been satisfied with respect to the Assumed Contracts that are to be assumed and assigned to the Purchaser. The provisions of Section 365(b) of the Bankruptcy Code have been satisfied with respect to the Debtors' assumption of the Final APA.

J. The conditions under Sections 363(b) and 363(f) of the Bankruptcy Code providing for the Debtors' sale of the Purchased Assets to Purchaser free and clear of any and all Liens, Claims, Encumbrances (as defined below) and other interests have been satisfied. Pursuant to Section 363(f) of the Bankruptcy Code, except for the Assumed Liabilities under the Final APA, Purchaser is not a successor of or to any of the Debtors for any fixed or contingent, known or unknown Lien, Claim, Encumbrance or other interest against any of the Debtors or any of the Purchased Assets including but not limited to any Claims held by Broadcast Music, Inc.

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[3] A true and correct copy of the Final APA (exclusive of schedules but inclusive of the First Amendment attached thereto) is attached hereto as Exhibit "A" and incorporated herein for all purposes.

("BMI") or the American Society of Composers, Authors and Publishers ("ASCAP") against any of the Debtors.

K. By this Sale Order, the Debtors are not assuming and shall not be deemed to have assumed any license or other agreements or obligations with BMI and ASCAP. Purchaser is not assuming or taking an assignment of any license or other contracts or obligations the Debtors have with BMI and ASCAP. Any and all Claims BMI and ASCAP have or may wish to assert with respect to such licenses or other agreements shall not be asserted against the Purchaser.

L. All findings of fact and conclusions of law made on the record of the Sale Hearing are incorporated herein by reference. Findings of fact that constitute conclusions of law shall be considered as such and vise versa.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. The Sale Motion is granted on the terms and conditions set forth herein. The Final APA and the transactions contemplated thereby are approved on the terms and conditions set forth herein, and, to the extent the Final APA was entered into prepetition between the Debtors and the Purchaser, such Final APA is hereby assumed by the Debtors pursuant to Section 365 of the Bankruptcy Code. To the extent that any of the terms of this Sale Order may conflict with the Final APA, this Sale Order shall control.

2. Debtors are authorized to and shall sell, assign, transfer and deliver to the Purchaser, and the Purchaser shall purchase, acquire and take assignment and delivery of the Purchased Assets in accordance with the terms and conditions of the Final APA and this Sale Order.

3. The Court retains jurisdiction for the purpose of enforcing the provisions of the Final APA and this Sale Order and determining any disputes arising therefrom, protecting the Purchaser or any of the Purchased Assets from and against any Liens, Claim, Encumbrances and other interests, and adjudicating any and all remaining issues concerning the Debtors' right and authority to assume and assign the Assumed Contracts and the Purchaser's rights and obligations with respect to such assignment and existence of any default under any Assumed Contract.

4. Debtors are authorized to sell the Purchased Assets pursuant to sections 363(b), (f) and (m) and 365 of the Bankruptcy Code free and clear of any and all Liens, Claims, Encumbrances and other interests, with such Liens, Claims, Encumbrances and other interests to attach to the sale proceeds of the Purchased Assets with the same validity, priority and perfection as existed immediately prior to such sale.

5. Purchaser and Debtors are authorized to close the Proposed Sale immediately upon entry of this Sale Order.

6. Upon failure to consummate the Proposed Sale of the Purchased Assets because of a breach or failure on the part of the Purchaser, the Debtors may select in their business judgment, and in consultation with the Agent and Creditors' Committee (as these latter two terms are defined in the Sale Motion), the next highest or otherwise best Qualified Bid(s) to be the Successful Bid(s) (as these latter two terms are defined in the Overbid Procedures Order) without further order of the Court.

7. The Purchaser is found to be a good faith purchaser within the meaning of section 363(m) of the Bankruptcy Code and shall be entitled to the protections afforded a good

faith purchaser pursuant to such section. The Purchaser has acted in "good faith" in connection with the Proposed Sale.

8. The Closing of the Proposed Sale of the Purchased Assets may take place even if a party in interest appeals this Sale Order, so long as this Sale Order has not been stayed.

9. Upon the closing of the Proposed Sale, the Debtors are hereby authorized and directed, pursuant to Bankruptcy Code §§ 363 and 365, to assume and assign the Assumed Contracts to the Purchaser. Upon the closing of the Proposed Sale, (a) the Purchaser shall pay, in accordance with the terms and conditions of the Final APA, to each of the counterparties to the Assumed Contracts the Cure Amount as set forth in Exhibit B attached hereto, which payment shall be in full and final satisfaction of all obligations and as full compensation to the counterparties for any pecuniary losses under the Assumed Contracts pursuant to Bankruptcy Code § 365(b)(1); and (b) Debtors are authorized and directed to make any payments required of Debtors to be paid in conjunction with the Proposed Sale. Payment of the Cure Amounts to the counterparties shall be made as soon as practicable after the entry of this Sale Order and closing of the Proposed Sale.

10. The Assumed Contracts will be assigned to the Purchaser, and will remain valid and binding and in full force and effect in accordance with their respective terms for the benefit of the Purchaser, notwithstanding any provision in such contracts or leases (including those described in sections 365(b)(2) and (f)(1) and (3) of the Bankruptcy Code), or applicable law that prohibits, restricts or conditions such assignment or transfer or terminates or modifies or permits a party other than the Debtors to terminate or modify such Assumed Contracts on account of such assignment or transfer, including, without limitation, all preferential rights or

rights of first refusal of any kind or nature whatsoever, pursuant to Bankruptcy Code 365(f); provided that such prohibition, restriction or condition on assignment or transfer shall be negated only with respect to transfers and assignments effected pursuant to the Final APA and the Sale Order, and that such prohibitions, restrictions and conditions on assignment shall otherwise remain in full force and effect and a part of the contract or lease so assigned or transferred.

11. The Final APA and all Assumed Contracts that are assigned to the Purchaser and such other contracts entered into by any of the Debtors as are necessary to effectuate the transactions contemplated in the Final APA are enforceable pursuant to their terms and applicable law.

12. The Debtors are further authorized and directed to take any and all actions reasonably necessary or appropriate to consummate the proposed assignment of the Assumed Contracts to the Purchaser, as specified in the Sale Motion and in the Final APA, except for the Purchaser's obligation to pay the Cure Amounts as provided herein and in the Final APA. The Purchaser shall have no liability for any defaults under the Assumed Contracts (except as may be specified in the Final APA or with respect to the payment of the Cure Amounts) that occurred prior to the assignment of the Assumed Contracts and the Purchaser has provided adequate assurance of future performance of and under the Assumed Contracts within the meaning of Section 365(b)(1)(C) of the Bankruptcy Code. Pursuant to Bankruptcy Code § 365(k), the Debtors are relieved of any liability for any breach of any Assumed Contracts occurring after the assignment of such Assumed Contracts to the Purchaser.

13. There shall be no rent accelerations, assignment fees, increases (including advertising or royalty rates) or any other fees charged to the Purchaser as a result of the

assumption, assignment and sale of the Assumed Contracts. The validity of the assumption, assignment and sale to the Purchaser shall not be affected by any dispute between any of the Debtors or their affiliates and another party to an Assumed Contract regarding the payment of any amount, including any Cure Amount under the Bankruptcy Code.

14. This Sale Order is and shall be effective as a determination that, upon closing of the Proposed Sale under the Final APA, all liens, claims, rights, Encumbrances and other interests (except for Permitted Liens under the Final APA) existing as to the Purchased Assets conveyed to the Purchaser have been and hereby are terminated and declared to be unconditionally released, discharged and terminated solely as to the Purchased Assets (and expressly excluding the Excluded Assets and/or sale proceeds of the Purchased Assets), and such determination shall be binding upon and govern the acts of all persons and entities, including all filing agents, filing officers, administrative agencies or units, governmental departments or units, secretaries of state, federal, state and local officials and all other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to any of the Purchased Assets conveyed to the Purchaser. Each of the Purchaser and the Debtors shall take such further steps and execute such further documents, assignments, instruments and papers as shall be reasonably requested by the other to implement and effectuate the transactions contemplated in this Sale Order and the Final APA. Subject to closing of the Proposed Sale under the Final APA, all liens, claims, rights, Encumbrances and other interests (except for Permitted Liens) of record as of the date of this Sale Order shall be forthwith removed and stricken as against the Purchased Assets (and

expressly excluding the Excluded Assets and/or sale proceeds of the Purchased Assets). All persons or entities described in this paragraph are authorized and specifically directed to strike all such recorded liens, claims, rights, Encumbrances and other interests (except for Permitted Liens) against the Purchased Assets (and expressly excluding the Excluded Assets and/or sale proceeds of the Purchased Assets) from their records, official and otherwise.

15. All persons or entities that have filed statements or other documents or agreements evidencing liens, claims, rights, Encumbrances and other interests (except for Permitted Liens) are hereby directed to deliver to the Debtors or the Purchaser prior to the closing of the sale of the Purchased Assets to the Purchaser, in proper form for filing and executed by the appropriate parties, termination statements, instruments of satisfaction, releases of liens and encumbrances, and any other documents necessary for the purpose of documenting the release of all liens, claims, rights, Encumbrances and other interests (except Permitted Liens) that the person or entity has or may assert with respect to any of the Purchased Assets. In the event that any such person or entity should fail or refuse to comply with the requirements of this paragraph, the Debtors and/or the Purchaser are hereby authorized to execute and file such statements, instruments, releases and other documents on behalf of such persons or entity with respect to any of the Purchased Assets (and expressly excluding the Excluded Assets and/or sale proceeds of the Purchased Assets).

16. On the Closing Date, all right, title and interest in and to the Purchased Assets shall be immediately vested in the Purchaser pursuant to Bankruptcy Code §§ 363(b) and (f) and 365, free and clear of any and all liens (including but not limited to any and all "liens" as defined in Bankruptcy Code § 101(37), except the Permitted Liens ("Liens")), claims (including

but not limited to any and all "claims" as defined in Bankruptcy Code § 101(5) and Liabilities, except the Assumed Liabilities ("Claims")), mortgages, deeds of trust, guarantees, security agreements, security interests, pledges, options, servitudes, liens, hypothecations, charges, employee benefits and obligations, rights of first refusal or set-off, restrictions, encumbrances and other interests in or with respect to any of the Purchased Assets (including without limitation any options or rights to purchase such property and any mechanic's or tax liens), whether asserted or unasserted, whether known or unknown, whether arising prior to or subsequent to the filing of the Debtors' Chapter 11 Cases, whether imposed by agreement, understanding, law, equity or otherwise (collectively, the "Encumbrances") (all of the foregoing are subject to the exception of the Permitted Liens), with such Encumbrances to attach to the sale proceeds of the Purchased Assets with the same validity, priority and perfection as existed immediately prior to such sale.

17. Except for the Assumed Liabilities under the Final APA, the Purchaser shall not be liable for any Claims against the Debtors, and the Purchaser shall have no successor or vicarious liabilities of any kind or character whether known or unknown, whether asserted or unasserted, as of the Closing Date, now existing or hereafter arising, whether fixed or contingent, with respect to any of the Debtors. Except for the Assumed Liabilities under the Final APA, under no circumstance will the Purchaser be deemed a successor of or to any of the Debtors for any fixed or contingent, known or unknown Lien, Claim, liability, Encumbrance or other interest against any of the Debtors or any of the Purchased Assets, and the Purchaser shall have no liability as a successor to any of the Debtors. The sale, transfer, assignment and delivery of the Purchased Assets shall not be subject to any such Liens, Claims, Encumbrances or other

interests, except for the Permitted Liens and Assumed Liabilities as provided under the Final APA, including but not limited to the Debtors' obligations under the Assumed Contracts to the extent such obligations arise after the Closing Date or as otherwise provided in the Final APA. All counterparties to Assumed Contracts shall have no recourse against Purchaser or the Purchased Assets to satisfy any default by Debtors (other than Cure Amounts which Purchaser is required to pay under the Final APA and any other Assumed Liabilities); instead such counterparties shall look solely to Debtors or to the proceeds of sale.

18. This Sale Order is not a determination as to whether the Purchaser is entitled to obtain any licenses under the BMI or ASCAP consent decrees (as such consent decrees are described in their respective objections – Docket Nos. 299 and 309), nor is it a determination regarding the rates and terms upon which any such license may be granted, provided, however, that the foregoing is not intended to and shall not in any way limit the scope and effect of any other provision of this Sale Order.

19. Pursuant to Bankruptcy Code Sections 105(a) and 363, the Court hereby issues a permanent injunction against the holders of any Liens, Claims, Encumbrances or other interests against any of the Debtors or the Purchased Assets with respect to assertion of or taking any action to collect or enforce such Liens, Claims, Encumbrances or other interests against any of the Purchased Assets or Purchaser except for the Assumed Liabilities and Permitted Liens. Pursuant to Section 363(f) of the Bankruptcy Code, any and all Claims that BMI or ASCAP have or may wish to assert with respect to any licenses or other agreements with the Debtors shall not be asserted against the Purchaser.

20. All persons or entities who are presently, or on the Closing Date may be, in possession of any of the Purchased Assets are hereby directed to surrender possession of the Purchased Assets to the Purchaser on the Closing Date.

21. Effective as of the Closing Date, Debtors and their estates shall be deemed (without further actions or order of the Court) to have sold to Purchaser and immediately thereafter to have released and discharged all of their right, title and interest in and to all claims, causes of action, choses in action, rights of recovery or setoff of any kind (including any preference or other avoidance claim) against any Person (ww) who is a Seller Subsidiary, (xx) who is a counterparty to an Assumed Contract (excluding any employment agreements), (yy) who holds an Assumed Liability; provided, however, that (i) clauses (xx) and (yy) shall not include any claims, causes of action, choses in action, rights of recovery or setoff of any kind (including any preference or other avoidance claim under the Bankruptcy Code) that are unrelated to the applicable Assumed Contract or Assumed Liability; (ii) such release and discharge by the Sellers shall not affect, in any way, any claims, causes of action, choses in action, rights of recovery or setoff by the Purchaser against any Person (including, without limitation, any Person identified in clauses (ww), (xx), (yy), or above). Effective as of the Closing Date, Debtors and their estates shall also be deemed (without further actions or order of the Court) to have sold to Purchaser and immediately thereafter to have released and discharged all of their right, title and interest in and to all preference and other avoidance claims and causes of action existing by virtue of the Bankruptcy Code against any Person who is an officer, director, employee or agent of any Debtor and who is employed by Purchaser or any subsidiary

of Purchaser immediately after Closing, but only to the extent that such claims and causes of action involve aggregate transfers of less than $5,000.

22. Except to the extent provided in the Final APA, Purchaser shall have no liability or responsibility for any Claim against or Liabilities of any of the Debtors, any Affiliate of any Debtor or any insider of any Debtors or any Lien or Encumbrance, other than the Assumed Liabilities and Permitted Liens.

23. The Debtors are hereby authorized and directed (i) to make all payments specified in clauses (i) through (viii) of Section 5.02(b) of the Final APA as deductions from the Purchase Price at Closing, and all payments required by Sections 5.04(c), (e) and (f), Section 9.01(a) (subject to a $100,000 cap with respect to consideration necessary to obtain Required Consents) and 9.01(h), 9.10 and Section 9.11 (subject to a $15,000 cap) of the Final APA, and (ii) to make all payments that are required to be made by Debtors under Article XIV of the Final APA after the Closing Date solely from the Holdback Amount (as defined in Section 14.06 of the Final APA), and provide that all such payments shall be (x) deemed allowed administrative expenses of the Debtors' estates under § 503(b) of the Bankruptcy Code (but in the case of Debtors' payments under Article XIV of the Final APA limited in recourse to the Holdback Amount), (y) senior in right of payment to any of Debtors' creditors (including, without limitation, the Secured Lenders) and (z) senior in priority to any and all Liens on the Debtors' property (including, without limitation, Liens of the Secured Creditors); provided, however, that the payment of all amounts owing by Debtors under Article XIV shall be limited in recourse solely to the Holdback Amount, and consequently shall not be made from any other property of Debtors or proceeds thereof and shall not be senior in right of payment to, or senior in priority to

any Liens of, any of Sellers' creditors with respect to any property of Debtors other than the Holdback Amount.

24. Each and every term and provision of this Sale Order shall be binding in all respects upon the Purchaser, the Debtors, the Debtors' bankruptcy estates, the Debtors' creditors, all persons or entities holding an interest in any of the Debtors, including, without limitation, any person or entity purporting to hold Liens, Claims, Encumbrances or other interests against all or any portion of the Purchased Assets. The Final APA and the transactions and instruments contemplated thereby shall be enforceable against and binding upon and shall not be subject to rejection or avoidance by the Debtors or any chapter 7 or chapter 11 trustee for any of the Debtors or their estates or any other person or entity on behalf of any Debtor.

25. Nothing in this Sale Order is intended to or shall be deemed to modify the terms of the Final APA except as expressly provided herein.

26. The Final APA may be modified, amended, or supplemented by the parties thereto, in a writing signed by both parties, with the written consent of the Agent and Creditors' Committee, in accordance with the terms thereof without further order of the Court, provided that any such modification, amendment, or supplement is not material. The terms and provisions of this Sale Order shall inure to the benefit of and shall be fully enforceable by Purchaser's successors and assigns.

27. This Sale Order shall be effective immediately upon entry pursuant to Rule 7062 and 9014 of the Federal Rules of Bankruptcy Procedure.

28. Notwithstanding anything herein to the contrary, but subject in all respects to paragraph 22 and 23 of this Sale Order, the terms and conditions of that certain Interim Order

(1) Authorizing Debtors To Incur Post-Petition Secured Indebtedness, (2) Granting Security Interests And Priority Claims Pursuant To 11 U.S.C. § 364, (3) Granting Adequate Protection, (4) Modifying Automatic Stay And (5) Setting Final Hearing, entered by this Court on February 14, 2005 (or subsequent final order) (the "DIP Order") are in full force and effect and all sale proceeds of the Purchased Assets payable to the Debtors under the Final APA shall be subject to and treated in accordance with the DIP Order.

29. Nothwistanding anything herein to the contrary, the executory contracts and unexpired leases set forth on Exhibit C to this Sale Order shall not be assumed and assigned to the Purchaser.

30. Notwithstanding anything herein to the contrary, the Purchased Assets and Assumed Contracts shall not include any licenses under 17 U.S.C. §§ 112(e) or 114, or any ephemeral phonorecords created pursuant to a statutory license under 17 U.S.C. § 112(e) without the consent of the copyright owners.

31. Notwithstanding any provision to the contrary in this Order, the Asset Purchase Agreement or any other related sale documents, to the extent that Debtors cannot obtain the necessary consents (i.e. the Japan Required Consent and the New Zealand Required Consent) to have the stock of DMX Music Japan and SKY DMX Music Limited transferred to THP Capstar prior to the sale closing date as set forth in the Asset Purchase Agreement (collectively "The Japan and New Zealand Contracts"), The Japan and New Zealand Contracts shall not be assumed or assigned to THP Capstar, and shall be deemed rejected as of that date.

32. All of the sale proceeds from the Sale other than $12 million (the "Retained Sale Proceeds" and all sale proceeds other than the Retained Sale Proceeds, including

any post-closing proceeds, collectively, the "Distributed Sale Proceeds") shall be remitted to the Agent on behalf of the Agent and Lenders for provisional application to the Indebtedness in accordance with, and as defined in, the final debtor-in-possession financing (the "Financing Order") and subject to the reservation of rights provisions of Paragraph 12 of the Financing Order; provided, however, that the Lenders shall be severally, but not jointly, responsible for any obligation to return or otherwise disgorge any portion of the Distributed Sale Proceeds that was remitted by the Agent to the Lenders, and the Agent shall not have any liability with respect to any portion of the Distributed Sale Proceeds required to be returned or otherwise disgorged (other than any portion of the Distributed Sale Proceeds retained by the Agent for application to any Indebtedness owed to the Agent in its capacity as Agent) and the Agent's indemnification and expense reimbursement rights vis-à-vis the Lenders pursuant to the DIP Credit Documents and the Pre-Petition Loan Documents shall remain in full force and effect. The amount of the Retained Proceeds shall not be probative of how the sale proceeds from the Sale are allocable to the Purchased Assets, and all parties reserve all of their rights with respect thereto.

Dated: May 16, 2005

Honorable Mary F. Walrath
Chief Judge, United States Bankruptcy Court
for the District of Delaware

Notice of Use of Sound Recordings under Statutory License

United States Copyright Office

In accordance with 37 CFR 270.3, the transmission service named below hereby files with the Library of Congress, Copyright Office, a notice stating the service's intention to use the statutory license under sections 112(e) or 114(d)(2), or both, of title 17 of the *United States Code*, as amended by Public Law 104-39, 109 Stat. 336, and Public Law 105-304, 112 Stat. 2860.

Check, if applicable:
☐ Amended filing

Please enclose a check or money order for the $20 nonrefundable filing fee, payable to "Register of Copyrights". Mail to:

Copyright Arbitration Royalty Panel
ATTN: Licensing Division
P.O. Box 70977
Southwest Station
Washington, D.C. 20024-0400

Please type or print the requested information for each item. If this is an amended filing, please indicate which item contains new information by checking the new information box to the left of that item.

New Information

☐ 1 Name of service: THP Capstar Acquisition Corp.

☐ 2 Mailing address: 600 Congress Avenue, Suite 1400, Austin, Texas 78701

NOTE: *A post office box is acceptable if it is the only address that can be used in that geographic location.*

☐ 3 Telephone no.: 512.340.7800

☐ 4 Fax no.: 512.340.7805

☐ 5 Website address of service: http:// www.DMXMusic.com

NOTE: *Information must be provided on how to gain access to the online website or home page of the service, or where information may be posted under the regulations concerning the use of sound recordings.*

☐ 6 Nature of license and category of service: (Check all that apply)

a *Statutory license for digital transmissions, 17 U.S.C. § 114(d)(2)*

☑ Preexisting subscription service
☐ Preexisting satellite digital audio radio service
☑ Eligible non-subscription transmission service
☑ New subscription service (to the extent not a preexisting subscription service)

b *Statutory license for making ephemeral phonorecords, 17 U.S.C. § 112(e)*

☑ Preexisting subscription service
☐ Preexisting satellite digital audio radio service
☑ Eligible non-subscription transmission service
☑ New subscription service (to the extent not a preexisting subscription service)
☑ A business establishment making ephemeral phonorecords in furtherance of an exempt digital transmission pursuant to 17 U.S.C. § 114(d)(1)(C)(iv)

☐ 7 Date or expected date of

a *Initial digital transmission of a sound recording*: June 3, 2005

b *Initial use of the section 112(e) license for the purpose of making ephemeral recordings of sound recordings*: June 3, 2005

☐ 8 Officer or authorized representative of service

a Name: Kristin L. Yohannan, Esq

b Title: legal representative, Wiley Rein & Fielding

c Date: June 3, 2005

d Signature: Kristin L. Yohannan

e Email address: Kristin.Yohannan@WRF.com

NOTE: *The date of filing will be the date when the notice and fee are both received in the Copyright Office.*

M 269 – 01/2004

EXHIBIT 7

Pepper Hamilton LLP
Attorneys at Law

Hercules Plaza, Suite 5100
1313 Market Street
P.O. Box 1709
Wilmington, DE 19899-1709
302.777.6500
Fax 302.421.8390

David B. Stratton
direct dial: 302-777-6566
strattond@pepperlaw.com

August 9, 2005

VIA FEDERAL EXPRESS

Patrick Breeland, Esq.
Vinson & Elkins LLP
Terrace 7
2801 Via Fortuna, Suite 100
Austin, TX 78746

Re: THP Capstar, Inc. ("Capstar")

Dear Mr. Breeland:

As you may recall, this firm represents SoundExchange, Inc. in the chapter 11 proceedings filed by Maxide Acquisition, Inc. ("Maxide") and its related entities. SoundExchange has advised us that Capstar filed a Notice of Use of Sound Recordings Under Statutory License (an "Initial Notice") with the United States Copyright Office on June 3, 2005, identifying Capstar as operating a preexisting subscription service ("PES"), an eligible non-subscription transmission service, and a new subscription service for digital audio transmissions of sound recordings under 17 U.S.C. § 114(d)(2). The Initial Notice also has a handwritten comment that the new subscription service statutory license was selected "to the extent [Capstar is] not a preexisting subscription service." Based on the nature of the transaction approved by the Court, the provisions of the Asset Purchase Agreement ("APA"), the order approving the sale (the "Sale Order") and statements made by counsel for Capstar and Maxide in support of the sale, the position that Capstar is entitled to operate a PES is untenable and may have unintended consequences of which we thought you should be aware.

As you know, Capstar only acquired certain assets of Maxide. It did not acquire the equity interest in Maxide and it did not acquire Maxide's business in its entirety. Specifically, among other things, neither the APA nor the Sale Order provide for the transfer of Maxide's rights as a PES to Capstar. To the contrary, the APA and the Sale Order both explicitly provide that the copyright licenses owned by Maxide were not transferred to Capstar. Because the licenses held by Maxide and its status as a PES are inextricably intertwined, it is impossible for Capstar to qualify as a PES.

EXHIBIT
8

The Sale Order and the record at the sale hearing also refute the position Capstar now wishes to take in front of the Copyright Office. At Capstar's insistence, the Sale Order contains a finding that Capstar "is a newly formed entity unaffiliated with the Debtors or any of the equity interest holders." As you will recall, this was a key point in Judge Walrath's ruling that Capstar was not a successor to Maxide. You will also recall that Capstar argued at great length that it could not and should not be considered Maxide's successor in response to arguments raised by BMI and ASCAP. Capstar cannot now argue that it is Maxide's successor when it comes to being a PES.

If Capstar persists in its position that it is the successor to Maxide's business, SoundExchange reserves the right to take the position that Capstar is liable for all unpaid royalties, late fees and other charges (which may exceed $2 million) that Maxide owes to SoundExchange. Of course, other creditors, as well as BMI and ASCAP, may also use Capstar's position in the Copyright Office to persuade Judge Walrath that Capstar should be considered as Maxide's successor for purposes of being liable for claims against Maxide.

Once you have had a chance to discuss this letter and the issues it raises with your client, I would appreciate it if you would advise me if Capstar intends to pursue its status as a PES in the Copyright Office. Capstar must make its first royalty payment to SoundExchange by August 14, 2005, for any reproductions or transmissions of sound recordings it made under the Section 112 and 114 statutory licenses during the period June 3-30, 2005, and SoundExchange has asked us to inform you of its position so that Capstar can avoid any liability for failing to pay the proper royalty rates. I look forward to hearing from you.

Very truly yours,

David B. Stratton

cc: Gary R. Greenstein

DBS/rtb

soundexchange 1330 CONNECTICUT AVE, NW, SUITE 330, WASHINGTON, DC 20036
P: 202.828.0120 F: 202.833.2141
WWW.SOUNDEXCHANGE.COM

August 17, 2005

VIA FACSIMILE & CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. L. Barry Knittel
Senior Vice President
Business Affairs – Worldwide
DMX Music
11400 W. Olympic Blvd., Suite 1100
Los Angeles, CA 90064

Re: *Notification of Violation of Statutory License For Failure to Pay Required Royalties*

Dear Barry:

We are in receipt of your August 9, 2005 letter for DMX MUSIC (Capstar) Report and Payment to SoundExchange, Inc. for Residential Services and a check in the amount of [redacted]. The Statement of Account submitted with the check indicates Residential Revenue of [redacted], which means that DMX paid a royalty equal to [redacted]% of the revenues reported for the period June 3-30, 2005 ([redacted] divided by [redacted]). We are unaware of any statutory license that has a royalty rate of [redacted]%, and therefore deem this payment to be incomplete and in violation of the payment provisions for any license for which this payment is purportedly made.

As we have previously informed you, Capstar is not entitled to the rates available for Preexisting Subscription Services. Among other reasons, Capstar specifically obtained in the Sale Order issued by the bankruptcy court language that it "is a newly formed entity unaffiliated with the Debtors or any of the equity interest holders." Capstar also argued that it was not a successor to Maxide/DMX. We therefore do not understand how Capstar can claim to be a successor when it comes to enjoying the below-market rates established for the Preexisting Subscription Services but not one when it comes to the unpaid liabilities that arose from DMX's failure to pay statutory royalties as required.

As you know, in order to avoid liability for copyright infringement a service must pay the royalties established for the applicable license. See 17 U.S.C. § 114(f)(4)(B)(i). Capstar took the position in the Bankruptcy Court that it was not a successor to DMX. Therefore, the only rates that are available to Capstar for its subscription transmissions

are those for New Subscription Services. The rates presently available to New Subscription Services are those set forth in 37 C.F.R. § 262.3(a)(2). If you are unable to measure the number of "performances" (defined term) or "aggregate tuning hours" (defined term) for Capstar's residential transmissions, then you would have to pay royalties under the "Percentage of Subscription Service Revenues Option." 37 C.F.R. § 262.3(a)(2)(iii).

If Capstar persists in claiming that it is now a successor to DMX for purposes of copyright statutory licenses notwithstanding its position before the bankruptcy court, SoundExchange and its copyright owner members reserve all of their rights to pursue claims against Capstar in either the bankruptcy court or federal district court should DMX's unpaid statutory liability remain unpaid.

Without waiving any of our rights or those of the copyright owners we represent, SoundExchange will deposit the aforementioned check in the amount of [redacted] as partial payment for the royalties due for a New Subscription Service. Late fees at the rate of 0.75% per month will be due for any unpaid royalties from the due date until the date received.

Please do not hesitate to call me if you have any questions.

Sincerely,

Gary Greenstein /KDF

Gary R. Greenstein
General Counsel

soundexchange 1330 CONNECTICUT AVE. NW, SUITE 300, WASHINGTON, DC 20036
P: 202.828.0120 F: 202.833.2141
WWW.SOUNDEXCHANGE.COM

September 19, 2005

VIA FACSIMILE & CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. L. Barry Knittel
Senior Vice President
Business Affairs – Worldwide
DMX Music
11400 W. Olympic Blvd., Suite 1100
Los Angeles, CA 90064

Re: Notification of Payment of Incorrect Royalties

Dear Barry:

We received a check from an entity identified as "DMX2" in the amount of [redacted] on September 15, 2005 for July 2005 royalties for a Residential Service. This payment was received one day after the due date for July 2005 payments. In addition, this payment is calculated under the rates available to preexisting subscription services.

As you know, SoundExchange believes that Capstar is not entitled to pay royalties at the rates available for preexisting subscription services. We are therefore accepting this payment as partial satisfaction of the actual liability that is due for DMX2's transmissions to residential customers, and SoundExchange and its copyright owner members reserve all of their rights to pursue claims against DMX2 for its failure to pay royalties under the appropriate rates.

Sincerely,

Gary R. Greenstein
General Counsel
202.828.0126

cc: Bruce Joseph

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P: 202.828.0120 F: 202.833.2141
WWW.SOUNDEXCHANGE.COM

October 18, 2005

VIA FACSIMILE & CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. L. Barry Knittel
Senior Vice President
Business Affairs – Worldwide
DMX Music
11400 W. Olympic Blvd., Suite 1100
Los Angeles, CA 90064

Re: Notification of Payment of Incorrect Royalties

Dear Barry:

We received a check from an entity identified as "DMX2" in the amount of [redacted] on October 14, 2005 for August 2005 royalties for a Residential Service. You confirmed in your phone call of October 17, 2005 with my colleague Kyle Funn that this payment is calculated under the rates available to preexisting subscription services.

As you know, SoundExchange believes that Capstar, the purchaser of some but not all of the assets of DMX, Inc., is not entitled to pay royalties at the rates available for preexisting subscription services. We are therefore accepting this payment as partial satisfaction of the actual liability that is due for DMX2's transmissions to residential customers, and SoundExchange and its copyright owner members reserve all of their rights to pursue claims against DMX2 and Capstar for its failure to pay royalties under the appropriate rates.

Sincerely,

Gary R. Greenstein
General Counsel
202.828.0126

GG Chron file

soundexchange 1330 CONNECTICUT AVE, NW, SUITE 330, WASHINGTON, DC 20036
P: 202.828.0120 F: 202.833.2141
WWW.SOUNDEXCHANGE.COM

December 19, 2005

VIA FACSIMILE & CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. L. Barry Knittel
Senior Vice President
Business Affairs – Worldwide
DMX Music
11400 W. Olympic Blvd., Suite 1100
Los Angeles, CA 90064

Re: Notification of Payment of Incorrect Royalties

Dear Barry:

We received a check from an entity identified as "DMX2" in the amount of [redacted] on November 14, 2005 for September 2005 royalties and a check in the amount of [redacted] on December 14, 2005 for October 2005 royalties. Both of these payments are identified as being applied to the Residential Service and calculated at the rate available for preexisting subscription services (7.25% of residential revenue).

As you know, SoundExchange is firm in its belief that Capstar, the purchaser of some but not all of the assets of DMX, Inc., is not entitled to pay royalties at the rates available for preexisting subscription services. In fact, as our outside counsel has previously informed counsel to THP Capstar, Inc. ("Capstar"), both the Asset Purchase Agreement and the bankruptcy court's order approving the sale of some but not all of DMX's assets (the "Sale Order") explicitly provide that the preexisting subscription service license held by DMX was not transferred to Capstar. More specifically, the Sale Order contains a finding that Capstar "is a newly formed entity unaffiliated with the Debtors or any of the equity interest holders." We are therefore at a loss as to how Capstar can now claim for the purposes of statutory royalties that it is a successor to DMX when in the bankruptcy court it took every step possible to ensure that it was neither a successor to nor affiliate of DMX (so as to avoid DMX's unpaid liability of more than two million dollars).

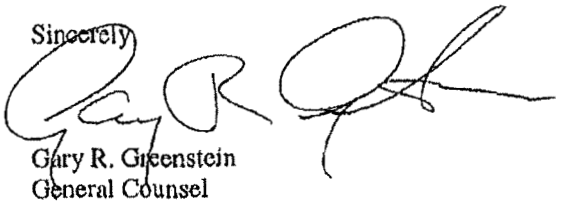
So as not to deprive the copyright owners and performers that we represent of the royalties they are due, and in light of our experience of having not been paid royalties for more than two years by DMX, we are reluctantly accepting the most recent payments from DMX2 ***as partial satisfaction of the actual liability that is due for DMX2's transmissions to residential customers as a new subscription service***, and

SoundExchange and its copyright owner members reserve all of their rights to pursue claims against DMX2 and Capstar for improper payment of royalties under the rates available to preexisting subscription services or such other claims as may be available.

Nothing herein shall be deemed an admission that Capstar is entitled to pay royalties for any transmissions under the rates established for the limited class of statutory licensees identified as preexisting subscription services.

Please do not hesitate to contact me if you have any questions.

Sincerely,



Gary R. Greenstein
General Counsel
202.828.0126

cc: Patrick Breeland, Esq., Vinson & Elkins LLP
R. Steven Hicks, Chairman, Capstar Partners, LLC
David B. Stratton

soundexchange 1330 CONNECTICUT AVE, NW, SUITE 330, WASHINGTON, DC 20036
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January 23, 2006

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. R. Warren Taylor
Vice President & Controller
THP Capstar, Inc./DMX Music
600 Congress Ave.
Suite 1400
Austin, TX 78701

Re: Notification of Late Fees and Payment of Incorrect Royalties

Dear Mr. Taylor:

We received a check from an entity identified as "DMX2" in the amount of [redacted] on January 19, 2006 for November 2005 royalties. The statement attached to the check indicates that [redacted] is for a residential service and [redacted] is for a commercial service.

Pursuant to Copyright Office regulations, payments are due by the 45th day after the end of each month. See 37 C.F.R., § 262.3(a). Therefore, this payment is two days late and subject to late fees. Copyright Office regulations provide that a service shall be charged a late fee of .75% per month for any payments not received in a timely manner. Id. at § 262.4(e).

The attached spreadsheet shows that DMX2 owes late fees totaling [redacted] for the payment received on January 19th. Please remit to SoundExchange by February 6, 2006 a payment in the amount of [redacted] for the above payment not received in a timely manner.

On another note, we notice that DMX2's payment for its residential service is calculated at the rate available for preexisting subscription services (7.25% of residential revenue). We have indicated to Barry Knittel on several occasions that SoundExchange believes that Capstar, the purchaser of some but not all of the assets of DMX, Inc., is not entitled to pay royalties at the rates available for preexisting subscription services. We are therefore accepting DMX2's payment of [redacted] as partial satisfaction of the actual liability that is due for DMX2's transmissions to residential customers, and SoundExchange and its copyright owner members reserve all of their rights to pursue claims against DMX2 and Capstar for its failure to pay royalties under the appropriate rates.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Gary R. Greenstein
General Counsel
202.828.0126

cc: L. Barry Knittel (via facsimile)

soundexchange 1330 CONNECTICUT AVE, NW, SUITE 330, WASHINGTON, DC 20036
P: 202.828.0120 F: 202.833.2141
WWW.SOUNDEXCHANGE.COM

February 21, 2006

VIA CERTIFIED MAIL

Mr. R. Warren Taylor
Vice President & Controller
THP Capstar, Inc./DMX Music
600 Congress Ave.
Suite 1400
Austin, TX 78701

Re: Notification of Payment of Incorrect Royalties

Dear Mr. Taylor:

We received a check from an entity identified as "DMX2" in the amount of [redacted] on February 15, 2006 for December 2005 royalties. The statement attached to the check indicates that [redacted] is applied to a residential service and is calculated at the rate available for preexisting subscription services (7.25% of residential revenue).

As previously mentioned in my letter to you dated January 23, 2006, SoundExchange believes that Capstar, the non-successor purchaser of some but not all of the assets of DMX, Inc., is not entitled to pay royalties at the rates available for preexisting subscription services. We are therefore accepting DMX2's payment of [redacted] as partial satisfaction of the actual liability that will be due for DMX2's transmissions as a new subscription service, and SoundExchange and its copyright owner members reserve all of their rights to pursue claims against Capstar for improperly claiming the benefits of a preexisting subscription service.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Gary R. Greenstein
General Counsel
202.828.0126