

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

CORRECTED TESTIMONY OF

DENNIS KOOKER

**Executive Vice President, Operations
and General Manager, Global Digital Business and U.S. Sales
for Sony Music Entertainment**

Public Version

Witness for SoundExchange, Inc.

SX Trial Ex. 1

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SONY MUSIC ENTERTAINMENT

Public Version

QUALIFICATIONS

My name is Dennis Kooker. I am currently Executive Vice President, Operations, and General Manager, Global Digital Business and U.S. Sales, for Sony Music Entertainment (“Sony”), a position I have held since October 2008. In this capacity, I am responsible for overseeing all aspects of the day-to-day operations of the Global Digital Business Group and the U.S. Sales Group. The Global Digital Business Group handles digital distribution and sales initiatives on behalf of each of Sony’s various label groups worldwide including the United States, and the U.S. Sales Group handles distribution and sales and marketing initiatives on behalf of each of Sony’s various label groups in the United States. The areas within the organization that report directly to me include Finance, Sales Reporting, Research, U.S. Supply Chain, and distributed labels such as IODA and RED. In addition, I have general oversight with respect to our artist website group and our direct to consumer sales group.

Before assuming my current role at Sony, I was Executive Vice President, Operations, Global Digital Business and U.S. Sales for Sony, where I oversaw physical sales and channel marketing as well as all aspects of finance for the division. In that role, I oversaw new product development and customer relationship management activities in relation to Sony’s artist websites, as well as developed and implemented key commercial strategies and policies for the physical and digital distribution of our repertoire. During this period of my career, the Finance, Sales Reporting, Research, and U.S. Supply Chain areas reported directly to me, while I had general oversight with respect to the artist website and direct to consumer sales groups.

From 2004 to 2007 I was Senior Vice President and Controller for SONY BMG MUSIC ENTERTAINMENT (Sony's corporate predecessor). Prior to that, I was Senior Vice President for Finance at BMG Entertainment. From 2003 to 2004 I was Senior Vice President of BMG North America, and for the four years before that I worked in BMG's United Kingdom and Ireland operations.

I hold a Bachelor of Science in Business Administration from Shippensburg University and an MBA from St. Joseph's University.

DISCUSSION

I. Sony's Position in the Music Industry

Sony is a global recorded music company with a roster of current artists that includes a broad array of both local talent and international superstars. Sony's vast catalog of recorded music comprises some of the most important recordings in history. It is home to premier record labels representing music from every genre, including American Recordings, Arista Nashville, Arista Records, Aware, Battery Records, Beach Street Records, Black Seal, BNA Records, Cinematic, Columbia Nashville, Columbia Records, Epic Records, Essential Records, Flicker Records, Fo-Yo Soul, GospoCentric, Hitz Committee Entertainment, J Records, Jive Records, LaFace Records, Legacy Recordings, Masterworks, Polo Grounds, RCA Records, RCA Nashville, RCA Red Seal, RCA Victor, Reunion Records, Slightly Dangerous, Sony Classical, Sony Music Latin, Star Time International, Verity Records, and Volcano Entertainment.

Sony is a wholly owned subsidiary of Sony Corporation of America and is currently the second largest record company in the United States. In August 2004, Sony Corporation of America and Bertelsmann AG formed a global recorded music joint venture

where each contributed its existing recorded music business — Sony Music Entertainment in the case of Sony Corporation of America, and BMG Music, in the case of Bertelsmann AG — to the venture. In October 2008, Sony Corporation of America purchased Bertelsmann AG's fifty percent share of the joint venture. The combined company is called Sony Music Entertainment.

Sony's year to date market share for CD albums in the U.S. is approximately 29.3% (including both owned and distributed repertoire), and its year to date digital marketshare for digital albums is approximately 23.5% (including both owned and distributed repertoire).

II. Sony's Substantial Investment in the Creation, Marketing and Distribution of Music

Each year, Sony makes substantial investments in the creation, production, marketing, promotion and distribution of recorded music. These investments are and continue to be the life blood that the music industry — in the broadest possible sense, which extends well beyond just record companies — relies upon to find and develop musical talent and transform musical talent into important brands. Once established, the power of these brands goes far beyond just the sale and other exploitation of recorded music. The sale and other exploitation of recorded music alone is a vital function, for without that investment, it would not be possible to bring to the marketplace the new recordings, new artists and heritage recordings that the public clearly enjoys and continues to expect. But the power of these brands also drives other industries, such as webcasting and other digital services, live events and touring, the sale of branded or sponsored merchandise, endorsement opportunities, film and TV careers and music publishing, just to name a few. Each of these industries creates jobs, revenue and growth for a plethora of

interested parties and advisors, including the artists. However, it all starts with the substantial investment we make because the careers of these musical artists that eventually become brands begin with the initial financing we provide to record, market and promote the recorded works.

For Sony, the investment activity starts with the discovery of talent. Although talent discovery can occur in several different ways, the primary methodology is for members of our Artists and Repertoire (A&R) department to go to nightclubs and music festivals throughout the country, and spend countless hours listening to demonstration tapes. Out of the hundreds or even thousands of potential artists that our A&R department scouts, only a small handful of new artists get signed. In addition, Sony also invests in third parties who scout for talent under a range of different business arrangements such as so-called “P & D” deals, so-called “label deals”, joint ventures and distribution deals. To say the least, this time consuming and laborious “research and development” process involves the skills of an array of highly trained personnel who have a talent for finding that “needle in the haystack” that might become tomorrow’s superstar.

Once an artist is signed, we then spend considerable amounts of time and money in developing the repertoire to be recorded, recording the music and working closely with the artist on the branding and imaging that will be used by the artist for his or career generally, including the sale and exploitation of the resulting sound recordings. One of the most significant talent-related expenses are the recording costs and other artist advances, which enable the artist to make the best recordings possible and cover the artist’s living expenses during the recording process. We typically advance millions of dollars per year for these purposes. Over the long term, there is much of this investment that Sony often is unable to

recover, and many advances simply have to be written off. These recording costs include the cost of backup musicians, sound engineers, producers, and all of the other creative talent required to make a commercial sound recording. All told, our total expenditures for talent and recording in the most recent fiscal year, ending in March 2009, were roughly [REDACTED].¹ (This figure reflects only our out of pocket expenses on these activities. It does not include the salaries and other overhead costs that are required to locate and sign talent and to oversee the process of making a record, such as the A & R staff discussed above, which accounts for many millions of dollars more.)

Of course, making a sound recording is only the beginning. Once a recording is made, it has to be distributed and marketed, which includes manufacturing costs for physical products, marketing costs, promotion costs, and distribution costs (which is substantial even for digital distribution). We invest extraordinary amounts in all of these activities. In 2008, for example, we invested over [REDACTED] on the manufacturing of records and over [REDACTED] on distribution. Our marketing costs are even higher — in the most recent fiscal year alone, we invested over [REDACTED] to sell and market our records, including our out of pocket marketing expenses and our selling and marketing overhead. In the year before that, those same activities required a combined investment of over [REDACTED]. Even with these substantial investments that would seemingly guarantee success, the vast majority of new releases are not profitable for the company.

¹ When we were co-owned by Bertelsmann AG, we reported on a calendar year. Now that we are again wholly owned by Sony Corporation of America, we have returned to our previous practice of reporting on a March year-end. Thus, our fiscal years 2005 through 2007 are equivalent to calendar years, but the next fiscal year (which we refer to in our records as “fiscal 2009”) is actually the year running from March 2008 to March 2009. For the sake of clarity, I will simply use “2008” in this statement to refer to that latter year.

III. The Recording Industry's Transformation from Physical Products to Digital Distribution and Its Challenges

The recording industry is currently in a state of extraordinary flux and transformation. Historically, Sony's revenues have been principally derived from the sale and distribution of pre-manufactured physical products, such as vinyl records, cassette tapes, VHS tapes and most recently CDs, DVDs and Blu-Ray discs. Unlike music publishers who have long enjoyed a public performance right and associated revenues every time their songs get played on the radio or TV, the recorded music industry has been almost entirely dependent on the revenues generated by the sale of these packaged goods.

Today, sales of these physical products have fallen precipitously year-over-year, and to satisfy the evolving needs of our consumers and the expectations of the marketplace, we have focused our energies and resources on the digital distribution of music. The challenges associated with this migration from physical to digital distribution are significant, as it significantly "changes the game" from a financial perspective.

The first challenge associated with this migration from physical to digital distribution is that for many consumers, digital formats — including streaming over the Internet — have replaced the consumption of physical products. As a result of this substitution of digital for physical, revenues from digital exploitations of our repertoire — including those attributable to statutory and other forms of licensing activities — are now viewed as a primary source of revenues (rather than "ancillary") that must be maximized in order for the recorded music business to survive, and for Sony to keep making the various investments I have already discussed. Further, I believe that digital revenues will become even more critical as the sale of packaged media continues to decline in the future.

Digital revenues have grown steadily at Sony — both in absolute terms and also as a percentage of Sony’s revenues. This is no accident, as Sony has invested heavily in the infrastructure necessary to operate this component of its business. In 2007, for example, digital revenues were [REDACTED] — about [REDACTED] percent of total revenues. In 2008 (i.e., the year ending March 2009), digital revenues were [REDACTED] — about [REDACTED] of total revenues in that year. We expect that digital will make up an even higher proportion of our revenues in the future.

The second challenge associated with this migration from physical to digital distribution is that the marketplace is slowly migrating from a model based on “ownership” of digital music to “access” to digital music. While much of Sony’s digital revenue currently comes from a la carte and subscription sales of permanent digital downloads (such as iTunes or other similar online and over-the-air download services) which consumers purchase and own, we are seeing an increasing trend towards streaming services which enable users to “rent” or “access” music from their PC or mobile device without actually “owning” the music. For example, our online subscription revenue from various interactive streaming services such as Napster, Zune and Rhapsody has increased approximately [REDACTED] from [REDACTED] in 2005, to approximately [REDACTED] in 2008.

The third challenge associated with this migration from physical to digital distribution is that consumers only have a finite amount of time to consume music in a day, and the types of interactive services previously mentioned — which generally speaking yield Sony more revenue on both a per user and per play basis — compete head-to-head with the services that operate under the statutory licenses covered by Sections 112 and 114 of the Copyright Act. Our performance revenues from those statutory licenses likewise

have risen steadily, from about [REDACTED] in each of 2005 and 2006 to [REDACTED] in 2008.

Thus, in a very real sense, Sony has come to depend on digital revenues from all sources, including the performance royalty income from statutory license. Accordingly, digital revenue is a “core” (not “incidental”) source of revenues that is increasingly vital in order to make the continued investment necessary to record, produce and market the recording stars of tomorrow.

IV. The Continuing Decline of Physical Sales and the Failure of Digital Distribution to Close the Gap Is Making It Harder for Record Companies to Recoup on Their Investments.

In light of the challenges I have discussed in section III, it has not been easy to recoup Sony’s substantial investments in the creation, production, marketing, promotion and distribution of recorded music. As the Judges well know by now, these challenges have thrust the recorded music industry into a 10-year downward spiral, and we do not believe that we have reached the bottom yet.

The retail sales figures collected and distributed by the RIAA bear that out. Those figures show that the total retail value of all music shipped in the United States in 2008 was \$8.5 billion — down 18.2 % from 2007, and down a full 42% from 1999. Breaking out that figure to see the trends in physical versus digital sales is instructive. In 1999, U.S. manufacturers distributed 938.9 million CDs for a total retail value of \$12.8 billion. When other forms of distribution are taken into account, such as albums, singles and cassettes, the retail value of all shipments in that year was \$14.5 billion. By 2007, CD shipments had fallen to 511.1 million units with a total retail value of \$7.5 billion, and things have only

continued to get worse: in 2008, the retail value of CD shipments was down to \$5.5 billion — a 26.6 % drop from 2007, and about 38% of the 1999 figures.


While sales of traditional physical products have plummeted, Sony's digital revenues have failed to close the gap. While some may have predicted that growth in digital sales would make up for the loss in physical sales by now, I want to stress that this has not yet happened. And the revenue trends I have observed based on the industry in general and Sony's business in particular do not suggest that it will happen any time soon.

In 2008, the total retail value of digital music goods and services was \$2.7 billion — which is well short of what would have been needed to offset the decline in traditional physical sales. Our experience at Sony is entirely consistent with these nationwide trends. Sony's U.S. sales of physical product has fallen from [REDACTED] in 2005 to [REDACTED] in 2007, and [REDACTED] 2008 (i.e., the year ended March 2009). Over the same period, revenues attributable to digital products rose from [REDACTED] in 2005 to [REDACTED] in 2007, and only to [REDACTED] in 2008 — not nearly enough to make up for the loss in physical revenues.

Generally speaking, while our digital revenue is growing (though not nearly at the pace we would like to see), as the revenues from our physical records continue to decline, we are becoming increasingly reliant on our digital revenues in order to survive; make the substantial investments in creating, producing, marketing, promoting and distributing recorded music; and bring the public the stars and hits of tomorrow. Without a significant contribution from every conceivable source of those digital revenues — including performance royalties under the Sections 112 and 114 statutory licenses — these goals will not be attainable.

I declare under penalty of perjury that the foregoing is true and correct.

Date: 4/7/10


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MICHAEL D. PELCOVITS

Principal, Microeconomic Consulting & Research Associates

Witness for SoundExchange, Inc.

SX Trial Ex. 2

Before the
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AMENDED AND CORRECTED TESTIMONY OF

MICHAEL D. PELCOVITS

Principal, Microeconomic Consulting & Research Associates

February 2010

1. INTRODUCTION AND QUALIFICATIONS

My name is Michael Pelcovits. I am a Principal of the consulting firm Microeconomic Consulting & Research Associates, Inc. (“MiCRA”), which specializes in the analysis of antitrust and regulatory economics. My business address is 1155 Connecticut Avenue, N.W., Washington, D.C. 20036.¹

Since joining MiCRA in 2002, I have provided consulting services and reports for major corporations on a wide range of applied microeconomic issues, including telecommunications and intellectual property. I have provided testimony before the Federal Communications Commission, many state regulatory commissions, the Office of Telecommunications (“OfTel”) in the United Kingdom, the European Commission, and the Ministry of Telecommunications of Japan, often in rate-setting proceedings. I have testified previously before this Court on behalf of SoundExchange on three occasions: Docket No. 2005-1 CRB DTRA (“Web II”); Docket No. 2006-1 CRB DSTRA (“SDARS”); and Docket No. 2005-5 CRB-DTNSRA. On each occasion, the Court has accepted me as an expert in applied microeconomics.

Prior to joining MiCRA, I was Vice President and Chief Economist at WorldCom. In this position, and in a similar position at MCI prior to its merger with WorldCom, I was responsible for directing economic analysis of regulatory and antitrust matters before federal, state, foreign, and international government agencies, legislative bodies, and the courts. Prior to my employment at MCI, I was a founding principal of a consulting firm, Cornell, Pelcovits & Brenner. From 1979 to 1981, I was Senior Staff Economist in the Office of Plans and Policy, Federal Communications Commission.

¹ A copy of my curriculum vitae is attached as Appendix I.

I have lectured widely at universities and published several articles on telecommunications regulation and international economics. I hold a B.A. from the University of Rochester (*summa cum laude*) and a Ph.D. in Economics from the Massachusetts Institute of Technology, where I was a National Science Foundation fellow.

2. OVERVIEW OF TESTIMONY

I have been asked by counsel for SoundExchange to analyze the market for Internet music services and provide my expert opinion on a range of reasonable rates for the compulsory license fee to be set in this proceeding for the digital audio transmission of sound recordings by Internet webcasters under the statutory licenses set forth in 17 U.S.C. §§ 112 and 114. My goal has been to develop a bundled rate for the Section 112 and Section 114 rights that fully comports with the statutory requirements that license rates should “most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and willing seller.”

I have concluded that a range of reasonable rates can be derived from several types of evidence from the market. The first is the license fees for statutory services that recently were negotiated under the Webcaster Settlement Act (“WSA”) between SoundExchange and two groups of webcasters: broadcasters represented by the National Association of Broadcasters (“NAB”); and Sirius XM Satellite Radio (for its webcasting service). The second type of evidence from which I derive a rate is the license fees that have been negotiated in the recent past between willing buyers and willing sellers in the market for interactive, on-demand digital audio transmissions.

The WSA agreements and the on-demand digital service agreements each have important strengths as an evidentiary basis on which to establish rates in these proceedings. The WSA agreements are important evidence because they are very recent, voluntary agreements covering

precisely the statutory webcasting services at issue here, negotiated on both sides between entities that have an important stake in establishing reasonable rates, and Section 114(f)(2)(B) permits the Court to “consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements.” The interactive, on-demand service agreements are important evidence because they are marketplace agreements negotiated, in many cases, between the very same companies that would be actors in the hypothetical market in this case, and involve services that are very similar to statutory webcasting except for the degree of interactivity that is offered to consumers.

Neither the WSA agreements nor the interactive, on-demand service agreements are perfect benchmarks. With respect to the WSA agreements, among other things, consideration must be given to the fact that these agreements were negotiated in the shadow of a regulatory environment that prohibited the sellers from refusing to grant a license, and allowed both buyers and sellers to seek a rate from this Court in the event that a rate could not be achieved through negotiation. In contrast, the interactive, on-demand service agreements represent marketplace transactions with no regulatory backstop for the parties, and in that sense offer a better benchmark. With respect to the interactive, on-demand service agreements, however, certain adjustments are necessary in order to derive a rate for statutory webcasting services. Most importantly, an adjustment must be made to account for the value that consumers place on the greater interactivity offered by the on-demand services compared to statutory services.

For the reasons stated in greater detail in later sections of this testimony, however, I believe that evidence from the WSA agreements and the interactive, on-demand service agreements, when properly adjusted, provides a very reliable basis from which I can derive a range of rates

that meet the statutory criteria applicable in this case. A table summarizing the range of possible outcomes based on this evidence appears below:

Year	Average WSA Agreement Rates	Adjusted Interactive, On-Demand Rates
2011	\$.00175	\$.0036
2012	\$.0020	\$.0036
2013	\$.00215	\$.0036
2014	\$.00225	\$.0036
2015	\$.00245	\$.0036

I understand that SoundExchange is proposing a rate in this proceeding that is within the range set out above, beginning at \$.0021 per performance in 2011 and increasing to \$.0029 per performance in 2015.

This testimony is organized as follows. In Section 3, I review the statutory requirements and this Court's precedent to provide a framework for the discussion of the evidence and analytical exercises contained in the testimony. In Section 4, I discuss the trends in the industry that create the backdrop for my analysis of the marketplace in which the statutory license is used. In Section 5, I present the rates from the recently negotiated agreements for the statutory license and explain how they can be used to assess the likely outcome of a free-market negotiation between willing buyers and willing sellers. In Section 6, I present the evidence from the agreements licensing sound recordings for use by interactive, on-demand music services; and I adjust the license fees from those agreements to derive the rates for the target market at issue here.

Pursuant to 37 C.F.R. § 351.4(c), I am amending this testimony based on new information received during the discovery process. Specifically, I have added footnote 27 to my testimony in

which I analyze certain data produced by Live365 in discovery. I have not otherwise amended this testimony.²

3. FRAMEWORK FOR ANALYZING RATES FOR STATUTORY WEBCASTING SERVICES

The statutory criteria for setting rates and terms for the Section 114 webcaster performance license are enunciated in 17 U.S.C. § 114(f)(2)(B), which provides in part that

the Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.

This Court considered the application of those standards in its 2007 decision setting rates for statutory webcasting for the license period from 2006 through 2010. *In the Matter of Digital Performance Rights in Sound Recordings and Ephemeral Recordings, Docket Number 2005-1 CRB DTRA*, 72 Fed. Reg. 24084 (2007) (the “Web II Decision”). I have read that decision and the ruling of the U.S. Court of Appeals for the District of Columbia Circuit affirming that decision. In its Web II Decision, the Court made several key determinations on how the statutory standards should be applied, and I have applied the Court’s conclusions in my analysis here. Among those conclusions were:

- the “willing buyer/willing seller” standard is not defined by the two specific factors identified in Sections 114(f)(2)(B)(i) and (ii) and those factors are merely to be considered, along with other factors, to determine rates under the willing buyer/willing seller standard;

² In addition to this single amendment, I have undertaken a small number of corrections to the testimony. Specifically, I have corrected the graph on page 8, a number of the calculations in Section 6.d related to the effect of substitution, and the list of agreements that I reviewed in Appendix IV. These corrections were disclosed to opposing counsel before my deposition. I also corrected a minor mistake in the table on page 4 which was identified during my deposition.

- Congressional intent was for “the Judges to attempt to replicate rates and terms that ‘would have been negotiated’ in a *hypothetical* marketplace;”
- the buyers in this hypothetical marketplace are the statutory webcasting services and this marketplace is one in which no statutory license exists; and
- the sellers in this hypothetical marketplace are record companies, and the products sold consist of a blanket license for the record companies’ complete repertoire of sound recordings.

In the Web II Decision, the Court also carefully considered the appropriate rate structure for the statutory license fees. For reasons that it detailed at length, the Court determined that a per-performance usage fee structure should be applied, and it rejected alternatives such as fees calculated as a percentage of the buyer’s revenue, a flat fee, or a per-subscriber fee. The per-performance fee structure was favored because it was directly tied to the nature of the right being licensed and the actual amount of usage of that right, and a per-performance fee also would avoid the significant measurement difficulties that could be associated with a percentage-of-revenue fee.

In light of the Court’s reasoning supporting the per-performance approach, I have followed the precedent established by this Court with respect to the rate structure. I propose only a per-performance fee, and I do not attempt to independently examine the merits of different rate structures. The goal of my testimony is to estimate the price of a per-performance license fee for statutory webcasting that would prevail in the hypothetical market as defined by this Court’s interpretation of the governing statute.

4. THE STATUTORY WEBCASTING MARKET

I developed considerable familiarity with the market for statutory webcasting and other digital music services in connection with my work for SoundExchange in the Web II and SDARS matters. In preparing this testimony, I took a number of steps to update my knowledge of the relevant markets, and I studied the trends in the webcasting industry over the past four years. This effort was undertaken to understand whether changes in the businesses of the willing buyers and sellers should alter how I conducted my benchmark analysis, and also to help understand the motivations of the webcasting services that negotiated settlements with the record companies.

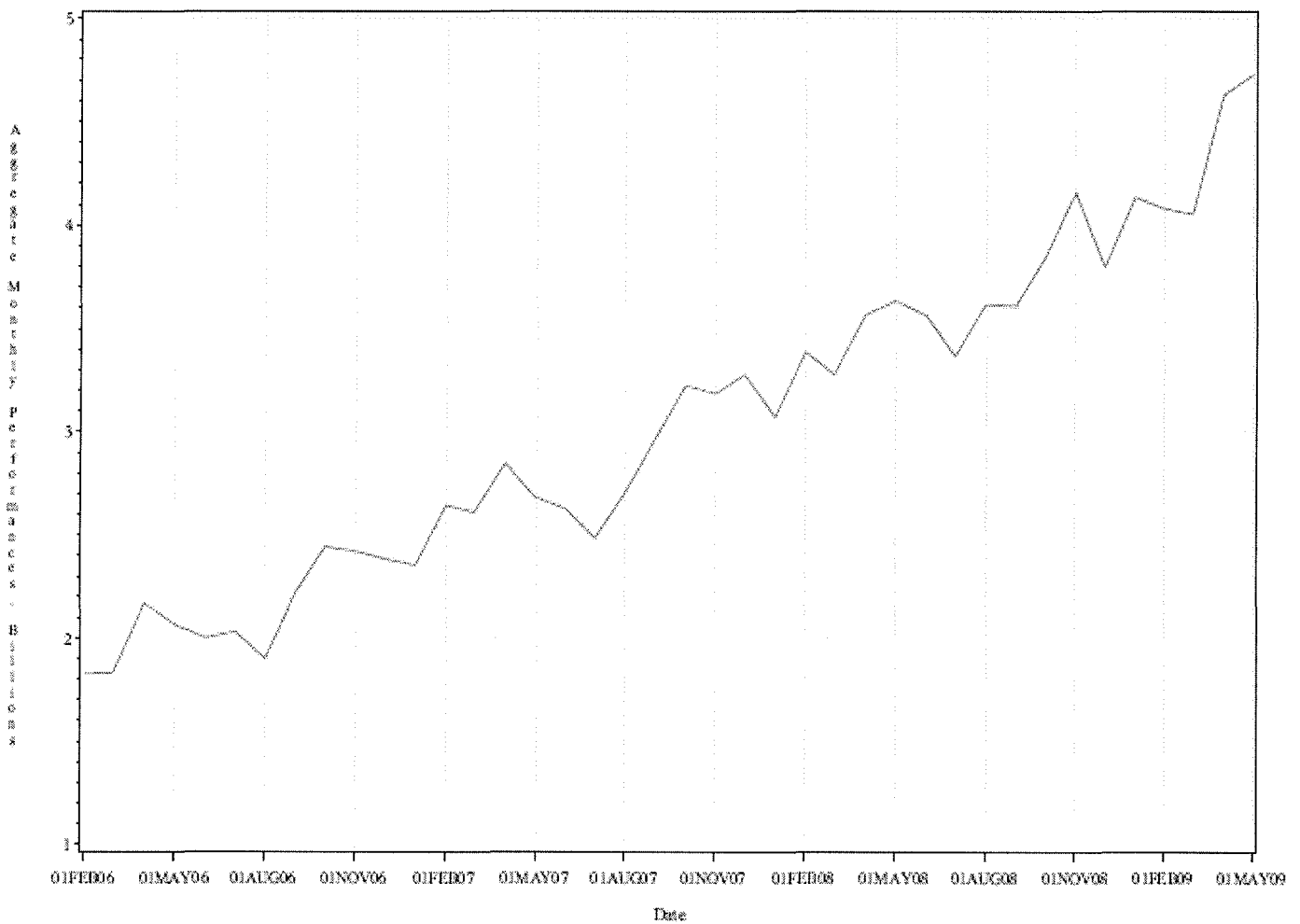
Among other things, I met in person with executives from Sony Music Entertainment, Warner Music Group and EMI who are responsible for digital music markets, and I met by video-conference with an executive from Universal Music Group. I reviewed dozens of recent contracts between the major record companies and digital music services. My staff and I signed up for and used many digital music services, and we conducted an extensive internet search for recent information on the financial and technological developments in the market. My overall conclusion is that the webcasting industry continues to grow, and there continues to be significant change in the types of services and service providers that are succeeding in the market.

a. The Growth and Maturation of Statutory Webcasting

The webcasting industry has evolved significantly since the Web II decision. Between 2005 and 2007 the number of visitors to webcasting sites increased substantially. One measure of this increase is the CommScore Media Metrix reported by JPMorgan, which shows a compound growth rate of 9.3% a month in the number of unique visitors from 15 million in January 2005 to

over 62 million in May 2006.³ This number leveled off between May 2006 and February 2008, according to the last report available from JP Morgan. Overall usage of statutory webcasting services, however, has continued to show significant growth. Based on usage reports from SoundExchange, the number of aggregate monthly performances reached 4.65 billion by May of 2009. The graph below shows the general usage trend from early 2006 until May of 2009.

Statutory Webcasters' Aggregate Monthly Performances, 2006-2009
Reported to SoundExchange

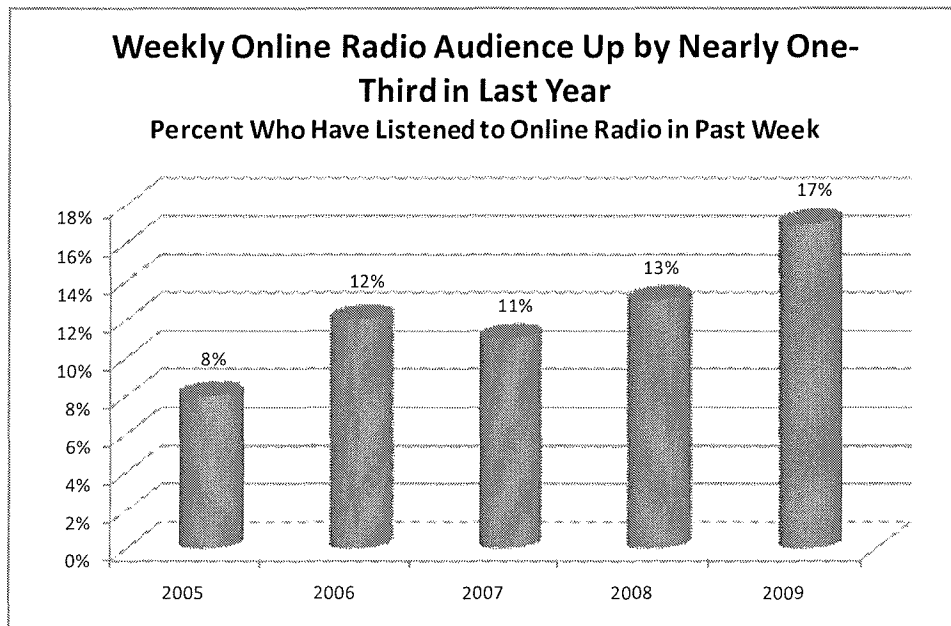


Source: SoundExchange Usage Reports, 2006-2009

The popularity of webcasting was noted in a study by Arbitron and Edison Media Research,

³ JPMorgan, North America Equity Research, "Radio Broadcasting," April 10, 2008.

which reported that in 2008 “online radio is the largest and most developed digital radio platform — compared to satellite radio, HD radio and podcasting — with about 33 million Americans, or 13% of the country’s population over 12 years of age, tuning in on a weekly basis.”⁴ More recently, Arbitron and Edison Media Research updated their findings and reported that “42 million Americans ages 12 and over tuned in to online radio in a given week, up from 33 million 2008,” thereby boosting current listener rates to 17% of the U.S. population.⁵ The trend over the last five years is shown in the table below.⁶



By 2009, online radio listenership represents 42 million people.
Source: Arbitron, Edison Research.

The Arbitron and Edison Media Research study highlights other important trends in online radio usage. For example, 35- to 54-year-olds — a key radio demographic — are becoming more frequent online radio listeners; additionally, online radio listeners are typically well-

⁴ Jonathan Paul, “Internet radio is ready for take-off,” Strategy Magazine, March 2009, p.39.

⁵ Impact Lab, “Internet Radio Fastest Growing Online Media,” September 9, 2009, <http://www.impactlab.com/2009/09/09/internet-radio-fastest-growing-online-media/>.

⁶ Arbitron, Edison Media Research. “The Infinite Dial 2009,” (pg. 8) http://www.edisonresearch.com/home/archives/2009/04/the_infinite_dial_2009_presentation.php (accessed 09/25/09).

educated, upper-income, full-time employed, and technologically savvy individuals.⁷

There has also been a degree of fluidity in the statutory webcasting market over the past several years, with partnerships and consolidations changing the identity and characteristics of market participants. Due to the nature of statutory webcasting, it is possible for a new firm to rapidly capture listeners. The technology necessary to become a webcaster is widely available and the most valuable input (*i.e.*, recorded music) is available at a very low sunk cost in the form of the statutory license. From the demand side, customers can sample new services easily and also appear willing to try out new services. By its very nature, the internet provides potential listeners with many means of learning about new services, thus breaking down what would ordinarily be a barrier to entry. A good example of a *de novo* entrant that grew very quickly in this dynamic market is Last.fm, which entered in 2003 and received almost 1.9 million unique visitors in the U.S. per month by February 2008 — more than all but three terrestrial radio operators' websites.⁸ In March 2009, Last.fm reported that its number of visitors worldwide had doubled to 30 million from the levels obtained a year before.⁹ Based on reporting to SoundExchange for 2009 through April, Last.fm is now the eighth largest statutory webcaster as measured by licensing fees paid to SoundExchange. Last.fm was purchased for \$280 million in May 2007, demonstrating the ability of a new entrant to succeed in the market.¹⁰

Another new entrant, Slacker Radio, began offering service on March 15, 2007. In the first four months of 2009, Slacker ranked as the 13th largest statutory webcaster based on payments to SoundExchange. Slacker has rapidly adapted its service to work with new devices as well as its own dedicated web radio. For example, Slacker partnered with BlackBerry to create “the free

⁷ Id. pp. 58, 59.

⁸ JPMorgan, North American Equity Research, April 10, 2008, pp. 4-5.

⁹ Last.fm blog. “Last.fm Radio Announcement.” <http://blog.last.fm/2009/03/24/lastfm-radio-announcement> (accessed 09/21/2009).

¹⁰ Paidcontent.org, “CBS Pulls Last.fm, Radio into Interactive Music Group.” (05/05/2009).

Slacker Mobile application for the BlackBerry Storm smartphone from Research In Motion.”¹¹

One other significant factor in the growth of statutory webcasting is the ability of advertisers to obtain detailed demographics on listeners. Advertisers have access to detailed audience demographics from firms including Ando Media (“Webcast Metrics”). Katz Online Network, a leading full-service media sales and marketing firm serving the broadcasting industry, utilizes Ando Media’s Webcast Metrics to measure demographics and improve ad sales on web radio, using real-time metrics, seamless ad insertion, geo-targeting, and campaign optimization. The Katz Online Network delivers more than 52 million listener sessions per month and aggregates over 4 million listeners a week.¹² The robust market for advertising on internet radio has led to a surge in spending on digital advertising to \$101 million in the radio industry in the first quarter of 2009.¹³ One analysis projects that more than \$350 million will be spent on advertising on internet radio as a medium by 2011.¹⁴

In sum, the information that I have reviewed points to a robust and evolving market for webcasting that has grown significantly since the last proceeding. The market is aided by the low costs of entry, especially for entities such as broadcasters that simply simulcast their terrestrial programming over the internet. The growth of sophisticated analytical services and the increased ad revenue associated with internet radio also provide compelling evidence of an industry that has both short and long-term viability.

¹¹ Slacker Personal Radio, Press Release, January 14, 2009.

¹² Ando Media Press Release, April 1, 2009.

¹³ Joe Mandese, “Digital Radio Ad Spending Surges Amid Medium’s Downturn,” Media Post News (05/22/2009).

¹⁴ Impact Lab, “Internet Radio Fastest Growing Online Media,” September 9, 2009, <http://www.impactlab.com/2009/09/09/internet-radio-fastest-growing-online-media/>.

b. Evolution of Webcasters' Business Models

In recent years statutory webcasting has grown and evolved based in part on new business models. A number of the fastest-growing services provide functions that increase the subscriber's ability to customize the audio stream that he or she receives. One example is Pandora, which was founded in 2000, and is now the largest webcasting service.¹⁵ It has more than 25 million registered users and is growing fast, entering into partnerships with industry leaders such as AT&T, HP, Samsung, and Sprint. It has one of the most popular applications ("apps") on the Apple iPhone. Pandora provides highly customized radio-type stations for each subscriber, based on the listener's stated preference for certain songs or artists. This is in marked contrast to the situation three or four years ago when all of the statutory webcasters that I analyzed — except for Live 365 — provided less than four hundred channels of preprogrammed streaming music. The popularity of Pandora and other services that offer very similar services, such as Last.fm and Slacker Radio, demonstrates that there is significant demand for what is termed "push" type services, which provide a continuous stream of music programmed to suit the subscriber's tastes.

Another important trend in the industry is the development and deployment of mobile webcasting services. Many webcasting services feature mobile device applications, such as Slacker, Pandora, Live365, and Last.fm, all of which have apps for the iPhone and Blackberry. This reflects an important trend in the wireless handset industry, where the penetration of wireless data handsets has increased markedly in the last several years, to the point that 28% of new handsets sold in the United States in the second quarter of 2009 were wireless data handsets

¹⁵ <http://blog.pandora.com/jobs/> (visited September 13, 2009).

or so-called “smartphones.”¹⁶ These wireless handsets enable customers to remain connected to the internet even when they are mobile. The most popular consumer wireless handset is the iPhone, of which 13.4 million have been sold during the first nine months of 2009.¹⁷ A large number of the webcasters are enabled to be played on the iPhone (as well as other mobile handsets). This includes services like Pandora, which recently announced its availability on the iPhone and other iPod devices. Pandora's iPhone app was recently named the top iPhone app of 2008 by Time Magazine.¹⁸ This trend towards increased mobility enables the webcasters to provide an important and valuable service to consumers, which in a free market would generate additional payments to the owners of the copyright in the sound recordings.

There has also been an increase in the development of Net radios, which receive both terrestrial and internet radio stations (for example, Livio Radio). Another new frontier for webcasting is the potential for vehicle-based web radios. In fact, both Chrysler and Ford now offer various models with in-car wireless capabilities.¹⁹ According to Sirius XM Radio, the improvements in internet radio continue to make it an “increasingly significant competitor” to its satellite radio service in the near future.²⁰

These trends in the market (increased customization of web-radio and increased mobility) may be particularly important for this proceeding in light of the recent decision by U.S. Court of Appeals for the Second Circuit, *Arista Records, et al. v. Launch Media, Inc.*, Docket No. 07-2576-cv (August 21, 2009) (the “*Launch* decision”). Prior to the *Launch* decision, services that

¹⁶ The NPD Group, “Feature Phones Comprise Overwhelming Majority of Mobile Phone Sales in Q2 2009,” http://www.npd.com/press/releases/press_090819.html.

¹⁷ Apple Inc., Form 10-Q, for the quarterly period ended June 27, 2009, p. 31.

¹⁸ Time Magazine, “Top 10 iPhone Apps,” http://www.time.com/time/specials/2008/top10/article/0,30583,1855948_1863793,00.html.

¹⁹ See Chrysler Town & Country uconnect, http://www.chrysler.com/en/2009/town_country/innovations/u_connect/; Ford Work Solutions, <http://www.fordworksolutions.com/Products/In-Dash>.

²⁰ Sirius XM Radio Inc., 2008 Form 10K, p. 11.

offered customized webcasting might not — depending on the degree of customization — qualify for the statutory license. The *Launch* decision may be interpreted by webcasters and record companies to loosen the constraints on the capabilities of the statutory services and bring more customized services under the statutory license. Although webcasters offering the kinds of functionality at issue in the *Launch* decision cannot provide truly on-demand programming or give the listener complete control over the stream of music he or she is listening to, nevertheless these services can provide significant functionality, and consumers appear to value that functionality. The greater ability to offer customization under the statutory license pursuant to the *Launch* decision renders the license more valuable.

In contrast to the situation at the time of the Web II Decision, when there was limited product differentiation and customization of “non-interactive” services, these services are now adding more functionality and becoming increasingly valuable to consumers. Technological advances and refined interpretations of the limits of the statutory license are likely to lead to significant further growth in the webcasting industry, although the exact contours of such growth are difficult to fully predict.

5. EVIDENCE FROM SETTLEMENTS BETWEEN SOUNDEXCHANGE AND WEBCASTERS

SoundExchange recently entered into multi-year agreements with the National Association of Broadcasters (the “NAB”), covering webcasting by over-the-air terrestrial radio stations, and with Sirius XM Satellite Radio, covering webcasting of the music channels broadcast on satellite radio. Each of these agreements was entered into in 2009 pursuant to the WSA and each establishes royalty rates through 2015. Together, these two agreements cover webcasters that paid more than 50 percent of the webcasting royalties received by SoundExchange in 2008. I

have reviewed these agreements, which provide useful information on rates that could be expected under a willing buyer/willing seller standard.

Both the NAB and Sirius XM agreements set royalty rates on a per-performance basis. The rates established by those agreements for the license term under consideration by this Court are set forth below:

Year	NAB Agreement	Sirius XM Agreement
2011	\$.0017	\$.0018
2012	\$.0020	\$.0020
2013	\$.0022	\$.0021
2014	\$.0023	\$.0022
2015	\$.0025	\$.0024

The WSA agreements are useful to understand the bargaining range over which buyers and sellers would negotiate in the hypothetical market for statutory webcasting. To state what is perhaps obvious, the rights being sold in these agreements are precisely the rights at issue in this proceeding. The buyers (with the broadcasters represented as a group by the NAB) are identical to the buyers in the hypothetical market at issue in this case. The sellers are the same copyright owners whose copyrights are at issue in this case, albeit represented by SoundExchange. The copyrights will be used for statutory webcasting services, and the agreements are very recent.

Each of these contracts, of course, was negotiated in the shadow of the regulatory scheme and against the background of statutory rates previously set by this Court. To that extent, they may or may not represent the same outcome that would result in a pure market negotiation with no regulatory overtones. In particular, any negotiation over rates to be in effect in 2011-2015 will be affected by the parties' expectations as to the rates this Court would set if no settlement were reached (and also after netting out the cost of litigating the case before this Court). A buyer will not agree to rates above the upper end of the range of its expectations of the rates to be set by this Court; otherwise it would be better off litigating the rates. Similarly, Sound Exchange, as

the seller, will not agree to rates below the low range of its expectations as to what rates the Court would set.

Under the particular circumstances presented here, I conclude that the WSA agreements likely represent the low end of the range of market outcomes. I reach this conclusion for several reasons.

The buyer's negotiating position will be affected by whether it feels it can construct a financially viable business model using the rates in the settlement. The buyer in the existing statutory scheme always has the option of not offering a statutory service. The rate that the NAB participants and Sirius XM agreed to in the settlements must reflect a judgment that they can operate a viable statutory webcasting service by purchasing sound recording rights at those rates. If they were not financially viable at the negotiated rates, they either would seek better rates from this Court, or simply not engage in statutory webcasting at all.

The analysis is somewhat different from the sellers' side. Because of the statutory license, the sellers *must* sell. Absent the statutory license, a record company would have the very real alternative of not licensing the music to non-interactive webcasters, and would not grant a license if withholding the license would increase sales or licensing of music to other channels (such as CDs, digital downloads, or fully interactive music services).

Thus, the buyers operating under a statutory scheme are not likely to negotiate a rate above the free market rate even if they believe that the Court might set the rate too high, because they have the option of not buying at all. But the sellers might sell at a rate below the free market rate if they believe that the Court might set the rate too low, because they have no ability to decline a license. Therefore, the outcome of settlements — in the current regime where a statutory license

is the alternative to the settlement — is likely to be more favorable to the webcasting industry than what would prevail in a free-market setting.

The fact that the seller in the WSA agreements was SoundExchange, rather than the individual record companies, does not change this analysis. Because all of the copyright owners (on whose behalf SoundExchange negotiated) must sell under the statutory scheme, while the buyers have the option not to buy, the effect of the statutory scheme that I described above impacts SoundExchange as much as any other seller. Moreover, negotiation of the WSA agreements by SoundExchange does not significantly alter the market power equation. Each record company has a unique catalog of sound recordings that are highly valued (or even necessary inputs) to any webcasting service. The individual record companies, as a consequence, have a degree of market power. Conversely, there are many webcasters and few barriers to entry that would limit the effectiveness of potential competition among webcasters with respect to the negotiation of licenses, effectively making the webcasters price takers in the market. Thus, the fact that the sellers in the WSA agreements were the copyright owners acting through SoundExchange does not suggest that SoundExchange was able to extract a rate above the level that would prevail if each record company negotiated separately. Indeed, had SoundExchange attempted to do so, the buyers presumably would have rejected a settlement with SoundExchange and resorted to a rate-setting proceeding in this Court.

That the WSA agreements represent the low end of a market rate is confirmed by evidence drawn from the record companies' marketplace agreements to license "custom radio" services. Custom radio services are webcasters that offer some degree of interactivity, short of providing music on demand. Such services may allow skipping of songs, or the ability to cache a particular song for replay at a later time, or the ability to customize a stream to the consumer's particular

musical tastes. The record companies and the custom radio services have often disagreed about whether these services fall within the statutory webcasting license. In many cases the record companies have negotiated agreements licensing such services at a rate higher than the prevailing statutory rate. The licenses for custom radio service contain per-performance rates ranging from 115% of the prevailing statutory webcasting rate to 150% of the statutory rate, and frequently an alternative percentage of revenue fee as well.

I have testified in past proceedings that the custom radio service rates should not be adjusted to remove the effect of interactivity and then used as a benchmark to set statutory webcasting rates, because the custom radio rates likely were dragged down by the statutory rate. However, the recent *Launch* decision suggests that many such services may in fact qualify to operate under the statutory license. As an economist, I express no opinion on the merits of the *Launch* decision or the longer-term development of the law in this area. But if, under *Launch*, services that voluntarily agreed to pay 115% to 150% of the existing statutory rate actually qualify as statutory services, those voluntary agreements represent compelling evidence that on a forward-looking basis the current statutory rate may be too low. If greater and more valuable functionality is permitted for statutory webcasters than previously was thought to be the case, the statutory rate should reflect that fact. The custom radio rates may be artificially low due to the gravitational pull of the statutory rates, but they nevertheless stand as evidence that webcasters willingly agree to pay more than the current statutory rates for the right to use music in a customized digital music service.

Not only are the custom radio rates higher than the current statutory rates, but they are also higher than the rates negotiated by SoundExchange with the NAB and Sirius XM for the upcoming license term. The current per-play rate for statutory webcasting services for 2010 is

\$.0019 per play. A rate that is 115% of the 2010 statutory rate would equal \$.0022, and a rate that is 150% of the 2010 statutory rate would equal \$.0028. Yet the NAB and Sirius XM agreements with SoundExchange start well below those rates and do not reach a per-play rate of \$.0022 until 2013 and 2014 respectively. The agreements with the NAB and Sirius XM never reach the level of \$.0028 per play. Thus the per-play rates in the agreements negotiated by SoundExchange under the WSA are, on the whole, lower than rates negotiated in a free market between record companies and the custom radio services that, under the *Launch* decision, may qualify for the statutory rate.

This evidence is probative of the issue of whether the collective bargaining under the WSA enabled the copyright owners to exercise cartel-like power and therefore set a higher price than in the absence of a statutory regime. Since the record companies negotiated the custom radio deals individually and independently, and the resulting rates were above the WSA agreement rates, this would indicate that cartel-like discipline was not essential to achieving the WSA agreement rates. If the opposite were true and SoundExchange had significantly more bargaining power than the individual record companies, one would not expect the rates negotiated by SoundExchange to be significantly lower than the individually negotiated rates for custom radio services that are close substitutes to the statutory services (and may now be statutory services under the *Launch* decision).

The custom radio rates, in fact, suggest that the WSA agreements negotiated by SoundExchange represent the low end of the range of market rates, because webcasters who can offer some degree of customization have shown themselves willing in marketplace negotiations to pay more than the WSA agreement rates. Sirius XM and the broadcasters who are part of the NAB agreement generally offer webcasting services that are not customized. Thus the rates they

negotiated may be lower than the rates that would be negotiated by webcasters offering customized services, which may now be deemed to be statutory. In addition, the WSA agreement rates may be low in part because, as I suggested earlier, a seller whose copyrights are subject to a statutory license loses bargaining power due to the fact that it cannot refuse to license its rights.

Having concluded that the WSA agreements provide useful evidence, I next consider whether those rates need to be adjusted in any way. In particular, I have considered whether the rates in the WSA agreements should be adjusted to reflect discounts from the current statutory rates that the NAB and Sirius XM negotiated for 2009 and 2010.²¹ As shown in the table below, SoundExchange agreed to accept rates for 2009 and 2010 below those set by this Court for the current license term, but received long-term contracts through 2015 at gradually increasing rates.

Year	Current Statutory Rate	NAB Rate	Sirius XM Rate
2009	.0018	.0015	.0016
2010	.0019	.0016	.0017
2011		.0017	.0018
2012		.0020	.0020
2013		.0022	.0021
2014		.0023	.0022
2015		.0025	.0024

²¹ The NAB negotiated performance complement waivers with each of the major record companies at the same time it negotiated the WSA agreement with SoundExchange. These waivers allow the broadcasters to simulcast their broadcasts on the internet even though the number of plays by an artist or from an album might exceed the allowed levels under Section 114. I have reviewed these waivers and discussed this issue with the record company executives. My opinion is that a statutory license for non-broadcast webcasters that was set at the same level as the NAB settlement would not be measurably less valuable because it does not contain performance complement waivers. The performance complement waivers are uniquely valuable to broadcasters, whose over-the-air programming is not subject to a sound recording copyright and therefore not subject to the performance complement. The waiver allows these broadcasters to re-transmit their terrestrial signal without having to alter the programming that they created primarily for a use not subject to the performance complement. While the waivers may be important to the particular business model of terrestrial broadcasters, the waivers have little value for non-broadcasters, because the waivers are expressly limited to traditional broadcast-type programming aimed at a mass market, as opposed to the niche programming of multi-channel or customized webcasters. The market value of the waiver appears to be very small, since Sirius XM, with no such waiver, agreed to rates that are virtually identical over the life of the contract. Consequently, there is no reason to adjust the NAB rates to account for the performance complement waivers.

I do not believe that any adjustment is necessary if the Court chooses to base its rates for the upcoming license period on the WSA agreements. It is extremely unlikely that a willing seller who expected to have to negotiate future contracts with the same customer base would enter agreements that placed those who settled early at a competitive disadvantage compared to those who held out and settled later. To do so would send a strong signal to customers that it is a mistake to settle early. It would not be in a seller's interest to create a reputation that settling with it before everyone else does is a big mistake. In this case, in the two WSA agreements that I have discussed, the copyright holders have settled with customers accounting for more than 50% of royalties paid to SoundExchange during 2008. The same copyright holders are unlikely to risk their reputation as a trustworthy partner in future negotiations with those who settled for the WSA rates by agreeing to lower rates for the minority of webcasters who have not yet settled.

Moreover, if new webcasters enter the market during the upcoming license term, it would not be economically rational for the copyright owners to license those new market entrants at rates below what the copyright owners are receiving from Sirius XM and the NAB webcasters. The likely result of granting lower rates would be to enable the new market entrants that pay lower royalty rates to take market share away from the NAB webcasters and Sirius XM, which pay higher royalty rates, thus reducing the aggregate royalties paid by webcasting services. This would be contrary to the economic interests of the copyright owners. Therefore, I would not expect the copyright owners to agree to rates below those established by the WSA agreements during the license term that runs from 2011 to 2015. That is especially so for new market entrants that offer customized webcasting services, which, as I discussed previously, have been

shown by marketplace evidence to be more valuable than purely non-interactive webcasting services.²²

Other factors that would not apply to non-settling parties may also account for the lower rates in 2009 and 2010. For example, SoundExchange may have viewed the ability to obtain agreements with webcasters that represent more than 50% of its webcasting royalty receipts in 2008 as warranting a discount akin to a signing bonus. Such considerations would not warrant discounting rates for non-settling parties in the later years of the license term.

In summary, the rates found in the agreements between SoundExchange on the one hand, and Sirius XM and the NAB on the other hand, provide a lower bound for potential market rates in this proceeding. The average of those rates appears in the table below.

Year	WSA Agreement Average Rates
2011	\$.00175
2012	\$.0020
2013	\$.00215
2014	\$.00225
2015	\$.00245

6. BENCHMARK ANALYSIS OF THE INTERACTIVE, ON-DEMAND MARKET

a. Overview

As the Court is aware, a benchmark rate can provide very useful evidence because it represents actual marketplace transactions between willing buyers and willing sellers, provided that the benchmark rate can be adjusted appropriately to account for differences between the benchmark and target markets.

²² For the sake of completeness, I have calculated the effect on rates if one were to factor into the rate calculation the discounts that the NAB and Sirius XM received for the final two years of the current rate term. That calculation appears in Appendix II.

In the Web II Decision, this Court found that the market for the digital performance of sound recordings by interactive, on-demand music services was the most appropriate benchmark to use for the analysis in that proceeding. Based on my recent research regarding developments in the digital music business, I am persuaded that the interactive, on-demand music services remain the best benchmark to use for the purpose of setting rates for statutory webcasting services in this proceeding.

The economic theory that supported my methodology for analyzing the interactive music service benchmark in Web II remains essentially the same in this proceeding. Because that analysis was accepted by the Court as a reasonable basis for setting rates, and the Court's decision was affirmed by the D.C. Circuit Court of Appeals, I will not restate the theory here. I believe it is reasonable to predict that the ratio of per-subscriber royalty fees to consumer subscription prices will be essentially the same in both the benchmark and target markets. It follows then that consumer subscription prices in the benchmark market can be adjusted to remove the value of interactivity, and then the resulting per-subscriber royalty rate for the target market can be calculated by multiplying the adjusted subscription price by the ratio of the per-subscriber royalty fee to the subscription price that we find in the benchmark market.

In addition to adjusting for the effect of interactivity, in the Web II proceeding, I made a second adjustment in order to derive a per-play rate for the target market — I adjusted to account for the greater number of plays per subscriber in the target market compared to the benchmark market. Finally, in Web II, although I found no evidence that the benchmark interactive music service market was more likely to substitute for purchases of CDs and downloads compared to the target market, I offered a sensitivity analysis to show the effect that substitution might have on royalty rates. In this case, similarly, I will calculate the interactivity adjustment and per-play

adjustment using current data, and will again offer a sensitivity analysis that assumes some greater substitutional impact on other music markets by interactive, on-demand music services as compared to statutory services.

b. The Interactivity Adjustment

1. Comparison of Subscription Rates for Interactive and Non-interactive Services

In my Web II testimony, I relied on two techniques to estimate the interactivity adjustment. The first was based on a comparison of the mean retail subscription rates in the benchmark and target markets, which in Web II yielded an interactivity adjustment factor of 0.53.

The digital streaming markets have changed somewhat since my earlier testimony, with webcasting services offering more customization that blurs the lines between on-demand services and statutory services. In order to update my analysis, therefore, I have collected information on the characteristics of forty-one webcasting services now available in the market. Of these forty-one webcasting services, eighteen are subscription services. Because it is more straightforward to infer differences in consumer willingness-to-pay (and by extension how much the webcaster would be willing to pay for the license) from observed prices for subscription services, I will focus my discussion on the results derived from these eighteen services. However, I have also conducted an econometric analysis of all forty-one services and generated results that confirm the validity of the conclusions from the subscription services. I discuss these regression results in Appendix III.

There are eleven subscription webcasting services that are fully interactive, *i.e.*, that allow complete on-demand listening. There are also seven subscription webcasting services that arguably qualify as statutory services (*i.e.*, services that offer no interactivity or limited

interactivity, which I will refer to as “statutory” services).²³ The average subscription price for statutory services is \$4.13. The average subscription price for fully interactive, on-demand services is computed on an unadjusted basis is \$13.70. Since two of these services bundle a fixed number of permanent downloads in the monthly subscription, I have also computed an adjusted price by subtracting the retail value of the actual number of downloads used by the average subscriber to these services.²⁴ As shown in the table below, the average subscription price adjusted for downloads is \$13.30.

Comparison of Subscription Services

Service	Price per Month	
<i>Statutory</i>		
Pandora One	\$3.00	
Last.fm Premium	\$3.00	
Live365 VIP	\$6.95	
Sirius XM Radio	\$2.99*	
Slacker Radio Plus	\$3.99	
Musicoverly Premium	\$4.00	
Sky.fm/Digitally Imported Premium	\$4.95	
Average	\$4.13	
<i>On-Demand</i>		
	Not Adjusted for Downloads	Adjusted for Downloads
Classical Archives	\$9.95	\$9.95
ZunePass	\$14.99	\$12.84
Rhapsody Unlimited	\$12.99	\$12.99
Rhapsody To Go	\$14.99	\$14.99
Napster	\$5.00	\$2.83
Napster To Go	\$14.95	\$14.95
iMesh Premium	\$7.95	\$7.95
iMesh ToGo	\$14.95	\$14.95
Pasito Tunes PC	\$14.95	\$14.95
Pasito Tunes Unlimited (Mobile)	\$19.95	\$19.95
Altnet (Kazaa)**	\$19.98	\$19.98
Average	\$13.70	\$13.30

* price for satellite radio subs

**includes free ringtones

²³ Whether these services actually qualify for the statutory license is a legal judgment about which I express no opinion. I have attempted to include a sufficient number of services that do not provide on-demand playing in order to increase the explanatory power of the statistics.

²⁴ The data suggest that subscribers typically redeem 27% to 44% of their available free downloads. This is referred to as “breakage” in the industry.

Using the data shown in the table above, the interactivity adjustment factor based on the difference in means would be 0.301 based on the unadjusted subscription prices for interactive services and 0.311 based on the adjusted subscription prices for interactive services.

As I stated at the beginning of this section, the comparable calculation in my Web II testimony yielded an interactivity adjustment factor of 0.53. Because the adjustment factor is defined as the ratio of the non-interactive to the interactive willingness-to-pay, the lower interactivity adjustment factor calculated above compared to the factor that I derived for Web II would mean a greater reduction in the target market royalty fees, all else being equal.

2. *Econometric Analysis*

In my Web II testimony, in addition to calculating an interactivity adjustment based on the above-described comparison of the retail subscription rates, I presented the results of a hedonic demand model, which was used to isolate the value of interactivity to consumers of online music services. A hedonic model is used to measure the value of different characteristics of a heterogeneous product. In Web II, I found that the coefficient on interactivity was 0.60, which implied that interactivity raises the price of an online music service by 60% above the level of a non-interactive service that is identical in every other respect.

I have repeated this econometric analysis using the most recent data on the prices and characteristics of on-line music services. The regression result based on the eighteen subscription services and using the adjusted price (for downloads) are shown in the table below.

Table: Regression of Subscription Price on Service Characteristics (Subscription Only)

Dependent Variable: Adjusted Monthly Subscription Price

Variable	Coefficient	Standard Error	T-Value
Intercept	2.07	3.36	0.62
Interactivity	8.52	2.00	4.26
Multiproduct	-5.85	3.77	-1.55
Mobile App	7.28	2.63	2.77
Desktop App	0.24	2.19	0.11
Tethered Downloads	2.01	1.77	1.14
Fixed Effects:			
Kazaa	9.39	4.31	2.18
Digitally Imported	8.73	4.01	2.18
Classical Archives	2.96	3.77	0.79
Pasito Tunes	7.83	2.24	3.50
iMesh	5.47	2.91	1.88

Number of Observations: 18

Adjusted R-Square: 0.8330

The regression includes a number of the same variables as in my previous work. The regression also includes some new regressors, which are helpful at explaining the variation in the subscription prices. For example, the availability of a mobile application (software that allows the user to listen on a cell phone or other mobile device) increases the value of a service by \$7.28. The regression also suggests that consumers value a service that allows for tethered downloads, which do not require an active internet connection, at an additional \$2.01, *ceteris paribus*. The presence of a desktop application, which allows the user to listen without an internet browser window open, appears to be associated with slightly higher-priced services, although not at a statistically significant level. Similarly, one might expect that a service produced by a multiproduct webcaster would be more expensive, but this effect is not statistically significant.

There are also a number of fixed-effect (*i.e.*, dummy) variables, which are used to capture the unique aspects of several atypical services. Classical Archives, Digitally Imported and Pasito Tunes, for example, are services devoted to classical, electronic and Latin music, respectively, and are therefore horizontally differentiated from one another in ways that are difficult to otherwise include in the regression. Altnet (formerly Kazaa) is not a genre-specific service but markets itself primarily as a download service.²⁵ The two services offered by iMesh.com are also somewhat different, being peer-to-peer services in which users search for a track ‘owned’ by another user, and download it (legally) from this source.

The most important result of the regression analysis is the value of the interactivity coefficient, which is equal to \$8.52. This means that interactivity, which is defined in the coding of data as an on-demand capability, is worth \$8.52 per month to the typical subscriber. This coefficient is highly significant with a t-value of 4.26.

This regression result can be used to calculate the interactivity adjustment factor. I calculate the adjustment factor as the ratio of the average price of the interactive services net of the interactivity coefficient to average price of interactive services without this adjustment. The formula is: $(\$13.30 - \$8.52)/\$13.30 = 0.359$.

The results from the comparison of the mean retail subscription rates in the benchmark and markets, calculated in the prior section of this testimony, and the regression described above, provide a range of interactivity adjustment factors that I will use to present a range of reasonable license fees for statutory services. The range, which is shown in the table below, is 0.301 to

²⁵ Although not exclusively a streaming service, this service appears to be otherwise very similar to streaming services like Rhapsody and Napster, and therefore merits inclusion in the regression sample. Notably, the record companies have negotiated agreements with Altnet that feature payments to the record companies for audio streaming by Altnet subscribers.

0.359. This compares to the interactivity adjustment factor of 0.55 that I calculated in the Web II proceeding.

Table: Interactive Adjustment

Source	Adjustment
Comparison of Mean Subscription Rates — Unadjusted Subscription Prices	0.301
Comparison of Mean Subscription Rates — Adjusted Subscription Prices	0.311
Regression of Subscription Prices	0.359

c. Per-Play Computation of License Fee

The evidence on which I relied in the Web II case in order to derive a rate for the interactive music services market consisted primarily of the royalty rates set out in the contracts between the major interactive webcasting services and the four major record companies. In this case, I have again obtained the current agreements between the four major record companies and digital streaming music services in order to update my analysis. The contracts that I have reviewed contain rates and provisions that are very similar to the contracts that I reviewed in the Web II case. This data shows that the fully interactive subscription services continue to pay royalties on the basis of the greatest of three measures: a per-play rate; a percentage of gross revenue rate; and a per-subscriber fee.²⁶

²⁶ Appendix IV to my testimony provides a list of the contracts reviewed.

In my Web II testimony, I used the per-subscriber fee from these contracts as the starting point to calculate a three-part royalty rate for the target market. In this case, however, I have adopted the approach that this Court found most appropriate in Web II, and will present only a per-play rate. Because I am only calculating a per-play fee, it is logical to use the effective per-play rate paid under the current contracts as the starting point for my calculation, rather than the per-subscriber rate.

I have obtained data from the major record companies, Universal Music Group (UMG), Sony Music Entertainment (Sony), Warner Music Group (WMG), and EMI, which reveals that the effective per-play rates paid under these contracts to the companies is 2.194¢. The record companies provided me with either the raw monthly or quarterly statements that they receive for the interactive services with which they have agreements, or a spreadsheet showing the monthly revenue and unique plays reported by all such services. The revenue that the services report is collected under the “greatest of” formula that each record company has negotiated with each service. I divided the total revenue collected by the record companies from these services by the total number of unique plays of recorded music owned (or distributed) by the four major record companies reported by the interactive webcasting service.

In making this calculation, I considered data from the following interactive webcasting services: Altnet (d/b/a Brilliant Digital Entertainment), Classical Archives, Imesh, Microsoft/ZunePass, Napster, and Rhapsody. For those services that feature a different rate structure for portable versus non-portable streams or for university student subscribers, I did not differentiate between the revenue and plays attributable to such distinctions, and I did not consider plays reported as part of trial memberships that exist solely as enticements for users to subscribe to a service. And for those services where a user receives credits for permanent

downloads along with an unlimited on-demand streaming service, such as Napster's recently introduced 5-for-5 bundled offering, I have considered only the revenue that the record companies receive as a result of streaming in my calculations.

To calculate the per-play rate for the target market, I will apply the range of interactivity adjustments calculated previously to the effective per-play rate of 2.194¢ currently paid by interactive, on-demand services. However, since the interactivity adjustment described in the prior sections was calculated using the monthly subscription prices for interactive and non-interactive services, I must also adjust for any differences in the number of plays per subscriber between interactive, on-demand services and statutory services. In other words, since the number of plays per subscriber differs for interactive and non-interactive services, a *per-play* adjustment factor must account for these differences.

To calculate the number of plays per subscriber per month, I used the same data set that I used to calculate the effective per-play rate, with the exception of Classical Archives, which did not report consistent total usage data to all of the record companies. I divided the total number of plays reported by the services by the total number of subscribers reported by the same services. Again, I did not differentiate between the portable, non-portable or university subscribers where a service maintains such distinctions. The data shows that the average number of plays per subscriber per month for on-demand, interactive subscription service is 287.37.

It is more difficult, however, to estimate the average number of plays per subscriber for non-interactive services for two reasons. First, based on internet research and inquiries with SoundExchange, I determined that these services do not report the number of subscribers in public documents or in data provided to the record companies or SoundExchange. Second, I would expect that a greater percentage of the subscribers to "free" on-line music services do not

use the service regularly or are very light users, compared to the subscription services with a positive price, because there is no incentive to drop a free subscription. Hence, I have relied on data provided by the record companies for the “customized” on-line radio service Slacker Premium. Although this service involves a degree of interactivity (and therefore is not necessarily statutory), Slacker is similar to statutory services in that most of the music is pushed to the customer, rather than pulled by customers on an “on-demand” basis. Therefore, the data on plays-per-subscriber for this service is a good proxy for plays-per-subscriber for statutory subscription services — especially those with a positive price. This data yields an average number of 563.36 plays per subscriber per month.²⁷

To adjust the effective per-play rate paid by interactive in order to derive a per-play rate for the statutory market, I have used the following calculation:

$$F_N = F_I \cdot PL \cdot IAF, \text{ where:}$$

F_N is the recommended royalty fee for non-interactive services;
 F_I is the effective average per-play royalty fee paid for interactive services;
PL is the adjustment factor for differences in plays, equal to the ratio of plays in the interactive market to the plays in the non-interactive market;
IAF is the interactivity adjustment on a per-subscriber basis, derived from the comparison of means and regressions

²⁷ In discovery, SoundExchange obtained additional data from Live365, which offers a subscription non-interactive service. In the written direct statement of Johnie Floater, General Manager of Media at Live365, Mr. Floater testified that the average VIP subscriber to Live365 listens to 40 hours of music per month. Written Direct Testimony of Johnie Floater, at ¶ 23. These VIP subscribers listen to Live365’s statutory webcasting service “without any audio and banner ad interruptions.” *Id.* Using the conversion factor previously adopted by the Copyright Royalty Judges of 15.375 performances per aggregate tuning hour results in approximately 615 plays per Live365 VIP subscriber per month. Documents produced by Live365 in discovery suggest, however, that the actual plays per VIP subscriber are lower than reported by Mr. Floater. Relying on the documents reporting total ATH, VIP ATH and number of VIP subscribers for the time period January 2006 through August 2009, I calculated that the average VIP subscriber listens to 29.27 hours of music a month. I then used this data and the conversion factor for performances per aggregate tuning hour, which results in approximately 450.04 plays per Live365 VIP subscriber per month. Because I cannot determine accurately which of these calculations reflect the actual plays per subscriber for Live365’s VIP service, I will complete the remaining calculations using only the Slacker data. I note, however, that using the average of Slacker’s data and Mr. Floater’s assertion of 40 hours per subscriber would lead to a slightly lower recommended noninteractive rate of \$0.0035, and using the average of the Slacker data and the Live365 data as I have calculated it would lead to a rate slightly higher than the rate I have recommended.

This calculation involves taking the effective per-play rate from the interactive market and adjusting it twice: first to account for the difference in plays per subscriber; second to remove the additional value of interactivity. The data indicate that the number of plays is greater in the non-interactive than in the interactive market, and the “PL” adjustment factor reduces the interactive fee in order to restate the difference in subscription rates for the two services on a per-play basis. The second adjustment, “IAF”, is the interactivity adjustment factor that is described in the previous section. The table below provides the range of recommended statutory license fees based on this formula and the interactivity factors presented at the end of the prior section. The rates range from \$.0034 to \$.0040 per play, and the simple average is \$.0036 per play.

Table: Recommended Range of Per-Play Rates for Statutory Services

Interactive Fee Per-Play	Per-Play Adjustment	Interactive Fee Times Per-Play Adjustment	Source of Interactivity Adjustment	Interactivity Adjustment	Resulting Rate for Statutory Service
0.02194	0.5101	0.0112	Comparison of Mean Subscription Rates — Unadjusted Subscription Prices	0.301	0.0034
0.02194	0.5101	0.0112	Comparison of Mean Subscription Rates — Adjusted Subscription Prices	0.311	0.0035
0.02194	0.5101	0.0112	Regression of Subscription Prices	0.359	0.0040

d. Effect of Substitution

In my Web II testimony, where I used a similar benchmark approach, I discussed whether on-line music services were substitutes or complements to sales of CDs and downloads. Specifically, I considered whether non-interactive and interactive on-line services affect CD and download sales differently. This is a relevant question for purposes of applying a benchmark, because even if the use of on-line music substitutes for purchases of music, there will be no effect on the benchmark so long as the substitution effect is the same for non-interactive and interactive services. I found no evidence at the time that there was a difference between these two types of on-line services with respect to their substitutional (or promotional) effects.

I continue to find no evidence that would contradict my conclusion from the last case. In fact, on an anecdotal or logical basis I would expect that there is even more reason to believe that non-interactive (*i.e.*, statutory) services would be as much of a substitute for purchasing music as the interactive services. As subscribers have been increasingly able to customize their listening experience on non-interactive services, and as the legal framework appears to permit much of this to happen under the statutory license, I would expect that subscribers to these services will substitute this listening for the playing of CDs and downloads. Again, I have found no direct evidence that has quantified this effect or compared it to the music purchasing behavior of the subscribers to interactive on-line services.

In the prior case, I was asked to provide a sensitivity analysis to show the effect on my rate recommendation if interactive services did substitute for CD sales to a greater degree than statutory services. I have been asked to repeat this analysis to show how substitution would affect my benchmarking analysis in this case. To do this, I assumed, as before, that subscription

to an interactive service will cause the consumer to purchase two fewer CDs per year than if the consumer had subscribed to a non-interactive service instead. I also assumed, as before, that the profit margin on a CD was \$5.60. Hence, the differential effect of a subscription to on-line services on the profit earned from the average subscriber would be equivalent to 93¢ per month.²⁸

The loss in CD sales can be treated analytically as an increase in the marginal cost of the copyright holder of providing (or licensing) music to on-line services. This increase in marginal cost will be partially passed on to the music services in the form of higher license fees. As in my prior testimony, I will carry out this sensitivity analysis assuming a linear demand curve, which means that one-half of the margin lost from substitution — 47¢ — would be passed through to subscribers. This means I need to reduce the benchmark by this amount to remove the differential effect of CD substitution before making the other adjustments to apply the benchmark to the target market. The final step of this analysis is to convert the per-subscriber margin adjustment to a per-play margin adjustment. Using the average number of plays on interactive services given earlier of 287.37, this translates into a downward adjustment in the benchmark of 0.162¢. These calculations are summarized in the table below.

Sensitivity Analysis for Substitution

Number of CDs	2
Margin Per CD	\$5.60
Annual Loss	\$11.20
Monthly Loss	\$0.93
Passthrough (one-half)	\$0.47
Monthly plays-per-sub	287.37
Per-play Passthrough	\$0.00162
Actual Fee per-play	\$0.02194
Fee After Substitution Adjustment	\$0.02031

²⁸ This is derived as: #CD sales lost * profit margin ÷ 12 months; or 2*5.60 ÷ 12

In order to show the effect of differential substitution on the rate recommendation, I have substituted the “fee after substitution adjustment” from the sensitivity analysis in place of the actual fee per play. The results would be a range of recommended rates between \$.0031 and \$.0037, as shown below, with a simple average of \$.0033.

Effect of Substitution on Rate Recommendation for Statutory Services					
Interactive Fee Per-Play	Interactive Fee Per-Play Adjusted for Substitution	Source of Interactivity Adjustment	Interactivity Adjustment	Rate for Statutory Service No Substitution Effect	Rate for Statutory Service Net of Substitution Effect
0.02194	0.02031	Comparison of Mean Subscription Rates — Unadjusted Subscription Prices	0.301	0.0034	0.0031
0.02194	0.02031	Comparison of Mean Subscription Rates — Adjusted Subscription Prices	0.311	0.0035	0.0032
0.02194	0.02031	Regression of Subscription Prices	0.359	0.0040	0.0037

7. SUMMARY AND CONCLUSION

At the low end of possible market prices, my analysis has yielded a rate derived from the WSA deals between SoundExchange on the one hand, and Sirius XM and the NAB on the other

hand. In addition, I have calculated rates using the interactive, on-demand market as a benchmark. I have presented those rates below both adjusted for a potential substitution affect, and not so adjusted, and in doing so I have averaged the different rates that resulted from the different outcomes of the hedonic regression and the econometric analysis. The potential range of marketplace rates for statutory webcasting services for the period from 2011 through 2015 appears in the table below. I have added to this table the rates that I understand have been proposed by SoundExchange. As SoundExchange’s proposed rates fall well within the range of possible marketplace rates that I have calculated, I believe that those rates meet the willing buyer/willing seller standard imposed in 17 U.S.C. § 114(f)(2)(B).

Year	WSA Agreement Rates	<i>SoundExchange Rate Proposal</i>	Interactive On-Demand Rates (With Substitution Adjustment)	Interactive, On-Demand Rates (No Substitution Adjustment)
2011	\$.00175	\$.0021	\$.0033	\$.0036
2012	\$.0020	\$.0023	\$.0033	\$.0036
2013	\$.00215	\$.0025	\$.0033	\$.0036
2014	\$.00225	\$.0027	\$.0033	\$.0036
2015	\$.00245	\$.0029	\$.0033	\$.0036

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: February 16, 2010

Michael D. Pelcovits
Michael D. Pelcovits

Appendix I

CURRICULUM VITÆ

(September 2009)

EDUCATION

Massachusetts Institute of Technology, Ph.D. (Economics), 1976
University of Rochester, B.A. (Economics), *summa cum laude*, 1972

EMPLOYMENT

MicRA

Principal: October 2002 – Present

MCI Communications (WorldCom, subsequent to its acquisition of MCI)

Vice President and Chief Economist: 1998 - 2002

Executive Director: 1996 – 1998

Director: 1992 – 1996

Senior Policy Adviser: 1988 – 1992

Cornell, Pelcovits & Brenner Economists Inc

Vice President and Treasurer: 1982 – 1988

Owen, Cornell, Greenhalgh & Myslinski Economists Inc.

Senior Economist: 1981 – 1982

Federal Communications Commission, Office of Plans and Policy

Senior Economist: 1979 – 1981

Civil Aeronautics Board, Bureau of International Aviation

Industry Economist: 1978 – 1979

University of Maryland, College Park, Department of Economics

Assistant Professor: 1976 – 1978

ACADEMIC AWARDS

National Science Foundation Graduate Fellowship, 1972 – 1975
Phi Beta Kappa, 1972
Isaac Sherman Graduate Fellowship, 1972 (University of Rochester)
John Dows Mairs Prize in Economics, 1971 (University of Rochester)

PUBLICATIONS

“Long Distance Telecommunications” in Diana L. Moss, editor, Network Access, Regulation and Antitrust, (Routledge), 2005.

“The WorldCom-Sprint Merger” in John Kwoka, Jr. and Lawrence J. White, editors, The Antitrust Revolution, The Role of Economics, 4th Edition (Oxford University Press), 2003.

“Economics of the Internet,” (with Vinton Cerf), in Gary Madden and Scott Savage, editors, The International Handbook On Emerging Telecommunications Networks (Edward Elgar), 2003.

“Application of Real Options Theory to TELRIC Models: Real Trouble or Red Herring” in James Alleman and Eli Noam, editors, The New Investment Theory of Real Options and its Implications for Telecommunications Economics, (The Netherlands, Kluwer Academic Publishers, 1999).

“The Promise of Internet Access over Cable TV: Should the government force open access requirements?” (with Richard Whitt), CCH Power and Telecom Law, Vol. 2, No. 7, November/December 1999.

“Toward Competition in Phone Service: A Legacy of Regulatory Failure,” (with Nina W. Cornell and Steven R. Brenner), Regulation, July/August 1983.

“Access Charges, Costs, and Subsidies: The Effect of Long Distance Competition on Local Rates,” (with Nina W. Cornell), in Eli Noam, editor, Telecommunications Regulation Today and Tomorrow, (New York: Harcourt Brace Jovanovich, 1983).

“The Equivalence of Quotas and Buffer Stocks as Alternative Stabilization Policies,” Journal of International Economics, May 1979.

“Revised Estimates U.S. Tax Revenue (with Jagdish Bhagwati), in Bhagwati and Partington editors, Taxing the Brain Drain, (North Holland, 1976).

“Quotas Versus Tariffs,” Journal of International Economics, November, 1976.

OTHER PROFESSIONAL ACTIVITIES

Speaker and Panelist (selected examples):

National Association of Regulatory Utility Commissioners, 120th Annual Convention, “USF and ICC Reform; what did the FCC do,” November 19, 2008

Southeastern Association of Regulatory Utility Commissioners, Annual Meeting, “Intercarrier Compensation Reform,” June 2, 2008

New England Conference of Public Utility Commissioners, 61st Annual Symposium, Plenary Session: “The FairPoint Verizon Acquisition, Universal Service Reform and Broadband Deployment in New England – Where Are We Today,” May 5, 2008

Spring VON Exposition, “Competition Policy,” March 17, 2008

National Association of Regulatory Utility Commissioners, Winter Meeting, “Interconnection and Interoperability in a VOIP World,” February 19, 2008

Advanced Workshop in Regulation and Competition, Center for Research in Regulated Industries, Rutgers Business School, “Open Access Policies, Net Neutrality and Incentives for Innovation in the Telecommunications,” June 29, 2006

Guest lecturer in graduate and undergraduate courses at:

University of Chicago Law School
Columbia University, Graduate School of Business
New York University, Stern School of Business
Georgetown University, McDonough School of Business
George Washington University
Johns Hopkins University
University of Maryland
American University
Northeastern University

RECENT TESTIMONIES (2003 to present)

U.S. DISTRICT COURT

In The United States District Court for The District of Colorado, Civil Action No. 03-F-2084 (CBS), QWEST CORPORATION, Plaintiff, v. AT&T CORP, Defendant. (Deposition taken; case settled)

LONDON COURT OF INTERNATIONAL ARBITRATION

In the Matter of an Arbitration Between: France Mobile Telecom Mobile Satellite SA, Stratos Wireless Inc, Telenor Satellite Services AS Claimants - and – Inmarsat Global Limited Respondents, LCIA Arbitrations No. 6767, 6768, and 6769.

COPYRIGHT ROYALTY BOARD

In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Records, Docket No. 2005-1 CRB DTRA

In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings for a New Subscription Service, Docket No. 2005-5 CRB DTNSRA

In the Matter of Adjustment of Rates and Terms for Preexisting Subscription Service and Satellite Digital Audio Radio Services, Docket No. 2006-1 CRB DSTRA

STATE LEGISLATIVE COMMITTEE HEARINGS

State of Michigan, House Energy and Technology Committee, HB 4257, July 14, 2009-09-25

State of Delaware, House Telecommunication, Internet & Technology Committee, HB 417, June 3, 2008

State of Missouri, Joint Senate Commerce and Environment and House Special Committee on Utilities, 94th General Assembly, September 12, 2007

State of Missouri, Commerce and Environment Committee, 94th General Assembly, Senate Bill No. 552, March 15, 2007

State of Missouri, Special Committee on Utilities, 94th General Assembly, House Bill No. 1033, March 14, 2007

STATE UTILITY COMMISSIONS

State of Connecticut, Department of Public Utility Control, DPUC Investigation into the Southern New England Telephone Company's Cost of Service Re: Reciprocal Compensation and Docket No. 08-12-04, Petition of Youghiogheny Communications-Northeast, et al.

Commonwealth of Massachusetts, Department of Telecommunications and Cable, D.T.C. 07-9, Petition of Verizon New England, Inc., et al, for Investigation under Chapter 159, Section 14, of the Intrastate Access Rates of Competitive Local Exchange Carriers.

State of California, Public Utilities Commission, Order Instituting Rulemaking into the Review of the California High Cost Fund B Program, Rulemaking 06-06-028, (Declaration)

State of New Hampshire, Public Utility Commission, Joint Petition of Verizon New England Inc., and FairPoint Communications, Inc. Transfer of New Hampshire Assts of Verizon New England, Inc. et. al., Docket No. DT 07-011

State of Vermont, Public Service Board, Joint Petition of Verizon New England, Inc., d/b/a Verizon Vermont, Certain Affiliates Thereof and FairPoint Communications, Inc. for approval of asset transfer, acquisition of control by merger and associated transactions, Docket No. 7270

State of Connecticut, Department of Public Utility Control, DPUC Investigation of Intrastate Access Charges, Docket No. 02-05-17.

State of Connecticut, Department of Public Utility Control, Application of Southern New England Telephone Company for Approval to Reclassify Certain Private Line Services from Noncompetitive to Competitive Category, Docket No. 03-02-17.

Pennsylvania Public Utility Commission, AT&T Communications of Pennsylvania, Inc. v. Verizon North, Inc. Docket Number C-20027195.

Pennsylvania Public Utility Commission, Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements, Docket No. I-00030099.

Pennsylvania Public Utility Commission, Generic Investigation in re: Impact On Local Carrier Compensation if A Competitive Local Exchange Carrier Defines Local Calling Areas Differently Than the Incumbent Local Exchange Carrier's Local Calling Areas but Consistent With Established Commission Precedent, Docket No. I - 00030096.

Pennsylvania Public Utility Commission v. Verizon Pennsylvania Inc. Tariff No. 216 Revisions Regarding Four Line Carve Out, Docket No. R – 00049524; Pennsylvania Public Utility Commission v. Verizon Pennsylvania Tariff No. 216 Revisions Regarding Switching, Transport and Platform for High Capacity Loop, Docket No. R – 00049525.

FCC DECLARATIONS

In the Matters of Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island, WC Docket No. 08-24 and Petition of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area, WC Docket No. 08-49

In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, WC Docket 07-245

In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket No. 03-123

In the Matter of Amendments of Parts 1, 21, 73, and 101 of The Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66

In the Matter of Tyco Telecommunications, VSNL Telecommunications, et al, Application for Transfer of Control of Cable Landing Licenses, Petition to Deny of Crest Communications Corporation

In the Matter of Review of the Commission's Rule Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers

In the Matter of AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services

In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities

Center for Communications Management Information, Econobill Corporation, and On Line Marketing, Inc., Complainants, v. AT&T Corporation, Defendant

SELECTED CONSULTING ASSIGNMENTS

Telecommunications Industry

Prepared FCC declaration for Sorenson Communications concerning the rate methodology for reimbursing Video Relay Service providers

Prepared FCC declaration for the Wireless Communications Association International analyzing the impact of limits on spectrum leases in the Educational Broadcasting Service bands on investment in wireless infrastructure

Prepared expert reports for the Infocomm Development Authority of Singapore on access to submarine cable landing stations and regulation of local leased line circuits

Prepared and presented an analysis of the market for termination of calling on mobile phones to Ofcom, the independent regulator and competition authority for the UK communications industries

Hired to provide expert analysis of liability and damage issues in Civil Action No. 5:03-CV-229: *Z-Tel Communications Inc. v. SBC Communications Inc. et al*; In the United States District Court for the Eastern District of Texas, Texarkana Division (case settled)

Other Industries

Analyzed the market for satellite radio services (XM and Sirius) and recommended rates for the compulsory license fee for digital audio transmission of sound recordings

Analyzed the market for Internet music services and recommended rates for the compulsory license fee for digital audio transmission of sound recordings.

Hired by a rural electric power company to develop a damage model for a case involving the failure of a lessee to properly maintain and utilize a coal-powered electric power plant (case settled)

Analysis of economic benefits and tax revenues from the construction and operations of a hotel and villa complex in the British Virgin Islands

Appendix II

I have solved for a rate structure that utilizes the current statutory rates for 2009 and 2010 and then increases those rates in a stepwise fashion through 2015, but generates the same average rate per play from 2009 through 2015 as the NAB and Sirius XM agreements generate for that period. The rates resulting from this calculation would give webcasters that are not part of the WSA settlements the same effective rate over the eight-year period as the NAB and Sirius XM, assuming they all experience the same level of growth in performances. This rate structure is shown in the table below. It uses a 12% present value factor and an assumed 6% annual growth rate in plays.

RATE SCHEDULE COMPARABLE TO NEGOTIATED RATES								
						<u>PRESENT VALUE OF 2009 - 2015 RATES</u>		
	Web II	New Rate Schedule	NAB	Sirius XM	Traffic Growth	Web II & New Schedule	NAB	Sirius
2006	0.0008		0.0008	0.0008				
2007	0.0011		0.0011	0.0011				
2008	0.0014		0.0014	0.0014				
2009	0.0018		0.0015	0.0016	1.00	0.00180	0.00150	0.00160
2010	0.0019		0.0016	0.0017	1.06	0.00180	0.00151	0.00161
2011		0.0019	0.0017	0.0018	1.12	0.00170	0.00152	0.00161
2012		0.0020	0.0020	0.0020	1.19	0.00170	0.00170	0.00170
2013		0.0020	0.0022	0.0021	1.26	0.00160	0.00177	0.00168
2014		0.0020	0.0023	0.0022	1.34	0.00152	0.00175	0.00167
2015		0.0021	0.0025	0.0024	1.42	0.00151	0.00180	0.00172
Average						0.00166	0.00165	0.00166
Discount rate		1.12						
Traffic Growth		6.00%						

Appendix III

In conducting my econometric analysis, I considered the results from a second regression, which is reported in the table below. This regression includes both subscription and non-subscription services, which increases the sample size substantially to forty-one services.

Table: Regression of Subscription Price on Service Characteristics (All Services)

Dependent Variable: Adjusted Monthly Subscription Price

Variable	Coefficient	Standard Error	T-Value
Intercept	3.47	1.25	2.78
Interactive	6.92	1.29	5.37
Multiproduct	-0.91	0.88	-1.04
Mobile App	1.42	0.90	1.57
Desktop App	-0.58	1.09	-0.53
Tethered Downloads	2.99	0.98	3.06
Adverts	-3.69	1.05	-3.50
Fixed Effects:			
imeem	-5.78	2.37	-2.44
MySpace	-6.69	2.34	-2.86
Kazaa	9.60	2.44	3.93
Digitally Imported	1.76	1.58	1.12
Classical Archives	-1.96	1.70	-1.15
Pasito Tunes	6.35	1.58	4.01
iMesh	1.06	1.69	0.63

Number of Observations: 41

Adjusted R-Square: 0.9094

This regression adds three additional regressors; these are dummy variables for imeem and MySpace, which are interactive services that are highly differentiated from the other interactive on-line services, and a dummy variable equal to one if the service is advertising-supported. MySpace Music and imeem are primarily social networking sites, geared towards allowing users to share their taste in music and discover music that their friends enjoy. Neither MySpace nor imeem offer the comprehensive catalogs of music similar to what is available on Rhapsody or

Napster. Notably, imeem also permits users to upload their own music to the site and access it from the internet, but charges users based on how much of their own music they wish to upload.²⁹ Because imeem charges subscribers based on how much music they want to load on the site, rather than on the basis of the subscriber's use of the service to listen to music, I have included only the free service in the full regression sample.

The interactivity coefficient for this regression is \$6.92, slightly below the comparable estimate in the first regression. Using the same method as before, I calculate an interactivity adjustment factor of 0.385 — calculated as $(11.26 - 6.92)/11.26$, where \$11.26 is the mean adjusted price for all (subscription and free) interactive services.

I ultimately chose to not use the results of this regression to calculate a recommended rate for statutory services for two reasons. The first is that the dataset is difficult to adjust for the unique and highly distinguishable factors of the services and the negotiated agreements for the services, as well as the difficulty of measuring the intensity of advertising. The second is that it is difficult to estimate willingness-to-pay based on characteristics of non-subscription services. My analytical focus on determining the value that a *subscriber* assigns to interactivity requires that I give preeminence to the regression analysis of services with a positive subscription price.

²⁹ In addition, the agreements that the record companies have entered into with these services arose out of vastly different circumstances than the agreements with the other services. Prior to entering into the current licensing arrangements, at least one of the record companies had filed a copyright infringement lawsuit against imeem (sued by WMG) and MySpace (sued by UMG). The licensing agreements between the record companies and imeem and MySpace Music are the direct result of settlements of these lawsuits. In exchange for releasing their legal claims against these two services, the record companies agreed to license their music to both services, but the litigation backdrop resulted in some unique features of these agreements. Most notably, the record companies received equity interests in these services along with substantial cash payments in settlement of the copyright infringement claims. MySpace Music, in fact, is a joint venture between MySpace and the four major record companies, with the record companies controlling a substantial percentage of the venture's equity. The record companies' ownership stakes and the ability of the record companies to benefit from the revenue that these services generate make them distinguishable from the other interactive services governed by negotiated agreements.

Appendix IV

Digital Audio Transmission Agreements

LICENSOR	LICENSEE	DATE(S)
EMI	Akoo International, Inc.	3/1/2009
EMI	Alexander Street Press (fka Classical Music Library)	1/29/2009; 3/3/2009; 4/6/2009; 5/22/2009
EMI	Brilliant Digital Entertainment, Inc. d/b/a Altnet, Inc.	3/30/2007; 2/27/2009
EMI	Classical Archives, LLC	12/17/2007; 6/9/2008; 11/11/2008
EMI	Classical International Limited	6/30/2008
EMI	Dada Entertainment, LLC	7/22/2008
EMI	Dada S.p.A.	2/5/2009
EMI	imeem, inc.	10/10/2007; 10/15/2007; 7/15/2008; 10/15/2008; 10/16/2008; 11/25/2008
EMI	Instant Media Network, Inc. (fka Hotel Digital Network, Inc.)	3/12/2001; 5/5/2009; 5/19/2009
EMI	la la media, inc.	5/16/2008; 11/10/2008
EMI	Last.fm, Ltd	1/22/2008; 11/10/2008
EMI	LTDnetwork, Inc. d/b/a Qtrax	6/3/2008; 1/13/2009
EMI	Microsoft Corporation	11/5/2007; 11/11/2008; 3/3/2009
EMI	MusicNet, Inc. d/b/a MediaNet Digital	11/28/2006; 6/29/2007; 11/5/2007; 2/19/2008; 11/21/2008; 2/2/2009; 4/1/2009; 4/10/2009; 6/1/2009
EMI	MySpace Music, LLC	9/24/2008
EMI	MySpace, Inc.	9/24/2008
EMI	Napster, LLC	3/30/2007; 10/5/2007; 1/7/2008; 4/1/2008; 1/6/2009; 4/6/2009; 4/30/2009; 5/29/2009
EMI	National Radio Holdings, d/b/a NextRadio Solutions	1/17/2007; 1/1/8/2009; 5/4/2009; 5/19/2009

EMI	Online Entertainment Network, Inc.	Undated
EMI	PluggedIn Media Corp.	12/17/2007; 1/3/2008
EMI	Project Playlist, Inc.	3/9/2009
EMI	RealNetworks, Inc.	4/1/2005; 11/14/2006; 11/28/2006; 6/9/2008
EMI	Ruckus Network, Inc.	1/25/2005; 12/3/2007; 4/10/2008; 6/1/2008
EMI	Slacker, Inc. f/k/a Broadband Instruments Corp.	9/12/2007; 8/18/2008; 9/10/2008; 11/11/2008
EMI	SpiralFrog, Inc.	5/2/2008
Sony	Brilliant Digital Entertainment, Inc. d/b/a Altnet, Inc.	11/27/2007
Sony	BusRadio, Inc.	2/20/2008
Sony	Classical Archives, LLC	7/18/2008; 11/19/2008
Sony	Dada Entertainment, LLC	9/12/2007; 4/1/2008; 11/14/2008
Sony	Dada.net S.p.A.	6/24/2009
Sony	Hoodiny Digital, L.L.C.	3/28/2008
Sony	imeem, inc.	9/21/2007; 6/30/2009
Sony	iMesh, Inc.	1/31/2008; 5/30/2008; 6/5/2008
Sony	la la media, inc.	5/21/2008
Sony	Last.fm, Ltd	5/24/2009
Sony	LTDnetwork, Inc. d/b/a Qtrax	11/5/2008
Sony	Microsoft Corporation	6/12/2007; 10/10/2007; 2/22/2008; 7/23/2008; 11/13/2008; 2/11/2009
Sony	MusicMatch	4/30/2004
Sony	MusicNet, Inc. d/b/a MediaNet Digital	7/12/2002; 1/9/2003; 10/1/2004; 11/29/2004; 3/1/2005
Sony	MySpace Music, LLC	Undated
Sony	MySpace, Inc.	4/1/2008
Sony	Napster, LLC	10/1/2002; 11/5/2003; 11/1/2004; 12/17/2008; 5/13/2009

Sony	Project Playlist, Inc.	4/29/2008; 8/1/2008; 2/18/2009
Sony	RealNetworks, Inc.	4/1/2005; 4/1/2006; 10/4/2006
Sony	Slacker, Inc. f/k/a Broadband Instruments Corp.	3/9/2007; 7/28/2009
UMG	Brilliant Digital Entertainment, Inc. d/b/a Altnet, Inc.	1/3/2008; 12/23/2008
UMG	Buzznet, Inc.	1/28/2008
UMG	Classical Archives, LLC	6/15/2007; 12/31/2008
UMG	Duet GP d/b/a "pressplay" (Napster)	12/21/2000; 8/1/2002
UMG	imeem, inc.	11/26/2007; 7/16/2008; 12/12/2008; 4/3/2009
UMG	iMesh, Inc.	9/15/2005; 12/21/2006; 2/28/2007; 5/1/2007
UMG	Instant Media Network, Inc. (fka Hotel Digital Network, Inc.)	4/1/2009
UMG	la la media, inc.	10/22/2007; 5/23/2008; 12/22/2008
UMG	Last.fm, Ltd	12/21/2007
UMG	Live Nation Studios, LLC	11/21/2007
UMG	Microsoft Corporation	11/7/2006; 8/15/2008; 10/10/2008; 6/10/2009
UMG	MusicNet, Inc. d/b/a MediaNet Digital	11/13/2004; 11/12/2005; 11/11/2007; 2/12/2008; 5/31/2008; 9/10/2008; 11/12/2008
UMG	MusicNow LLC	3/16/2005; 11/1/2005
UMG	MySpace, Inc.	3/28/2008
UMG	Napster, LLC	1/1/2007; 1/30/2007; 9/14/2008; 12/22/2008; 2/27/2009
UMG	National Radio Holdings, d/b/a NextRadio Solutions	2/26/2007; 2/26/2008; 3/26/2008; 4/16/2008
UMG	RealNetworks, Inc.	7/1/2004; 10/26/2005; 6/29/2006; 8/1/2006; 6/16/2008

UMG	Slacker, Inc. f/k/a Broadband Instruments Corp.	3/13/2007; 11/19/2007; 12/20/2007; 9/11/2008; 12/10/2008
UMG	Yahoo! f/k/a MusicMatch Inc.	5/14/2004; 12/14/2004; 6/26/2006; 9/30/2006; 12/1/2006
WMG	Akoo International, Inc.	4/1/2009
WMG	Brilliant Digital Entertainment, Inc. dba Altnet, Inc.	2/7/2007; 12/21/2007; 2/7/2009
WMG	BusRadio, Inc.	8/18/2006; 2/11/2008; 9/3/2008
WMG	Catch Media, Inc.	10/8/2008; 10/13/2008
WMG	imeem, inc.	7/6/2007; 9/18/2007; 5/29/2009
WMG	Instant Media Network, Inc. (fka Hotel Digital Network, Inc.)	10/30/2000; 7/29/2003; 4/22/2005
WMG	la la media, inc.	9/1/2007
WMG	Last.fm, Ltd.	2/1/2007; 11/30/2007; 5/29/2008; 6/9/2008
WMG	LTDnetwork, Inc. d/b/a Qtrax	8/29/2006; 6/27/2007
WMG	Microsoft Corporation	4/28/2008; 7/18/2008; 10/28/2008
WMG	MySpace Music, LLC	4/2/2008
WMG	MySpace, Inc.	4/2/2008
WMG	Napster, LLC	11/13/2005; 3/30/2007; 4/6/2007; 5/18/2009
WMG	National Radio Holdings LLC d/b/a NextRadio Solutions	11/18/2003; 9/5/2006; 8/6/2009
WMG	RealNetworks, Inc.	8/7/2008; 9/12/2008; 10/1/2008; 10/23/2008
WMG	Slacker, Inc. f/k/a Broadband Instruments Corp.	4/17/2007; 12/2/2008

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

TESTIMONY OF

KIM ROBERTS HEDGPETH

National Executive Director
American Federation of Television and Radio Artists

Witness for SoundExchange, Inc.

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
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TESTIMONY OF

KIM ROBERTS HEDGPETH

**National Executive Director
American Federation of Television and Radio Artists**

September 2009

WRITTEN DIRECT TESTIMONY OF KIM ROBERTS HEDGPETH

Background and Qualifications

I am the National Executive Director of the American Federation of Television and Radio Artists (AFTRA), the 70,000 member labor union representing the people who entertain and inform America: actors, journalists, singers, dancers, announcers, hosts, comedians, disc jockeys, and other performers across the spectrum of television, radio, cable, sound recordings, music videos, commercials, audio books, non-broadcast industrials, interactive games and emerging digital media. My responsibilities at AFTRA over the course of my 28-year association with the union have included negotiation of labor contracts in the areas of news, television and radio broadcasting, advertising, sound recordings and entertainment programming exhibited through traditional television, cable and emerging media.

I currently serve as a Trustee of the AFTRA Health and Retirement Funds, a multi-employer health and pension fund, with assets of over \$1.5 billion; and I am a member of the Boards of the AFM-AFTRA Intellectual Property Trust Fund, the Alliance of Artists and Recordings Companies and of SoundExchange. I also serve as AFTRA's representative to the AFL-CIO's Department for Professional Employees and as its representative to FIA, the International Federation of Actors.

I received a B.A. from Harvard University and a J.D. from the Georgetown University Law Center.

Discussion

I am submitting this testimony to express AFTRA's support for the designation of SoundExchange as the sole Collective to collect and distribute the statutory webcasting royalties

at issue in this proceeding for the period 2011 through 2015. In this testimony, I also discuss the important role that record companies serve in making sound recordings available to the public.

I. AFTRA

AFTRA is a national labor organization representing over 70,000 actors, performers, journalists and other professionals and artists employed in the news, entertainment, advertising and sound recording industries. AFTRA's membership includes approximately 12,000 vocalists on sound recordings, including approximately 4,000 artists who have royalty contracts with record labels (also known as "royalty artists"), as well as approximately 8,000 who perform as non-featured artists on sound recordings (also known as "session artists"). AFTRA actively pursues the rights of these recording artists through collective bargaining, public policy advocacy and legal action.

AFTRA and the American Federation of Musicians (AFM) worked to gain passage of the Digital Performance Right in Sound Recordings Act in 1995, which provided the first U.S. sound recording performance right of any kind and which ensured that the royalties collected pursuant thereto were shared with performers, including those represented by AFTRA and AFM, whose artistic creations bring the magic to sound recordings. AFTRA and AFM also worked to secure passage of the Digital Millennium Copyright Act of 1998 to clarify, among other things, that the digital performance right included webcasters.

One of AFTRA's primary goals is to ensure its members' livelihoods by securing adequate compensation for the use of copyrighted sound recordings. Vocal performance is the dedicated profession of AFTRA's recording artist members, both "royalty artists" who are generally featured artists who earn royalties from record companies, and session artists, who are paid, but not entitled to royalties from record companies for their work on a recording. All of

these artists rely on their vocal performance to earn a living, support their families, and provide access to health insurance and retirement security. The compulsory license fees at issue in this case can make a meaningful difference in the lives of recording artists.

II. Designation of SoundExchange as the Sole Collective

In the previous webcasting proceeding, Docket No. 2005-1 CRB DTRA, I provided a letter to Tom Lee, the President of AFM, for submission in connection with his testimony in that proceeding. In that letter, I expressed AFTRA's support of SoundExchange as the sole Collective for the collection and distribution of statutory royalties. I renew that support now, because I continue to believe there are several reasons why SoundExchange is the best choice for recording artists.

A. SoundExchange Represents Both Recording Artists and Copyright Owners.

SoundExchange is governed by a Board that includes representatives of artists and copyright owners – the very constituencies that are entitled by statute to receive the royalties that SoundExchange collects and distributes. This direct representation helps ensure the honest, efficient and fair distribution of royalties.

Half of the members of SoundExchange's Board directly represent the interests of artists. This institutional structure reflects the fact that half of the statutory royalties required under Section 114 are paid to artists and ensures equal participation of artists in the governance of SoundExchange. It also gives artists an equal voice in the organization, so that SoundExchange is attentive to the particular needs and concerns of recording artists.

SoundExchange has demonstrated its commitment to serving the best interests of artists. To ensure that artists are aware of the royalties to which they are entitled, SoundExchange engages in extensive outreach efforts, such as contacting artists and their representatives directly

and attending industry conferences and panels to publicize SoundExchange's mission and to encourage artists to register with SoundExchange. SoundExchange has also advocated vigorously for favorable royalty rates in rate-setting proceedings, and has worked tirelessly to create the legal and technical environment necessary to administer the statutory licenses. Through all of these efforts, SoundExchange has earned the trust of artists and copyright owners alike. Perhaps the best evidence of SoundExchange's commitment to the fair representation of artists and copyright owners is that tens of thousands of artists and copyright owners have registered with SoundExchange.

B. SoundExchange Is a Non-profit Organization.

As a non-profit organization, SoundExchange collects royalty payments for distribution to artists and copyright owners, not for its own financial gain. These royalty payments represent real money for many of AFTRA's members, and the payments should not be reduced by profits taken by a distribution collective which might occur if the license were administered by a for-profit entity. The purpose of the digital performance right is to compensate performers and copyright owners for the use of their recordings, not to create a business opportunity for organizations that collect and distribute royalties. The Collective should base the decisions it makes on the best interests of performers and copyright owners, not on the best way to generate a profit for itself. As a non-profit, SoundExchange's incentives are properly aligned with the interests of royalty recipients. AFTRA would have grave concerns about designating a for-profit entity to collect and distribute the statutory royalty payments that are due our members.

C. SoundExchange Has Substantial and Unparalleled Experience Collecting and Distributing Statutory Royalties and Has Devoted Significant Resources to Developing a Distribution Infrastructure.

I am aware that in the previous webcasting proceeding, the Copyright Royalty Judges and the D.C. Circuit held that the best approach was to designate a single Collective. I very much agree with this conclusion.

The single Collective should be SoundExchange. SoundExchange has a demonstrated record of serving the interests of recording artists, seeking to maximize royalty payments to them, and searching far and wide for recording artists (regardless of whether they are SoundExchange members) to distribute their royalty payments to them. To choose a new Collective now would not serve the interests of artists or copyright owners. SoundExchange has made substantial investments and developed expertise in the complex tasks of administering the statutory license. If a new Collective were selected to replace SoundExchange, the benefits of that work would be lost, and a new Collective would need to re-learn much of what SoundExchange already knows. In that circumstance, artists and copyright owners would likely suffer as administrative costs would be needlessly incurred in transitioning to a new Collective and as distributions could be delayed and processed less efficiently. The best interests of the royalty recipients will be served by renewing SoundExchange as the Collective.

If additional entities were designated to collect and distribute royalties so that there were two or more Collectives, it would introduce counterproductive inefficiencies into the system, and would needlessly require the additional expenditure of time, money and resources. This would hurt artists and copyright owners, as they would have to pay for duplicative systems to administer the statutory licenses.

Furthermore, having multiple Collectives could lead to substantial confusion and delay in the collection and distribution of royalties – all of which would negatively impact artists and copyright owners. For example, disputes between the Collectives would inevitably arise related to how to interpret the applicable regulations, and there would be no obvious way to resolve them. Similarly, I understand it is not uncommon for disputes to arise related to how to allocate royalties among performers in a group. SoundExchange works to resolve these disputes, but if there were two Collectives, the Collectives might well disagree about the best resolution (especially if different artists in a group were represented by different Collectives), which would delay the distribution of royalties and might require a third party to resolve.

Adding another Collective into the mix would also make complying with the statutory license more complicated for webcasting services. The statutory and regulatory scheme for collecting and distributing royalties is already complex. It would undoubtedly be confusing and inefficient for webcasting services to have to submit payment and usage information to multiple Collectives.

In short, artists and copyright owners have been well served, and will be better served in the future, by designating SoundExchange as the sole Collective and, thereby avoiding inefficiencies.

D. RLI Is Not an Appropriate Collective.

I am aware that in the past proceeding, RLI sought to compete with SoundExchange to collect and distribute statutory royalties, and I understand RLI has indicated its intention to participate in this proceeding. AFTRA believes that RLI is not an appropriate entity to serve as the Collective to collect and distribute royalties for several reasons. To the best of my knowledge, RLI is a for-profit entity, and it has indicated that it is interested in royalty collection

and distribution to make money; RLI's structure does not ensure equal participation by artists in its governance; and RLI has close ties to music licensees and is closely affiliated with Music Reports, Inc., a company that represents the interests of music licensees. As there is no need for more than one Collective (indeed, multiple Collectives would be inefficient), the choice between SoundExchange and RLI could not be easier – SoundExchange is by far the better choice, for all the reasons discussed above.

III. The Important Role of Record Companies

It is no secret that in some contexts, artists and record companies do not always see eye to eye on a number of issues. Nonetheless, I recognize the important role that record companies play in today's marketplace, and would like to comment briefly on it here. With the development of the Internet, it is tempting to think that recording artists have greater opportunities than ever before to deliver their recordings directly to their fans and that the role of record companies may have diminished. In reality, record companies continue to serve the interests of artists, and foster the availability of sound recordings to the public. Without record companies, many of the sound recordings that webcasting services play might never get created. Record companies provide upfront funding for artists to create recordings.

After the recordings have been created, record companies play a central role in marketing and promoting recordings. Although an artist could always try simply to post his or her songs on a website and hope that they will somehow become popular and generate income, those are not realistic expectations. The entertainment market, including the Internet, is so diffuse and so crowded with options that a recording artist cannot rely on releasing a recording into the digital space and then waiting for the revenue to start flowing. It is far too easy for a sound recording to get lost on the Internet. To generate consumer interest – and ultimately revenue – from a

recording, a coordinated marketing and promotional campaign is needed. More often than not, it is record companies that develop, execute and pay for such campaigns. Record companies have developed the infrastructure and expertise necessary to provide this important service for their artists. They marshal their resources and expertise to determine how best to position a recording so that it is targeted to the appropriate audience in an appealing way. These efforts help artists to the extent they result in revenue-generating opportunities (such as plays by webcasting services), and they help webcasting services by providing them with valuable and popular sound recordings to play.

Record companies also help recording artists create the sound recordings that webcasting services play by providing artists with some measure of financial security and stability. For example, not only do they fund the creation of recordings, but record companies often pay artists advances that provide an important source of income for artists before their recordings are able to generate revenue. In addition, record companies act as a stabilizing influence in the industry, as they generate employment for AFTRA members that provides wages and other benefits established pursuant to collective bargaining agreements negotiated between the record companies on the one hand and AFTRA on the other – these negotiated wages and benefits are important to assist our members in providing for themselves and their families in an industry in which careers can be otherwise insecure or reliant upon uncertain income streams.

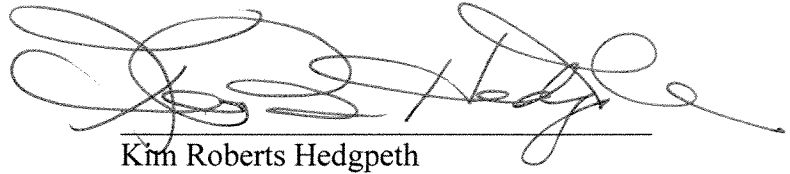
In short, when a webcasting service plays a recording, it is benefiting not only from the hard work and creativity of recording artists, but also from the substantial investments and contributions of record companies.

Finally, based on my experience in the industry, I am generally aware that CD sales have been declining in recent years. This trend hurts artists, including AFTRA members, because

with fewer sales, there is less revenue for artists. In this environment, the royalty paid by webcasters is becoming more important. While the royalties that artists receive from SoundExchange do not by themselves replace lost income from declining CD sales, it is an important revenue stream, especially as there remain relatively few ways for recording artists to generate income through the Internet.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Executed on September 28, 2009



Kim Roberts Hedgpeth

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2009-1
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TESTIMONY OF
GEORGE S. FORD

President, Applied Economic Studies

Witness for SoundExchange, Inc.

**Before the
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TESTIMONY OF

GEORGE S. FORD

President, Applied Economic Studies

September 2009

I. My Experience and Qualifications

My name is George S. Ford. I am the President of Applied Economic Studies, a private consulting firm specializing in economic and econometric analysis, located in Birmingham, Alabama. I am also the Chief Economist of the Phoenix Center for Advanced Legal & Economic Policy Studies, a Washington, D.C. based 501(c)(3) research organization that specializes in the legal and economic analysis of public policy issues involving the communications and technology industries. In addition, I am an Adjunct Professor at Samford University, a private university located in Birmingham, Alabama, where I teach economics in the graduate program of the business school. I serve as a member of the Alabama Broadband Taskforce upon appointment by Alabama Governor Bob Riley.

I received a Ph.D. in Economics from Auburn University in 1994. Since then, I have worked as a professional economist in both government and industry. In 1994, I became an economist in the Competition Division of the Federal Communications Commission, an organization located in the General Counsel's Office that provided competition analysis support to the many bureaus of that organization. My primary interests were multichannel video services and broadcasting policies, though my work ranged from international policy to radio interference standards to statistical analysis. After my government tenure, I became an economist at MCI Communications, where my work focused on telecommunications policy. In April 2000, I became the Chief Economist of Z-Tel Communications in Tampa, Florida, a small competitive telephone company where I performed both regulatory and business analysis. I have been in my present employment since the Summer of 2004.

My areas of specialty in economics include Industrial Economics, Regulation, and Public Policy, with an emphasis on the communications industries, including broadcast radio and television. I have written many papers on telecommunications and media policy, and much of this work has been published in economic and law journals including the *Journal of Law & Economics*, *Empirical Economics*, the *Journal of Business*, the *Journal of Regulatory Economics*, the *Antitrust Bulletin*, *Energy Economics*, the *Yale Journal on Regulation*, the *Federal Communications Law Journal*, and many others. I have testified before numerous public service commissions, state legislative bodies, and committees of the U.S. Congress on communications policy and rate setting. In June of this year, I filed testimony before the Copyright Royalty Judges in the Matter of Distribution of the 2004 and 2005 Cable Royalty Funds, Docket No. 2007-3 CRB CD 2004-2005. A copy of my curriculum vitae is attached as Appendix A.

II. **Summary of My Testimony**

The purpose of this proceeding is to establish the rates and terms for certain digital public performances of sound recordings under Section 114 of the Copyright Act and for the making of ephemeral copies in furtherance of such performances under Section 112(e) of the Copyright Act. I was engaged by SoundExchange, Inc. to provide an economic framework useful for establishing a rate for ephemeral copies under the statutory license provided in Section 112(e) of the Copyright Act and to canvas available sources for information relevant to that task.

In the course of my work, I have been given free reign by SoundExchange to examine any sources that I believed might be relevant in setting a rate for ephemeral copies. I have reviewed the relevant statutory provisions and the various decisions of the CRB and its predecessor, the CARP, as well as the Register of Copyrights, interpreting

those provisions. I have familiarized myself with the terms of marketplace agreements for non-statutory forms of music streaming licensing. I have familiarized myself with the technological issues arising from ephemeral copies. I have conferred with SoundExchange's other expert, Dr. Michael D. Pelcovits, Ph.D. I have also carried out a free-ranging search of online materials in an effort to determine whether there is any information that would help establish the proper royalty rate for ephemeral copies in the webcasting context.

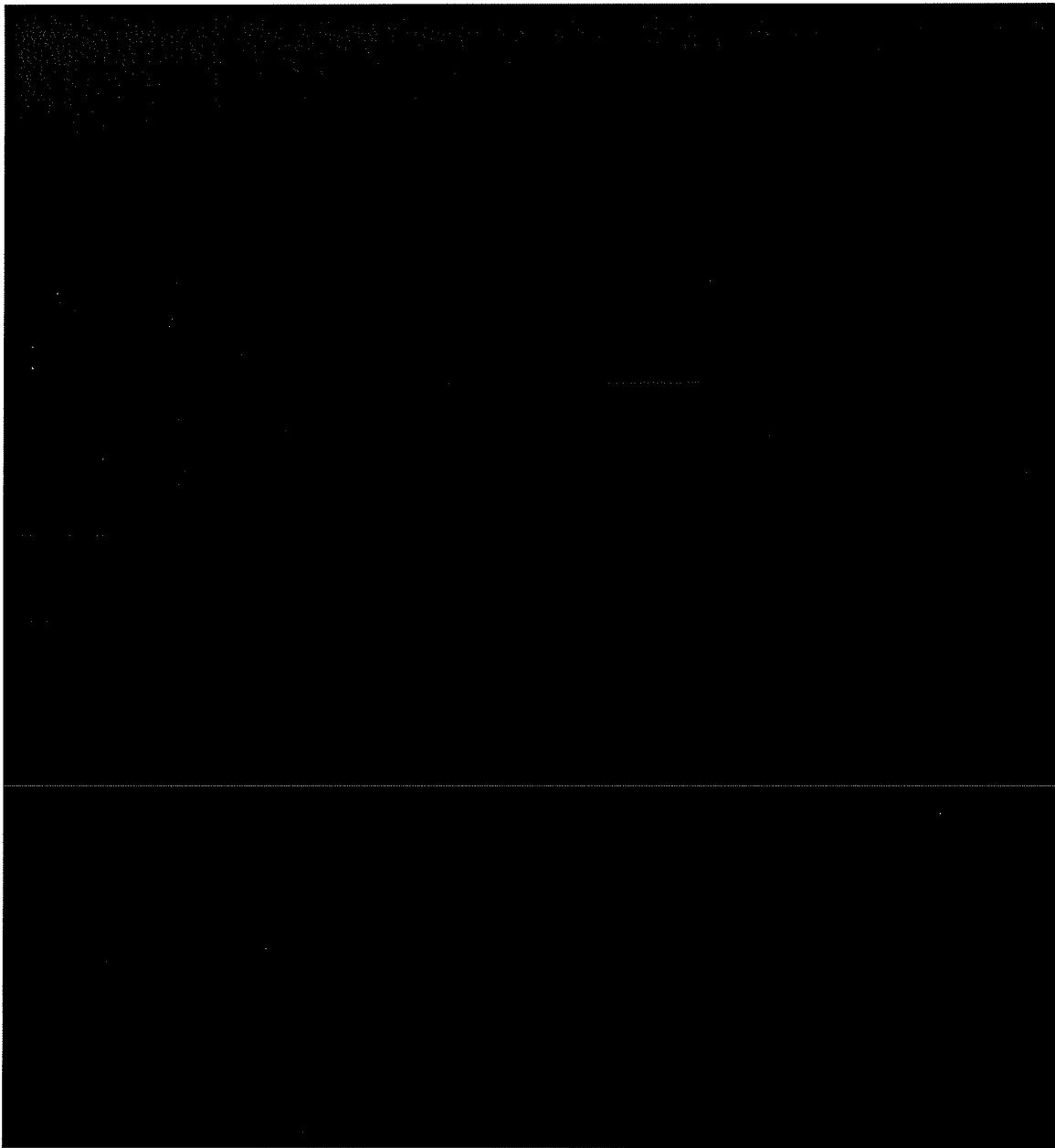
As I will explain below in further detail, I have concluded that sound principles of economic theory as well as observed marketplace benchmarks firmly establish that ephemeral copies have economic value. I have also concluded on the basis of marketplace benchmarks that the economic value of ephemeral copies is properly measured as a fixed percentage of the overall value of the rights acquired by webcasters under Sections 112 and 114. However, there exists very little in the way of traditional marketplace benchmarks to facilitate the proper computation of that percentage. This is because the hypothetical "marketplace" envisioned by Sections 112 and 114 is made up of actors with very different economic interests from the marketplace that exists outside of the statutory framework. In the unregulated marketplace, where copyright owners and services that publicly perform sound recordings freely negotiate to determine rates, the "willing buyers" and "willing sellers" are less concerned about the allocation of those royalty rates between payments for ephemeral copies and payments for public performances. However, when copyright owners and the service providers must abide by rates determined under Sections 112 and 114, the explicit allocation of payments between those two components becomes much more relevant, because the ephemeral copy payments under Section 112(e) are made

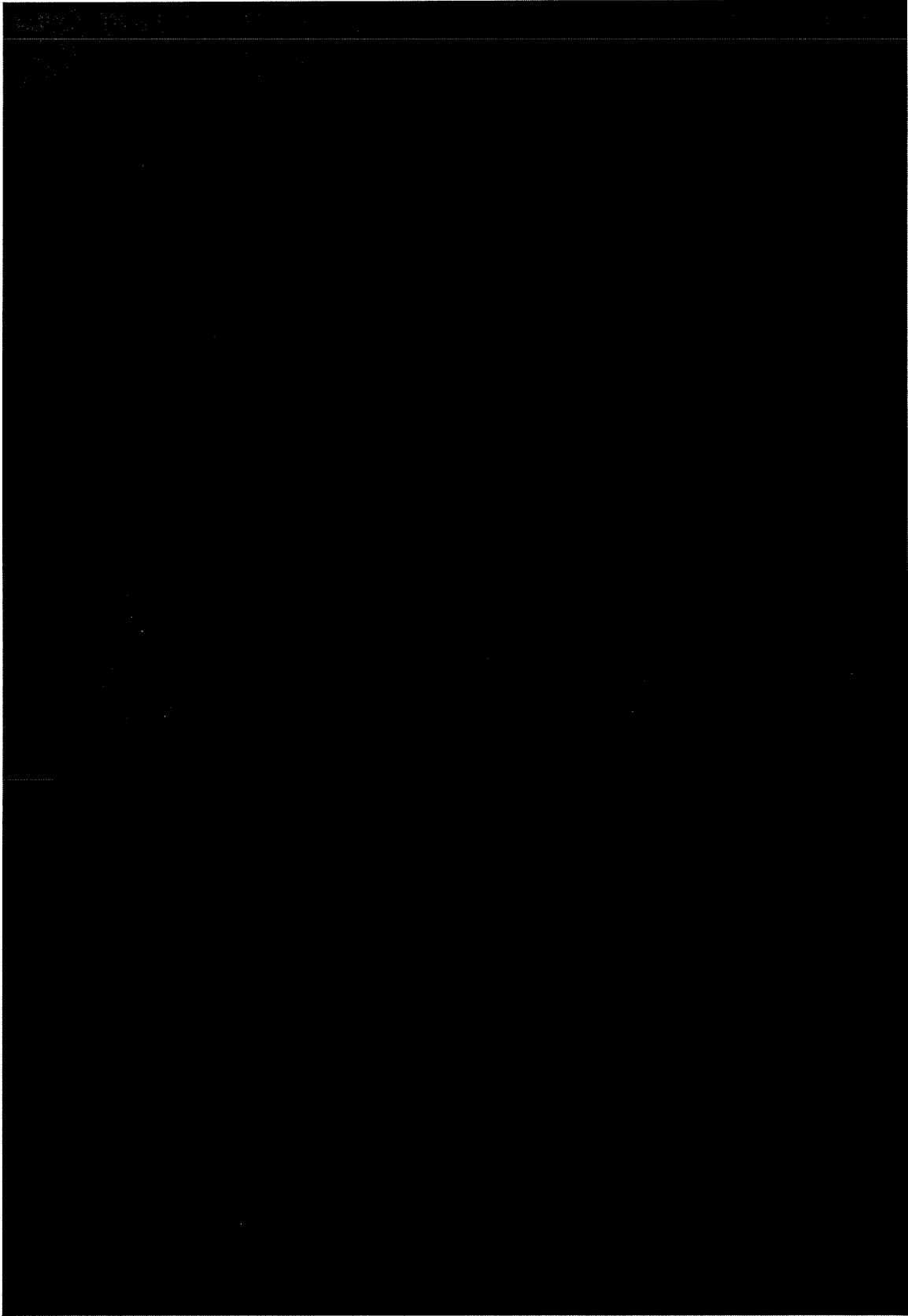
directly to copyright owners (or record companies in this case), while the performance payments under Section 114 are shared equally between copyright owners and artists. This particular division of payments is solely an artifact of the statute and does not bind or constrain market transactions.

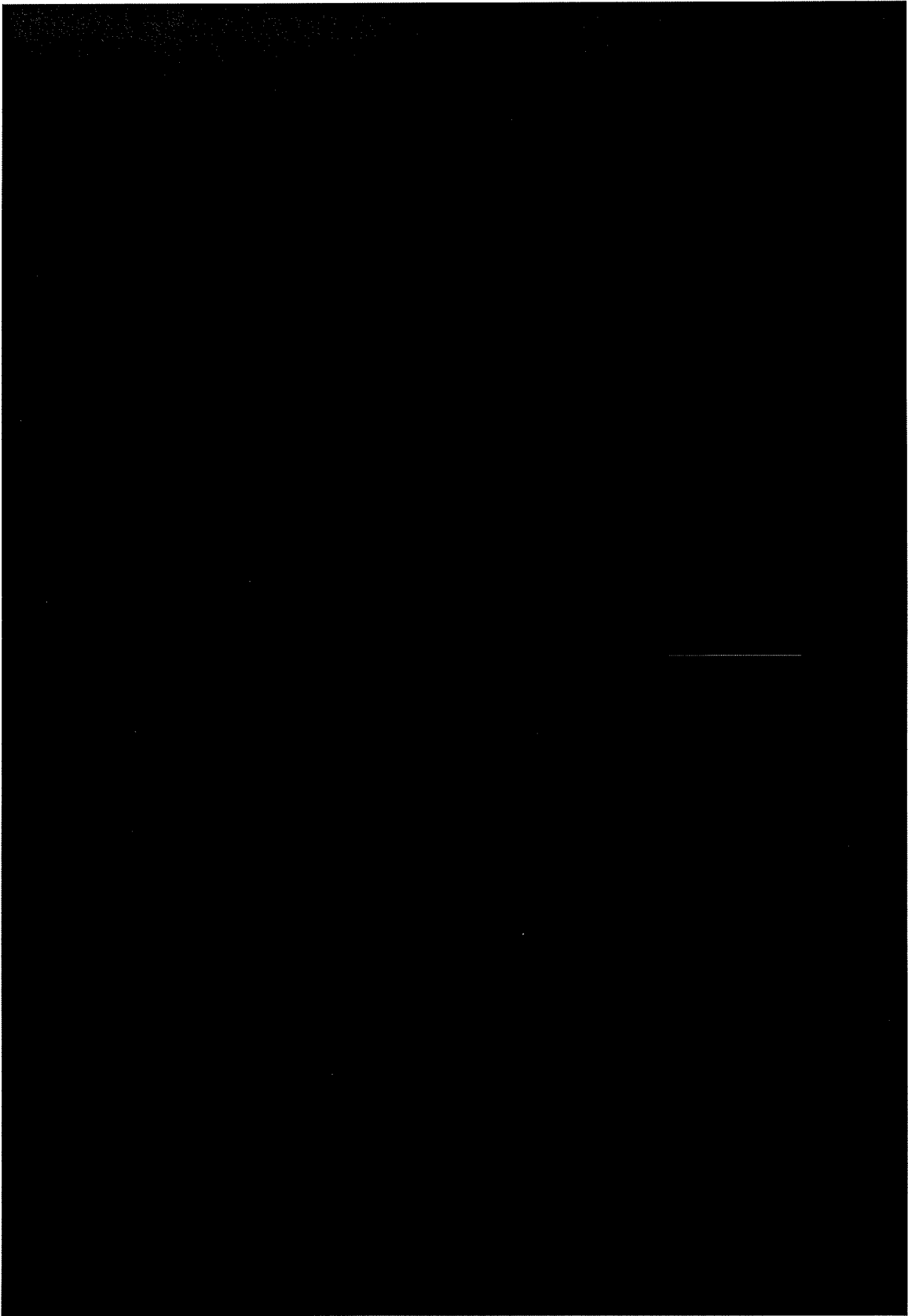
While this division of royalties among upstream providers makes little difference to the “willing buyer” in this hypothetical marketplace — that is, the webcasters — it makes a significant difference to the “willing seller” or “sellers”, i.e., the record companies that own the rights to the sound recordings and the artists who get a share of the royalties. Record companies and artists care about what portion of royalty payments are allocated to ephemerals because the higher the portion allocated to ephemerals, the lower the portion paid directly to artists per the terms of the Section 114 license. Record companies and artists therefore have every incentive to negotiate over the proper percentage of royalty payments that are allocated to ephemeral copies. This negotiation is precisely what one would expect to happen in a hypothetical free market in which both artists and record companies are forced by statute to share 50-50 in performance royalty payments.

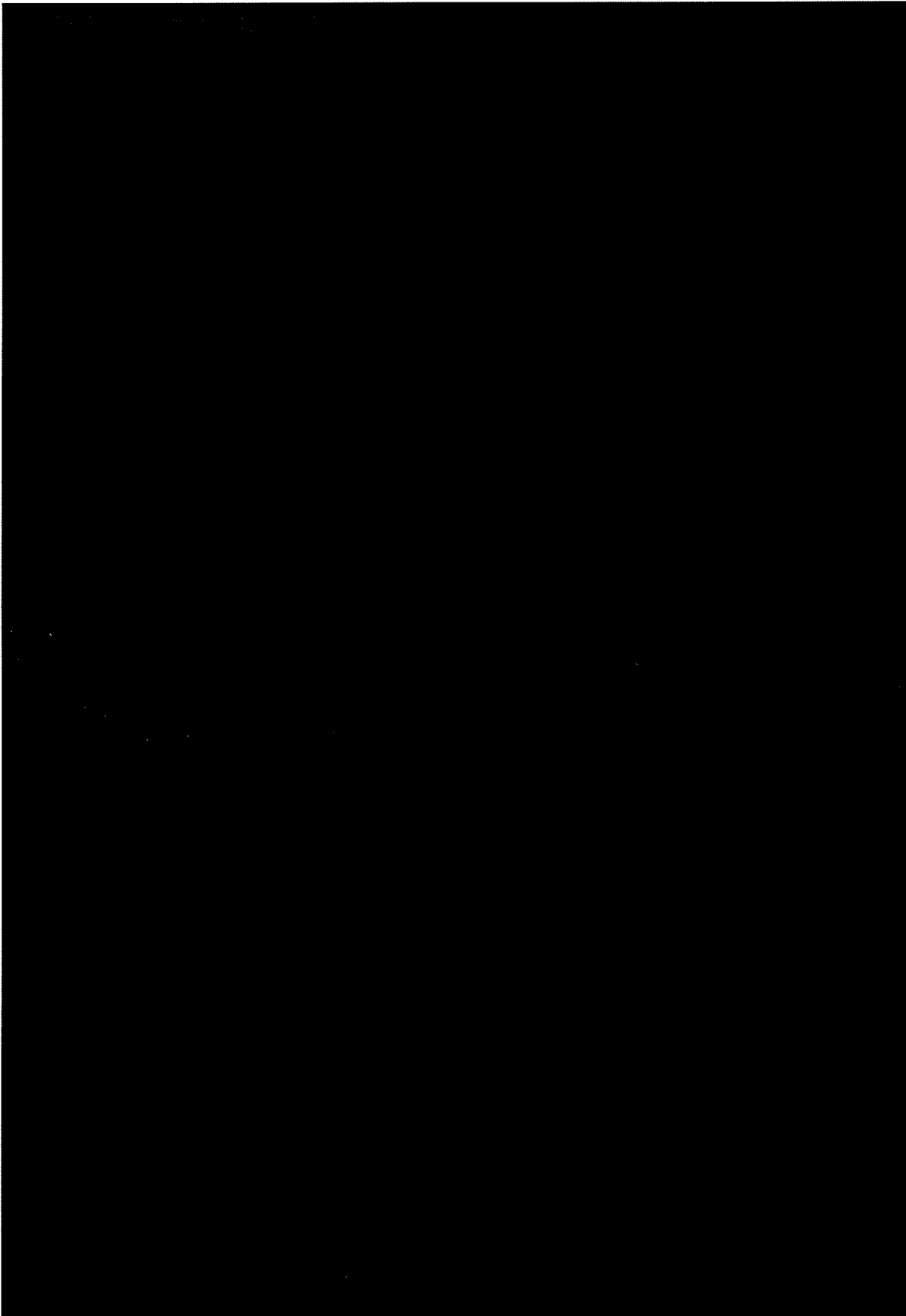
Such a negotiation is the basis of the rate proposal advanced by SoundExchange. SoundExchange, a collective made up of both record companies and artists, has proposed a rate that represents the result of negotiations between the artists and the record companies that make up its board. As long as the ephemeral rate is defined as a percentage subset of the total royalty payment, the willing buyer — the webcaster — is indifferent to the ephemeral copy rate. As such, marketplace negotiations between the “willing buyer” — the webcaster — and the “willing seller” — the copyright owner — while potentially informative, may or may not establish a specific ephemeral copy rate. From a ratemaking

standpoint, it does not matter. The SoundExchange proposal is what the willing seller in such a marketplace would propose. Because the willing buyer is indifferent, the rate proposed by SoundExchange is legitimately viewed as the proper marketplace rate for ephemeral copies. The proposal resolves the problem of a non-market allocation of royalties, and is the best evidence available of the market rate of, and rate mechanism for, ephemeral copies under Section 112.









IV. My Conclusions

Section 112(e), which governs the compulsory license for ephemeral copies, provides in relevant part that:

The Copyright Royalty Judges shall establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. . . .¹⁶

Despite minor differences in the language between Section 112(e)(4) (governing ephemeral licenses) and Section 114(f)(2) (governing statutory licenses for nonsubscription services and new subscription services), the economic criteria for setting rates and terms under those licenses are, in the words of the CARP, “essentially identical.”¹⁷ In measuring the value of the Section 112(e) statutory license, just as in measuring the value of the Section 114(f)(2) license, a key consideration in setting a proper rate is the identification of proper marketplace benchmarks. As the CARP has observed: “[T]he quest to derive rates which would have been observed in the hypothetical willing buyer/willing seller marketplace is best based on a review of actual marketplace agreements, if they involve comparable rights and comparable circumstances.”¹⁸

As I will explain below, in reviewing the most closely analogous marketplace agreements, I come to three conclusions about the proper royalty rate for ephemeral copies under Section 112(e). First, marketplace benchmarks as well as basic economic theory demonstrate that ephemeral copies have economic value to services that publicly perform sound recordings because these services cannot as a practical matter properly function without those copies. Second, marketplace benchmarks show that the royalty rate for

¹⁶ 17 U.S.C. § 112(e)(4)

¹⁷ Webcaster I CARP Opinion at 25; *see also* Webcaster II at 24100-01.

¹⁸ Webcaster I CARP Opinion at 43; *see also* Webcaster II at 24092 (“we adopt a benchmark approach to determining . . . rates”).

ephemeral copies, if directly established, is almost always expressed as a percentage of the overall royalty rate for combined activities under Sections 112 and 114. Third, because the only actors in the hypothetical three-party market established by the statute — webcasters, record companies, and artists — that have any economic interest in the measure of that allocation are the artists and the copyright owners, the agreement reached between them as to that allocation is the best measure of how a willing buyer and a willing seller would allocate royalty payments between performance royalties and ephemeral copies, and would value the ephemeral license in the course of a marketplace negotiation for public performances.

A. The Ephemeral License Has Economic Value.

As an initial proposition, it is beyond serious question that ephemeral copies of sound recordings have economic value. This is because, as Congress recognized in enacting Section 112(e), webcasters simply could not exist without the ability to make ephemeral copies. In fact, because webcasters must have both the ephemeral copy right as well as the performance right in order to operate their services, as a matter of economic theory one could say that the Section 114 right has zero economic value without the Section 112 right, and the Section 112 right has zero economic value without the Section 114 right. One cannot remove the Section 112(e) right from the full complement of rights required by webcasters any more than one can remove oxygen molecules from water and still have water.

This theoretical proposition is confirmed by a number of marketplace benchmarks. First, in the marketplace deals between record companies and webcasters for non-statutory forms of licenses, it is typical for ephemeral copy rights to be expressly included among the grant of rights provided to the webcaster. Most of these agreements do not set a

distinct rate for those ephemeral copies, incorporating them instead into the overall rate that the webcaster pays for the combined ephemeral copy rights and performance rights. Nonetheless, economic theory teaches that rational companies do not give away something for nothing. Because these ephemeral copy rights are essential for webcasters to operate their services, it follows that the value of ephemeral copy rights has been included in the overall rate that webcasters pay under these agreements.

Second, I am aware of several agreements over the years between record companies and services that publicly perform sound recordings that do establish specific rate mechanisms for ephemeral copies. For example, I have reviewed a current agreement between a major record label and a webcaster that covers ad-supported internet radio service, subscription radio service, and on-demand streaming and recites the parties' agreement that 10% of the royalty payments made under the agreement shall be designated as payment for ephemeral copies. Other agreements have contained similar language. For example, in Webcaster II and SDARS the CRJs were presented with evidence of agreements negotiated by Sony BMG and by Warner Music Group which provided that 10% of the overall fees for streaming are attributable to the making of ephemeral copies.¹⁹

¹⁹ See Webcaster II at 24101. The actual rates established in such marketplace agreements, while potentially informative, are not necessarily the best proxy for the ephemeral rate in the instant proceeding. These agreements are made without statutory constraints on how ephemeral and performance royalties are allocated between copyright owners and artists. Had these agreements been bound by such statutory conditions, then the outcomes may very well have been different. But these agreements are relevant in two important ways: First, they demonstrate that willing buyers and willing sellers do trade in ephemeral rights, which would be economically irrational if they had no value. Second, as discussed more fully in the next section below, they demonstrate that the payments for ephemeral rights, even absent regulatory constraint, employ a percent-of-total mechanism where ephemeral royalties are expressed as a percentage of payments metered on performances.

Third, I am also aware that, more recently, SoundExchange negotiated a number of voluntary agreements (with broadcasters, certain commercial webcasters and certain noncommercial educational webcasters) for the very same Section 112 and 114 rights at issue in this proceeding. In these agreements, the willing participants in the market agreed to structure the ephemeral reproduction rate as an allocation of the correlative performance royalty.²⁰

B. It Is Appropriate to Express the Value of Ephemeral Copies as a Fixed Percentage of the Performance Royalty.

Setting the ephemeral rate as a share of the total performance royalty fee does no injustice to economic theory. In fact, marketplace benchmarks consistently confirm that a percent rate is the appropriate measure. The marketplace has spoken with near unanimity in structuring the Section 112(e) ephemeral reproduction license as a percentage of the Section 114 performance royalty where such performance royalty is established. As discussed above, I have seen numerous voluntary agreements between willing buyers and willing sellers in which the rate for the ephemeral reproduction license was expressed as a percent of the performance royalty. Similarly, as mentioned above, SoundExchange negotiated a number of voluntary agreements (with broadcasters, certain commercial webcasters and certain noncommercial educational webcasters) for the very same Section 112 and 114 rights at issue in this proceeding. There, again, the willing participants in the

²⁰ Notification of Agreements Under the Webcaster Settlement Act of 2008, Agreed Rates and Terms for Broadcasters, 74 Fed Reg. 9293, 9299 (2009); Notification of Agreements Under the Webcaster Settlement Act of 2009, Agreed Rates and Terms for Webcasts by Commercial Webcasters, 74 Fed Reg. 40614 (2009); Notification of Agreements Under the Webcaster Settlement Act of 2009, Agreed Rates and Terms for Noncommercial Educational Webcasters, 74 Fed Reg. 40614, 40616 (2009).

market agreed to structure the ephemeral reproduction rate as an allocation of the correlative performance royalty.²¹

Thus, it appears that, where a rate for ephemeral copies is set in the marketplace, it is set as a percentage of overall royalties. As a structural matter, the available evidence suggests that setting the ephemeral rate as a percent of an overall payment is consistent with marketplace negotiation.

C. The Best Market Benchmark is the Agreement Between Artists and Record Companies.

Having established that the Section 112(e) ephemeral reproduction right clearly has value and is best expressed as a percentage of the Section 114 performance royalty where such royalty is set, the final step in the analysis is to determine how to set an actual percentage as required by the Register. As noted above, most agreements that set a rate for ephemeral copies specify that rate as a percentage of total royalty payments. Given the nature of the rights at issue, that is not a surprising outcome. Where performance royalties for streaming activities are negotiated in a free market setting, that is, outside of the Section 114 context, the copyright owner (in this case the record companies) and the service provider should have less at stake with respect to the allocation of payments between ephemeral copies and performances.

By contrast, in the Section 114 context, Congress radically altered this market dynamic when it comes to statutory licenses. There is a very significant difference between payments under the Section 112(e) compulsory license and the Section 114 compulsory license: payments under Section 114 are by law split between copyright

²¹ Although these agreements do not set the specific allocation, but leave that open to future determination, the point here is that the willing buyers and willing sellers agreed to structure the ephemeral rate as an allocation of the performance rate.

owners and artists, while payments under Section 112(e) go directly to copyright owners. The implication of this phenomenon is immediate. The sharing of income between record companies and artists for performances is set by law. Thus, if it is to have any relevance for the Judges, the willing buyer / willing seller market analysis suggested by Section 112(e) for ephemeral rates must reflect this statutory alteration to the market dynamics whereby the artists and the record companies jointly have a real interest in negotiating the Section 112(e) rate while the webcasters (as the willing buyers) do not.

By the very nature of the statute, the agreements reached under the constraints relevant in this proceeding will not be the same as in the unregulated market. Evidence suggests that the terms between the “willing buyer” in this hypothetical market — the webcaster — and the “willing seller” — the record companies — will either embody the ephemeral copy rate in the performance rate or express the ephemeral rate as a percent of the total overall performance royalty. If so, the buyer is indifferent to the allocation of payments between ephemeral copies and performance royalties. But the “willing seller” — the record companies — will not be so indifferent under the statutory division of royalties that cannot be assumed away. Under plausible conditions, only the record companies and artists are parties to the establishment of the ephemeral rate, and these parties have arrived at a royalty rate for ephemeral copies that reflects a more market based allocation of payments between ephemerals and performance royalties.

Because the willing buyer is disinterested with respect to that allocation, the agreement between the record companies and the artists thereby becomes the best indication of the proper allocation of royalties.

My understanding is that the recording artists and the record companies have reached an agreement that five percent (5%) of the payments for activities under Section 112(e) and 114 should be allocated to Section 112(e) activities. In light of the principles I have articulated above, that appears to be a reasonable proposal, and credibly represents the result that would in fact obtain in a hypothetical marketplace negotiation between a willing buyer and the interested willing sellers under the relevant constraints.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: 9/29/09


George S. Ford

Appendix A

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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

CORRECTED TESTIMONY OF

BARRIE KESSLER

Chief Operating Officer, SoundExchange, Inc.

Witness for SoundExchange, Inc.

Before the
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February 2010

Written Direct Testimony of Barrie Kessler

I. Background and Qualifications

I am the Chief Operating Officer of SoundExchange, Inc. (“SoundExchange”). I have held this position since July 2001. Before I became Chief Operating Officer, I served as SoundExchange’s Senior Director of Data Administration, beginning in November 1999. Prior to that, I worked as a database and technology consultant for the Recording Industry Association of America, Inc. (“RIAA”) for seven years. There, I developed the software for the certification system for Gold, Platinum and Multi-platinum record sales, and created the royalty distribution system for the Alliance of Artists and Recording Companies (“AARC”). I also previously served as Director of Systems for RSA, Inc., where I directed project teams that provided analytical and application design systems to corporate clients, and was responsible for the company’s network administration. I also previously worked as a database consultant for Price Waterhouse and DOC Computer Center.

My responsibilities as SoundExchange’s Chief Operating Officer include overseeing the collection and distribution of royalty payments for the performance of sound recordings through the various types of services eligible for statutory licensing, including the services at issue in this proceeding. In this capacity, I supervise SoundExchange staff who receive royalty payments from licensees, determine the amounts owed copyright owners and performers, and distribute the royalties to those individuals and entities. Additionally, I oversee SoundExchange’s technical involvement with licensees, manage its budget, and coordinate its systems requirements, development, and testing.

II. Overview

I am submitting this testimony to provide background information about SoundExchange and its operations; to describe SoundExchange's collection and distribution of royalties; to address several challenges that SoundExchange faces; to explain why SoundExchange should be the sole Collective for collecting and distributing royalties under the Section 112 and 114 licenses; to provide information related to the proposed minimum fee; and to support SoundExchange's proposal that the Judges continue the same terms for the statutory licenses as they adopted in the Webcasting II proceeding, with certain modifications.

III. SoundExchange's Collection and Distribution of Royalties

A. Overview of SoundExchange

SoundExchange is a 501(c)(6) nonprofit performance rights organization established to ensure the prompt, fair and efficient collection and distribution of royalties payable to performers and sound recording copyright owners for the use of sound recordings over, among other things, the Internet, wireless networks, cable and satellite television networks, and satellite radio services (hereinafter collectively "services" or "licensees") via digital audio transmissions. SoundExchange is governed by an 18-member Board of Directors that is made up of equal numbers of artist representatives and sound recording copyright owner representatives. Copyright owners are represented by board members associated with the major record companies (four), independent record companies (two), the Recording Industry Association of America (two), and the American Association of Independent Music (one). Artists are represented by one representative each from the American Federation of Musicians ("AFM") and the American Federation of Television and Radio Artists ("AFTRA"). There are also seven at-large artist seats, which are currently held by artists' lawyers and managers (four), an individual artist

(Martha Reeves), and individuals who are affiliated with the Future of Music Coalition and the Rhythm & Blues Foundation.

In Webcasting II, Docket No. 2005-1 CRB DTRA, the Judges designated SoundExchange “as the Collective to receive statements of account and royalty payments from Licensees due under § 380.3 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).” 37 C.F.R. § 380.4(b).

SoundExchange has represented artists and record labels on a vast array of issues, including notice and recordkeeping and rate-setting through the Copyright Royalty Judges’ proceedings, as well as the prior CARP processes. In addition, SoundExchange undertakes a number of measures to protect the interests of artists and copyright owners under the statutory licenses, including by conducting audits of licensees, seeking and obtaining compliance by noncompliant licensees, and engaging in other enforcement and compliance measures. Since its founding, SoundExchange has, on behalf of all artists and record labels, sought the establishment of fair royalties and regulations that enable the prompt, fair and efficient distribution of royalties to all those artists and copyright owners entitled to such royalties.

SoundExchange frequently refers to those record labels and artists who have specifically authorized us to collect royalties on their behalf as “members.” We have approximately 9,700 record label members and 29,000 artist members. We also pay statutory royalties to non-members – copyright owners and artists alike – as if they were also members. In total, we maintain accounts for approximately 11,500 record labels and 41,000 artists, including members and non-members.

SoundExchange has distributed royalties based on billions of webcasting performances. To date, SoundExchange has conducted a total of 33 royalty distributions and has made nearly 150,000 individual payments totaling more than \$250 million. SoundExchange collected approximately \$19 million in statutory webcasting royalties for 2006, \$40 million for 2007 and \$50 million for 2008.

SoundExchange strives to minimize the administrative costs associated with royalty collection and distribution. SoundExchange has 40 full-time staff members. In 2007, based on our audited expenses, our administrative rate was 4.3% of total revenue. In 2008, based on our (as of yet unaudited) expenses, our administrative rate was 5.1% of total revenue. This is a remarkable accomplishment, given the short time that SoundExchange has been in existence and the lower revenue base against which this number is calculated (compared with other U.S. collection societies, which often have overall royalties approaching or exceeding \$1 billion). For comparison purposes, I believe reported administrative costs for the American Society of Composers, Authors and Publishers (“ASCAP”) and BMI are typically higher.

B. Webcasting Licensees

The number of webcasters paying royalties to SoundExchange remains robust – 610 webcasting services paid SoundExchange statutory royalties in 2008. In fact, this number undercounts the total number of webcasters that paid royalties in 2008. Some corporate enterprises (*e.g.*, radio station groups) pay and report in a consolidated manner on behalf of all of their affiliates, while other affiliates of other enterprises pay and report separately for each station or for distinct subsets of stations (for example, on a regional basis). Taking these differences into account, SoundExchange actually receives separate reporting, and in some cases separate

payment, from over 1,400 different webcasting services, accounting for thousands of channels and stations.

The commercial webcasters participating in this proceeding – Live365 and RealNetworks – account for a relatively small portion of the total webcasting royalties paid to SoundExchange. In 2008, the royalties paid by these two parties’ webcasting services represented less than 2.5% of the total webcasting royalties paid to SoundExchange. In 2009, they represent less than 2% of the webcasting royalties paid to date.

By contrast, the royalties paid by the webcasters that have opted into one of the three Webcaster Settlement Act agreements that SoundExchange is submitting as exhibits in this proceeding – the Broadcasters agreement with the National Association of Broadcasters (“NAB”), the Noncommercial Educational Webcasters agreement with College Broadcasters, Inc. (“CBI”), and the Commercial Webcasters agreement with Sirius XM Radio – represent over 50% of the total webcasting royalties paid to SoundExchange in 2008.

C. Royalty Collection and Distribution

SoundExchange’s core mission is to collect and distribute statutory royalties as efficiently and accurately as possible. We have worked hard for nearly ten years to develop sophisticated systems, business processes and extensive databases uniquely suited to the challenging task of distributing statutory royalties. For managing royalty collection and distribution, SoundExchange employs the following operational procedures.

Receipt of Payment. SoundExchange’s Royalty Administration and Distribution Services Departments receive from statutory licensees royalty payments and, ideally, two reports: (1) statements of account that reflect the licensee’s calculation of the payments for the reporting period; and (2) reports of use that log performances of sound recordings. (We also receive

notices of election that indicate whether the licensee has utilized any optional rates and terms.)

When SoundExchange receives payment from a licensee, that payment is logged into SoundExchange's licensee database. If this is the first payment from a licensee, a new profile is created for the licensee. If the licensee has previously paid royalties, then the payment is entered under the existing profile. If the licensee operates services in multiple rate categories, the royalty payments are allocated among the applicable rate categories based on the statements of account. Similarly, block payments by a parent corporation covering corporate subsidiaries (e.g. by a radio station group covering individual radio stations) may be allocated among the subsidiaries if the parent provides separate statements of account for each of the covered subsidiaries.

Loading of Reports of Use. Reports of use are associated with a service's payments and statements of account for a particular period and loaded into SoundExchange's system. The reports are supposed to provide information about the sound recording title, album, artist, marketing label, International Standard Recording Code and other information, as well as information about the number of listeners. If a report does not conform to the required format and delivery specifications, it may not load without substantial manual intervention. Instead, SoundExchange staff must review the reports, identify the kinds of corrections that need to be made, work with the service to obtain a corrected report from the service, and then attempt again to load the report into the system. In some instances, services fail to accurately report identifying data for sound recordings by, for example, identifying an artist as "Various," reporting a performer as "Beethoven" or "Mozart," or simply not providing required information. In each of these instances my staff has to research the partially identified sound recording in order to identify accurately the sound recording copyright owners and performers entitled to royalties.

Matching. SoundExchange's systems seek to match the recordings reported in licensee reports of use with information in SoundExchange's database concerning known recordings and their copyright owners and performers. Our complex log loading algorithm attempts to match identical and similar data elements and combinations of data elements from the incoming log against performance information previously received from the services. If there is a match for a particular sound recording, then the program identifies the corresponding copyright owner and performer information. However, a reported recording might not match a known recording if, for example, the service has performed a recording by an unsigned band, or a very new, old, foreign or other obscure recording that has not previously been reported to SoundExchange, or if the service has provided incomplete or incorrect identifying information.

Research. SoundExchange has built its database of sound recordings from scratch, based on information reported to it by the services. To the extent a reported recording does not sufficiently match a known recording, SoundExchange personnel will research the recording in an effort to determine whether it should be added to SoundExchange's database or whether it is in the database under different identifying information. This research requires a significant amount of staff time. Such research is often required for new releases, works reported for the first time, works from small labels, compilation albums and foreign repertoire. In the case of compilation albums, for example, finding copyright ownership information is particularly time-consuming because, although the album is issued by one label, each of the sound recordings on it could be owned by a different label.

SoundExchange conducts extensive data quality assurance work to ensure the correct association of copyright owners and performers, on the one hand, and particular performances, on the other. For example, the SoundExchange system detects what we call "performances in

conflict,” a situation in which performances of the same sound recording are reported as being on more than one label. In such cases, we conduct research to determine the correct label for the sound recording. We also review situations in which an artist has performances of different sound recordings with different labels or with “unassociated labels,” which may indicate that the label information provided to us was incorrect.

Account Assignment. SoundExchange then assigns reported sound recording performances to accounts belonging to copyright owners and performers. Performances for which a copyright owner or artist account is not identifiable (e.g., because the recording reported has not yet been matched to a recording known to SoundExchange) are assigned to a “suspense” account for later review and research. This is often the result of poor quality data provided by licensees. Performances assigned to suspense accounts are processed through the steps that follow as soon as identification is made, with the associated royalties being released in the next scheduled distribution.

Royalty Allocation. Once account assignment has occurred, a service’s royalty payments for a given distribution period are allocated to sound recordings used by that service during that period and to SoundExchange’s costs deductible under Section 114(g)(3) (sometimes referred to as SoundExchange’s “administrative fee”). Before distribution of allocated funds, SoundExchange takes several quality assurance steps to ensure accounts are payable, address and tax identification information is complete, performances in conflict are resolved and copyright owner conflicts are resolved (to the extent practicable).

Adjustment. Once allocations are completed, it is sometimes necessary to adjust particular accounts to rectify reporting and other errors that occurred in prior distributions. For example, if Copyright Owner A was incorrectly reported as the copyright owner of Song X and

received royalties for Song X, but the actual owner of that song was Copyright Owner B, then SoundExchange would need to credit Copyright Owner B in a future distribution and debit Copyright Owner A's account for the improper distribution. Adjustments typically take the form of an additional payment or a reduced payment to an existing account in the next scheduled distribution. For copyright owners and artists who are newly identified and for whom royalties have been accruing, a new account is created and royalties attributed to the suspense account are transferred to the new account. Adjustments are also made from suspense accounts to copyright owner and artist accounts based on registrations received during the period between distributions.

Distribution. This process begins with consolidating allocations across licensees' performance logs within a license category according to earning entity,¹ which are then assigned to copyright owners, artists, or certain other payees (such as a producer who an artist directs SoundExchange to pay) based on the payment instructions for each. Next, the system generates a payment file, which we transmit to our banking partner. SoundExchange generally provides each royalty-earning entity with an electronic or hard copy statement reflecting the performances – and the licenses under which the sound recordings were performed – for which the royalty payment is made. When there is a payable balance in a payee's account above the distribution threshold, a check is mailed or funds are electronically transferred.

SoundExchange's database containing payee information is derived from account information received from record labels and artists, and includes such payees as the copyright owners and artists themselves, management companies, production companies, estates and heirs. We must, however, verify address and other information and secure appropriate tax forms

¹ An "earning entity" is the person or entity who has earned the royalties from a tax standpoint and does not have to be the person who receives royalties.

directly from each artist and label. If an earning entity fails to provide SoundExchange with tax information, then we can still distribute royalties but must withhold a portion of the royalties pursuant to applicable Internal Revenue Service (“IRS”) guidelines.

SoundExchange presently conducts distributions at least four times a year for statutorily licensed uses (*i.e.*, performances pursuant to 17 U.S.C. §§ 112(e) and 114) and, at times, for non-statutorily licensed performances for which SoundExchange has collected royalties, typically from non-U.S. performing rights organizations who have money for U.S. performers or copyright owners. The threshold for distributing royalties to a payee is \$10. Distributing smaller amounts would incur significant additional transaction costs. Every payee with a balance greater than \$10 receives at least an annual distribution. Payees with balances less than \$100 receive more frequent distributions only if they have opted to be paid by electronic funds transfer rather than by check.

Payments for which SoundExchange lacks sufficient information to distribute to the appropriate copyright owner or performer are allocated to separate accounts in accordance with 37 C.F.R. § 380.8. When SoundExchange subsequently obtains the information necessary to distribute royalties to a particular copyright owner or performer, it will do so in a future distribution.

D. Challenges That SoundExchange Faces

1. The Complexities of Royalty Collection and Distribution

While SoundExchange has gained tremendous efficiencies through its custom software system, the massive scope of the undertaking and the frequency with which novel circumstances arise make the actual task of collecting and distributing royalty payments extremely complex.

Collecting royalties from hundreds of services and distributing the royalties to thousands of payees is an enormous undertaking. Working together with statutory licensees, artists, unions and record labels, we endeavor every year to streamline our processes and ensure that the maximum amount of royalties we collect are paid out to those entitled to receive them.

SoundExchange has automated many of its functions (and such automation is critical to ensuring efficient distribution of royalties). About a year ago, we deployed a new royalty distribution platform that has improved SoundExchange's ability to manage royalty recipient accounts, match performances to repertoire, and manage our research work flow. This new platform automates more functions, enables us to process large volume logs more easily, and permits greater flexibility in how artist and copyright owner accounts are paid, among other things. I am very pleased with these improvements and greater automation, though SoundExchange staff still must undertake the laborious process of tracking down individuals entitled to royalties and correcting or completing misreported performance data.

The process of matching performances of specific sound recordings to individual copyright owners and performers is often difficult because many business arrangements in the recording industry are intricate and continually evolving. For a given sound recording, there may be multiple artists as well as multiple payees entitled to receive a portion of the royalties, as well as the IRS. Further, members of a band often change over the course of the band's

existence. When a band that has undergone changes in membership releases multiple versions of the same song, each release may involve payments to different people. Matching the performing band members to a particular sound recording of such a song can be complicated. For example, Fleetwood Mac has undergone multiple changes in membership since it originally formed in 1968, making the task of determining which royalties belong to which members difficult. Indeed, fourteen different individuals may claim to have been a part of the “featured artist” Fleetwood Mac at one time or another, and SoundExchange must determine which individuals are entitled to payment for which sound recording. And Sade is the name of both the individual artist Sade Adu and the band with which she has sung. When SoundExchange receives reports from licensees that list only “Sade” as the performing artist, it can be difficult to determine whether Sade Adu or Sade the band (which includes other members in addition to Sade Adu) is the proper recipient of royalties for a sound recording performance.

Band members may also share royalties on an unequal basis. In the easy case, bands or artists have a corporation that receives the royalties and the corporation assumes responsibility for dividing and distributing royalties among the band members. In some cases, however, SoundExchange itself has to locate the information regarding shares, divide the royalties, and make the payments to each band member. The general rule we have created is to distribute royalties on a pro rata basis among the members of a band when there is no indication to the contrary from band members.

Furthermore distributions can be especially complicated if an artist is deceased and there are multiple heirs (each of whom may have a different share) entitled to the royalties from the performance of a single sound recording; this is particularly true where the artist is a group and more than one group member is deceased.

2. Problems Caused by Poor Licensee Compliance

SoundExchange works diligently to pay through as high a percentage of its receipts as possible, as fast as possible. SoundExchange's royalty distributions are impeded by many licensees' submitting reports of use that are inaccurate, incomplete, improperly formatted or delinquent, or by their failure to provide reports of use altogether. SoundExchange understands that the CRJs are considering issues related to reports of use, including census reporting, in a separate proceeding, Docket No. RM 2008-7, and that proposals for regulations related to reports of use properly belong in that proceeding. To that end, SoundExchange has submitted three sets of comments in Docket No. RM 2008-7. However, I mention the problems SoundExchange faces in connection with licensees' widespread noncompliance with the reporting regulations and poor quality reports of use because it has a direct impact on SoundExchange's distribution of royalties.

SoundExchange's ability to allocate and distribute royalties depends to a large degree upon the cooperation of licensees in complying with their payment and reporting obligations on a timely basis, and among services there is widespread noncompliance with the Judges' regulations. Unfortunately, many services have not historically and still do not regularly provide reports of use or have submitted defective reports of use.

For example, in past years, RealNetworks failed to provide reports of use. This failure to comply with basic reporting requirements has caused SoundExchange to expend time and money to get RealNetworks to fulfill its obligations and prevents the prompt distribution of royalties.

In addition to missing or defective reports of use, many services fail to provide the required statement of account or other necessary documentation with their payments, or are paying at an improper rate. All of this has the effect of delaying distribution. For example, since

the Judges set the webcasting royalty rates for 2006 - 2010 in Webcasting II, Live365 has not paid SoundExchange at those new rates. Live365's recent litigation efforts suggest that it is unsatisfied by the rates set in Webcasting II. It certainly has every right to seek whatever legal remedies may be available to it, and to participate in this rate-setting proceeding to advocate in favor of different rates. But a service's unhappiness with the rates set by the Judges should not excuse the service from paying those rates.

Poor compliance by licensees impedes SoundExchange's efforts to administer the license efficiently. SoundExchange has taken a number of steps to address these problems. We have applied increased pressure on services to supply missing reports of use and to provide more compliant reports of use. We work with licensees to improve their reporting compliance. We have also assigned more SoundExchange staff to focus their attention on resolving problems with logs, and we have reallocated members of our software development team to data and distribution activities. However, all such efforts require SoundExchange's attention, time and money – all of which could have been devoted to its core mission of collecting and distributing royalties.

3. Identifying and Locating Royalty Recipients

In an effort to maintain accurate information on artists' arrangements for division of royalties as well as basic contact and tax information, SoundExchange actively engages in artist outreach. SoundExchange attends about 50 music industry conferences, meetings, festivals and events a year, and speaks to artist management firms, record labels, performing rights organizations and law firms that represent artists. SoundExchange also works with music associations to spread awareness of its services, and it advertises in a variety of media outlets.

SoundExchange personnel are available to artists (as well as to copyright owners and licensees) to provide information and answer questions, and we do so on a regular basis.

For undistributed royalties, six SoundExchange staff members' and three consultants' responsibilities include conducting research to locate artists and obtain their payee information. Even where SoundExchange is able to determine the identity of the artist and record label, that does not mean that SoundExchange knows where to locate them. Locating accurate payee information for a sound recording can be very difficult, especially if the recording is listed in a non-active, deep "catalog" or involves an artist who does not have a U.S. corporate entity designated to receive royalties on his or her behalf. Moreover, even when we locate artists or their managers, we still need them to return payee information so that we can send their royalties to them. All of these steps mean that tracking down and paying the enormous number of artists and record companies entitled to statutory royalties is a daunting task.

Through niche programming, services perform many sound recordings of smaller, less well-known labels and performers who are hard to find (and the problem is magnified if the labels are no longer in existence). SoundExchange spends a significant amount of time addressing this problem in two ways. First, SoundExchange personnel publicize the organization, its mission and its functions in order to ensure that artists and copyright owners are aware that they may have royalties owed to them. We hope that individuals who learn about us will contact us to provide us with the information we need to pay them. Second, SoundExchange performs extensive research to locate and contact individuals who may be entitled to royalties. For example, we rely on databases such as Celebrity Access and All Music Guide as well as information provided by other organizations within the music industry, both domestic and

foreign, to locate artists. SoundExchange also utilizes temporary employees, interns, and independent contractors to assist in locating individuals and entities entitled to royalty payments.

SoundExchange's ability to distribute royalties depends upon the cooperation of copyright owners and performers in providing necessary payment and tax information.

SoundExchange cannot distribute allocated royalties when the artist or the rights owner or both have failed to register with SoundExchange. Inexplicably, even when SoundExchange contacts artists about unpayable royalties, some of them fail to submit the proper registration information to enable payment. In addition, many artists change address frequently, and it is not uncommon that an artist SoundExchange has previously paid will move but fail to inform SoundExchange of his or her new address. SoundExchange is then unable to distribute royalties to that artist until he or she can be located again. If artist group members cannot agree to the splits among them for their repertoire or if there are multiple claims against the same repertoire (as with two foreign collecting societies claiming the same sound recording), those payments will be placed on hold, pending resolution of the dispute.

SoundExchange is working to address these challenges in several ways in addition to the outreach measures discussed above. For example, instead of issuing checks, we offer royalty recipients the option of receiving their royalties through automated check clearinghouses that essentially offer direct deposit into bank accounts. Even when artists tour frequently and change their addresses, their bank accounts generally remain the same. Under this system, when an artist moves or is touring, he or she will continue to receive payments directly into his or her bank account. In addition, we continue to pursue initiatives with foreign collectives to locate artists. SoundExchange has developed relationships and negotiated agreements with sister royalty societies around the world, including SOMEXFON in Mexico, PPL in the United

Kingdom, ABRAMUS and UBC in Brazil, AIE in Spain, RAAP in Ireland, and SENA in the Netherlands. Under these agreements, SoundExchange remits royalty payments due to copyright owners or performers represented by those societies. In some agreements, SoundExchange receives royalty payments for performances of U.S. sound recordings that these analogous societies have collected.

We also work with other organizations with connections to the artist community to compare our unmatched lists to data they maintain about artists. When those organizations have contact information for artists for whom we lack information, they contact the artists and encourage them to register with SoundExchange and collect their royalties. Furthermore, we have launched on-line registration, so that artists and copyright owners can register with SoundExchange without having to use conventional mail. Finally, we continue to appreciate the efforts of our record label members who encourage their artists to collect their SoundExchange royalties.

IV. SoundExchange Should Be Designated the Sole Collective to Collect and Distribute Webcasting Royalties.

In Webcasting II, the Judges found “that selection of a single Collective represents the most economically and administratively efficient system for collecting royalties under the blanket license framework created by the statutory licenses.” Faced with testimony and evidence submitted by SoundExchange and RLI, the Judges concluded that “SoundExchange is the superior organization to serve as the Collective for the 2006-2010 royalty period.” 72 Fed. Reg. at 24105 (May 1, 2007).

I agree with the CRJs’ conclusions, and request that the Judges again designate SoundExchange as the sole Collective to collect and distribute royalties for the 2011-2015 statutory period. SoundExchange now has considerable experience and expertise in

administering the statutory licenses. Whereas at the time I submitted my written direct testimony in Webcasting II, SoundExchange had processed over 650 million sound recording performances, 72 Fed. Reg. at 24104, SoundExchange has now processed billions of sound recording performances. SoundExchange has continued to increase the size of its membership and the number of record label and artist accounts it maintains. Whereas at the time the Webcasting II direct testimony was submitted, SoundExchange had approximately 3,000 record label members and 12,000 artist members, 72 Fed. Reg. at 24104, today SoundExchange has approximately 9,700 record label members and 29,000 artist members. And while SoundExchange had over 700,000 sound recordings in its database when I submitted my written direct testimony in Webcasting II, today that number has grown to nearly 2 million.

I am aware that RLI has filed a petition to participate in Webcasting III. I oppose any effort by RLI to be designated as the sole Collective or as an alternative collective to collect and distribute statutory webcasting royalties. In selecting SoundExchange over RLI as the sole Collective in the Webcasting II proceeding, the Judges expressed “serious reservations about the bona fides of Royalty Logic to act as the Collective under the statutory licenses.” Webcasting II, 72 Fed. Reg. at 24105. The Judges noted that RLI is a for-profit organization that wants to enter the royalty collection and distribution business to make money; that the testimony of Mr. Gertz raised concerns “as to whether Royalty Logic will act in the best interest of all copyright owners and performers covered by the statutory licenses”; that RLI’s relationship with copyright users and services “elevated” these concerns; and that RLI’s arguments about the potential effects of competition between collectives were not relevant. Webcasting II, Fed. Reg. at 24105.

In my testimony in Docket No. 2005-1 CRB DTRA, I discussed the problems associated with a system that includes more than one collection and distribution agent. Those problems

remain true today. SoundExchange’s system presently contains entries for tens of thousands of copyright owners and performers and nearly 2 million sound recordings. For the system to recognize multiple agents, SoundExchange would have to expend significant resources, both human and monetary, to create the accounting platform necessary to track numerous distributing agent relationships, keep accounts current when entitled parties change affiliation with multiple agents, and still ensure timely distributions. Adding multiple agents would not only create administrative costs and burdens, but would also result in substantial delay in distributing royalties owed. The resulting complexity and administrative burden would serve no one and would lead only to a large number of disputes between collectives – disputes that might end up back before the Judges.

In my view, a multi-agent system is anathema to the concept of an efficient statutory licensing system. Although proponents of a multi-collective system often point to ASCAP, BMI, and SESAC – the musical works performing rights organizations – it is important to understand that administering a statutory license is fundamentally different from what those organizations do. Those organizations all engage in direct, voluntary licensing. They represent their members (and only their members) and are able to compete for members by negotiating different rates and terms for collection and distribution of royalties. They only collect and distribute monies for their own members, and have no responsibility to anyone other than their members.

Under the Copyright Act, SoundExchange is in the position of administering a statutory license whose rates and terms are set by the Judges. There cannot be “competition” between collectives on rates and terms; the only “competition” would be created by one collective trying to free-ride off the efforts of another, as RLI has done in the past and may want to do in the future. Moreover, because many copyright owners and performers will be members of no

organization, there must be an entity that has the responsibility of researching and identifying their recordings, locating them and ensuring that they too receive the royalties to which they are entitled. SoundExchange (or its predecessor) has undertaken that responsibility since royalties began being paid under Section 112(e) and Section 114 of the Copyright Act.

Where a statutory license has specified rates and terms, it only makes sense for a single entity to provide administration. As I discussed in my prior testimony, if multiple collectives were to administer the same license, the collection and distribution process would grind to a halt.

Moreover, designating a second Collective would create greater overall costs because copyright owners and performers would have to pay for duplicative systems for license administration. Similarly, designating a new Collective to replace SoundExchange would be inefficient. SoundExchange has invested substantial time, effort and money into developing its collection and distribution systems, and has developed great expertise in administering the statutory license. The benefits to copyright owners and artists of that experience and expertise would be lost if a different entity were designated as the Collective. Copyright owners and artists would also be harmed because they would subsidize the costs of transitioning to a new Collective.

V. The Minimum Fee

SoundExchange proposes setting the statutorily-required minimum fee at \$500 per channel or station, subject to a \$50,000 annual cap for commercial webcasters. This proposal is supported by agreements that SoundExchange is submitting as evidence, and would ensure that every licensee makes some contribution to the costs of administering the statutory license.

A. Agreements

SoundExchange's agreements under the Webcaster Settlement Act establish that services are willing to pay the minimum fee that SoundExchange is seeking in this proceeding.

SoundExchange has submitted two settlements to the CRJs for publication and adoption – a Broadcasters agreement with the National Association of Broadcasters (“NAB”) and a Noncommercial Educational Webcasters agreement with College Broadcasters, Inc. (“CBI”).

The parties entered into the Broadcasters agreement pursuant to the Webcaster Settlement Act of 2008, and the Noncommercial Educational Webcasters agreement pursuant to the Webcaster Settlement Act of 2009. In addition, SoundExchange has entered into a Commercial Webcaster settlement with Sirius XM pursuant to the Webcaster Settlement Act of 2009. The agreements provided eligible services an opportunity to opt into the agreements and accept the rates and terms established by them.

The NAB agreement covers the time period 2006 through 2015, and includes an annual minimum fee of \$500 per station or channel, subject to a \$50,000 cap. According to SoundExchange's records, 404 entities have opted into the NAB agreement on behalf of several thousand individual stations.

The Commercial Webcaster Agreement covers the time period 2009 through 2015, and likewise includes an annual minimum fee of \$500 per station or channel, subject to a \$50,000 cap. Sirius XM has opted into the agreement for its webcasting service.

The CBI agreement covers the time period 2011 through 2015 (with special reporting provisions for 2009-2010), and includes an annual minimum fee of \$500 per station or channel. The opt-ins for the CBI agreement are not due until January 2010. The minimum fee in the CBI agreement has no cap but, in our experience, the huge majority of noncommercial services never

pay more than \$500, and no individual noncommercial licensee that pays SoundExchange reports more than ten stations on its statements of account, let alone the 100 that would reach the cap in the commercial webcaster context. In addition, for noncommercial services, \$500 covers the first 159,140 ATH per channel or station as well, meaning that a cap would be inappropriate. For example, if a noncommercial webcaster offered 150 channels, but was subject to a cap of \$50,000 at a minimum fee rate of \$500 per channel, that noncommercial webcaster should not get 159,140 aggregate tuning hours of usage on 50 channels for free.

These agreements show that both commercial and noncommercial stations are willing and able to pay a \$500 minimum fee.

B. Contribution Toward Administrative Costs

One rationale for the minimum fee that has been raised in past proceedings is that it should cover SoundExchange's administrative expenses even in the absence of royalties. 72 Fed. Reg. at 24096 (May 1, 2007). I agree that the minimum fee should ensure that every licensee makes an appropriate contribution to the costs of administering the statutory license, as well as a reasonable payment for usage of sound recordings. After all, if the minimum fee covered only administrative expenses, then copyright owners and performers collectively would receive no payment for the use of their sound recordings by services paying only the minimum fee. Those payments would in effect be completely consumed by costs of administration.

That said, SoundExchange has never sought to collect all of its costs from minimum fee payments. Payments from services that pay larger amounts of royalties in effect subsidize the costs associated with processing payments and information from smaller services that typically pay only the minimum fee.

SoundExchange's per service or per station or channel administrative costs are difficult to quantify. The expenses that SoundExchange incurs in relation to particular services vary widely depending on the quality of data that a service provides to SoundExchange and on the additional work that SoundExchange may need to do when it receives poor quality data. In addition, some large station groups submit separate statements of account and reports of use for each of their individual stations. This means that we need to process each such station individually, rather than as a group, which necessarily adds time to our efforts. Our costs also vary depending on the breadth and obscurity of a service's repertoire, with services that play a great deal of repertoire that is relatively unique imposing greater research costs. In addition, many of our costs are effectively shared across services – including things like research of repertoire used by multiple services, costs of artist outreach and distributing royalties once individual services' allocations are loaded, information technology and corporate overhead. SoundExchange does not track its administrative costs on a licensee-by-licensor, station-by-station or channel-by-channel basis and, as a result, there is no precise way to determine exactly what we must spend on such a basis.

As a check on whether the minimum fees agreed upon in SoundExchange's Webcaster Settlement Act agreements and proposed in this proceeding are reasonable in light of our administrative costs, SoundExchange nonetheless estimated our administrative costs per service. Based on current (and as of this point unaudited) records, SoundExchange's expenses for 2008 were approximately \$8.4 million. This amount includes SoundExchange staff, facilities, amortized and depreciated equipment, operating expenses, and other costs. This amount excludes the amortization of costs of rate-setting proceedings. In 2008, based on information available in September 2009, SoundExchange had 1,454 licensees (at the statement of account

level) of all license types.² When SoundExchange's operating costs are divided by the number of licensees, the result is a per licensee cost of approximately \$5,777.

While the overwhelming majority of these licensees (about 1,371) operated only one station or channel, some operated multiple stations or channels. The number of individual channels or stations on a licensee's service is often an indicator of greater complexity required to handle such payments and reporting. However, it is unclear how many "stations" there actually are in the case of a handful of internet-only services that allow users to create channels, and handling payments and reporting by those services is probably not hundreds or thousands of times more expensive or complex than handling payments and reporting by a service with only one channel. That is why we have been willing to agree to a cap on the minimum fee corresponding to 100 channels or stations per licensee, and propose such a cap for commercial webcasters in this proceeding.

As a further check on our proposed per channel or per station minimum fee, we tried to determine the average number of channels or stations per webcaster licensee. Calculating the average number of channels or stations per webcaster is necessarily an inexact exercise. Services do not always report the total number of channels or stations, and as noted above, for services that allow users to create channels, it is unclear how many "stations" there actually are. In estimating the average number of stations or channels per webcaster, we used actual numbers where that information is reported to us. Where that information is not reported to us, but where a service provides information about the number of its stations or channels on a publicly

² In this Corrected Written Direct Testimony, I am correcting the number of licensees and the calculations of per licensee cost and average per channel or station cost that use that number on pages 24 and 25, so that the testimony is correct as of the time I originally submitted my Written Direct Testimony on September 29, 2009. I have not otherwise updated these numbers or any other information in this testimony.

available website, we used that information. For the small number of services for which we lack information about their total number of stations or channels, but for which we are generally aware that they have a large number of stations or channels, we assumed 100 stations or channels. The assumption of 100 stations or channels is consistent with SoundExchange's proposal of a \$50,000 cap on minimum fees for commercial services with 100 or more stations or channels where the minimum fee is \$500.

Based on the foregoing information, we determined that there are an average of about seven channels or stations per webcaster licensee at the statement of account level. As a matter of arithmetic, SoundExchange's average per channel or station cost for webcasters in 2008 was approximately \$825 (\$5,777 divided by 7). One could do this analysis differently. For example, if one capped at 100 the number of channels on services known to have a much larger number of channels, one would get a lower average number of channels or stations per webcaster licensee at the statement of account level and a correspondingly higher average per channel or station cost.

The exact cost imposed by any particular licensee varies widely. Every single statement of account and every single report of use must go through the entire process described above – the payments and statements of account must be reviewed, verified, and recorded; and the reports of use must likewise be reviewed, tested, logged, and loaded into the distribution engine. Any problems with paperwork or logs can introduce problems and cause delay.

Nonetheless, the estimates described above demonstrate that SoundExchange's proposed minimum fee of \$500 per station or channel is below our estimated per station or channel costs. As indicated above, SoundExchange has never sought to collect all of its costs from minimum fee payments. Payments from services that pay larger amounts of royalties in effect subsidize the costs associated with processing payments and information from smaller services that

typically pay only the minimum fee. However, because \$500 per station or channel does not recover all of our administrative costs, particularly if the minimum fee is understood to include some payment for usage of sound recordings, that level of payment represents a reasonable and justified contribution to the costs of administering the statutory license.

VI. License Terms

SoundExchange generally proposes continuing the same terms in this proceeding as the Judges adopted in the Webcasting II proceeding, Docket No. 2005-1, subject to the revisions described below with regard to (i) server log retention, (ii) late fees for reports of use, (iii) identification of licensees, and (iv) certain technical and conforming changes.

Although the Judges did not rule in SoundExchange's favor on all of the terms issues raised in the Webcasting II proceeding, the Judges clearly recognized many of SoundExchange's concerns, and the terms adopted in that proceeding represented an important step forward. In the SDARS proceeding, Docket No. 2006-1, the Judges adopted terms that were largely similar to the terms adopted in the Webcasting II proceeding, except to the extent dictated by differences in the rate structure and for certain technical changes. I believe there is value in having consistency of terms across licenses, and in allowing time to fully assess the effectiveness of those terms based on experience working under those terms. Consistency among the terms regulations for the various types of services and over time aids SoundExchange's administration of the licenses and makes licensees' compliance with the terms more efficient.

For all of these reasons, SoundExchange proposes that the Judges adopt the same terms regulations as it adopted in Docket No. 2005-1, as codified at 37 C.F.R. Part 380, except as discussed below.

A. Server Log Retention

SoundExchange proposes that the statutory license terms expressly confirm that the records a licensee is required to retain pursuant to 37 C.F.R. § 380.4(h) and that are subject to audit under 37 C.F.R. § 380.6 include server logs sufficient to substantiate rate calculation and reporting. Licensees often do not retain the actual server logs showing which transmissions were made when. This data is critical for verifying that licensees have made the proper payments.

The current royalty rate structure is based on the actual performances transmitted, and SoundExchange proposes continuing that rate structure in the next rate period. Every webcaster's transmissions are made by computer servers that typically generate original records of what recordings they transmitted to how many users and when. Those logs should become the basis for a licensee's statements of account and reports of use. However, if SoundExchange cannot compare those logs to the statements of account, reports of use and other records maintained by the licensee that purportedly were derived from the server logs, we are missing the first – and perhaps most important – link in the chain of records that establish actual usage.

While I believe the current regulations already require licensees to maintain their server logs for at least a three year period, because they are “records of a Licensee . . . relating to payments of . . . royalties.” 37 C.F.R. § 380.4(h), some licensees apparently take a different view and do not retain their server logs. Accordingly, SoundExchange proposes that the Judges make this requirement more explicit.

B. Late Fees for Reports of Use

SoundExchange proposes that reports of use be added to the list in 37 C.F.R. § 380.4(e) of items that, if provided late, would trigger liability for late fees. SoundExchange made a similar proposal in the pending notice and recordkeeping proceeding, Docket No. RM 2008-7.

The implementation of that concept could be included in either the notice and recordkeeping regulations or the license terms. Implementing the concept in the license terms would be appropriate because late fees are otherwise provided for in the license terms, and timely provision of reports of use is essential to the distribution of statutory royalties as contemplated by the license terms. Indeed, reports of use are at least as important to timely distribution as statements of account, which are subject to late fees. SoundExchange is raising the issue here in case the Judges would prefer to consider the issue in the context of this proceeding, rather than in the recordkeeping proceeding.

As SoundExchange explained in Docket No. RM 2008-7, widespread noncompliance with reporting requirements demonstrates that it is important to provide greater incentives to compliance than in the past. We receive no reports of use from many webcasters, and the reports we received were often late or grossly inadequate. This is a significant impediment to our timely payment of copyright owners and performers. Other than the threat of litigation, there is no commercial incentive for a service to comply with the regulations governing reports of use. The possibility of late fees would provide an additional, immediate incentive to comply with the applicable reporting requirements and would greatly facilitate operation of the statutory licenses.

C. Identification of Licensees

SoundExchange proposes that statements of account correspond to reports of use by identifying the licensee in exactly the way it is identified on the corresponding notice of use and report of use, and by covering the same scope of activity (e.g., the same channels or stations). In addition, the regulations should be clarified to explain that the “Licensee” is *the entity* identified on the notice of use, statement of account, and report of use, and that each Licensee must submit its own notice of use, statement of account, and report of use. Under this proposal, a station

group could choose to submit separate statements of account for each of its stations, but if it did, it would also have to have filed a corresponding notice of use for each station and would have to submit separate reports of use for each station. Likewise, a station group could choose instead to file a single statement of account covering all of its stations, but in that instance, it would need to supply a single notice of use and a single report of use covering all of its stations. We would prefer that station groups consolidate their reporting to the extent possible.

Because SoundExchange receives reports from hundreds of webcasting payors covering thousands of channels and stations, we devote considerable effort to reconciling changes and variations in licensee names and matching statements of account to reports of use covering different combinations of channels and stations. Those aspects of our work would be greatly simplified at little or no evident cost to licensees if licensees were required to provide notices of use, statements of account and reports of use on a consistent basis, and to use consistent names to refer to themselves in such documents.

In addition, we would like a regulation requiring licensees to use an account number, that is assigned to them by SoundExchange, on their statements of account and reports of use. This unique identifier would make it easier for SoundExchange to identify each licensee in our system, and to distinguish between services with similar names. This proposal would not burden licensees, and indeed might simplify their reporting and accounting efforts, as well.

D. Technical and Conforming Changes

Finally, SoundExchange is proposing a few technical and conforming changes to the regulations, including changes that would be helpful to make for the sake of clarity or consistency across licenses. These proposed changes are reflected in the redlined proposed regulations that SoundExchange is submitting as an attachment to its rate proposal.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Executed on February 15, 2010



Barrie Kessler

**WHUS Radio
Actual vs. Budget**

June 30, 2009			
Revenues			
	<u>Actual</u>	<u>Budget</u>	<u>Variance</u>
50100 · Underwriting:50101 · Underwriting - Music	\$ -	\$ -	\$ -
50100 · Underwriting:50102 · Underwriting - Public Affairs	-	-	-
50100 · Underwriting:50103 · Underwriting Sports	5,000.00	5,000.00	-
50200 · Donations:50201 · Donations - Radiothon	25,329.00	20,000.00	5,329.00
50200 · Donations:50202 · Donations - WHUSapalooza	300.00	-	300.00
50300 · Dues	-	-	-
50400 · Events/Programs:50401 · Programs Training Class	1,085.00	1,100.00	(15.00)
50400 · Events/Programs:50402 · Programs - Concerts and Events	809.00	5,000.00	(4,191.00)
50400 · Events/Programs:50403 · Programs - WHUSapalooza	1,340.00	-	1,340.00
50500 · Events/Programs Co-Sponsorship	-	-	-
50600 · Contractual Fees:50601 · Tower Lease Fees	123,845.89	109,276.00	14,569.89
50600 · Contractual Fees:50602 · DJ Services	2,000.00	2,000.00	-
50600 · Contractual Fees:50603 · CPB Digital Conversion Grant	45,000.00	45,000.00	-
50600 · Contractual Fees:50604 · CPB Programming Grant	-	-	-
50600 · Contractual Fees:50605 · Miscellaneous Fees	-	-	-
50700 · Food Sales	-	-	-
50800 · Merchandise Sales:50801 · Poster Sale	26,995.53	27,800.00	(804.47)
50800 · Merchandise Sales:50802 · WHUS Logo Items	85.00	600.00	(515.00)
50800 · Merchandise Sales:50803 · Silent Auction	1,122.00	-	-
50900 · Fees - Fines, Late Charges	28.01	-	28.01
51300 · Student Fees	288,975.30	270,000.00	18,975.30
51400 · Interest	3,587.49	3,000.00	587.49
51500 · Miscellaneous	1,861.99	-	1,861.99
Total Revenues	527,364.21	488,776.00	37,466.21
Expenses			
60100 · Advertising:60101 · Advertisements and Sponsorships	11,926.13	17,500.00	(5,573.87)
60200 · Donations and Gifts:60201 · Promos	6,903.15	12,500.00	(5,596.85)
60200 · Donations and Gifts:60202 · Radiothon Premiums	2,199.61	4,000.00	(1,800.39)
60300 · Dues Expense	2,495.00	2,900.00	(405.00)
60400 · Registration Fees	2,825.00	3,400.00	(575.00)
60500 · Programs Co - Sponsorship	-	1,500.00	(1,500.00)
60600 · Fees (contractual services):60601 · Commissions	-	-	-
60600 · Fees (contractual services):60602 · Tower Loan	-	-	-
60600 · Fees (contractual services):60603 · Credit Card Fees	517.76	700.00	(182.24)
60600 · Fees (contractual services):60604 · HD Radio Project	-	-	-
60600 · Fees (contractual services):60605 · Studio Build Project	-	-	-
60600 · Fees (contractual services):60606 · DI Fees	7,100.00	7,000.00	100.00
60600 · Fees (contractual services):60607 · DJ Services Fee	800.00	1,000.00	(200.00)
60600 · Fees (contractual services):60608 · News Services	14,420.28	18,400.00	(3,979.72)
60600 · Fees (contractual services):60609 · Concerts and Events	10,282.00	16,000.00	(5,718.00)
60600 · Fees (contractual services):60610 · Lab Instructor Fee	500.00	1,000.00	(500.00)
60600 · Fees (contractual services):60611 · Web Hosting Services	3,806.51	10,800.00	(6,993.49)
60600 · Fees (contractual services):60612 · Syndicated Programming	490.00	1,000.00	(510.00)
60600 · Fees (contractual services):60613 · Miscellaneous Fees	2,590.18	4,850.00	(2,259.82)
60600 · Fees (contractual services):60614 · Tower Manager Salary	-	-	-

SX Trial Ex. 6

**WHUS Radio
Actual vs. Budget**

	Actual	Budget	Variance
60700 · Cost of Goods Sold - Food Sales	-	-	-
60800 · Cost of Goods Sold -Merchandise	20,465.55	24,000.00	(3,534.45)
60900 · Interest and Penalties	11.85	-	11.85
61000 · Raffle	-	-	-
61100 · Travel:61101 · Staff Development Travel	9,044.18	10,730.00	(1,685.82)
61100 · Travel:61102 · Sports Travel	14,333.92	15,000.00	(666.08)
61200 · Rental	4,023.50	4,400.00	(376.50)
61300 · Postage:61301 · General Postage	975.03	1,500.00	(524.97)
61300 · Postage:61302 · Radiothon Postage	1,821.62	2,000.00	(178.38)
61400 · Photocopying	105.26	250.00	(144.74)
61500 · Refreshments for Organization	4,798.29	4,700.00	98.29
61600 · Refreshments for Events	3,844.73	7,000.00	(3,155.27)
61700 · Printing:61701 · Publications	671.43	2,000.00	(1,328.57)
61700 · Printing:61702 · Radiothon	441.00	700.00	(259.00)
61700 · Printing:61703 · Miscellaneous	2,848.80	4,375.00	(1,526.20)
61800 · Telephones:61801 · General	10,334.63	13,000.00	(2,665.37)
61800 · Telephones:61802 · Sports	3,306.11	5,000.00	(1,693.89)
61800 · Telephones:61803 · Radiothon	77.45	400.00	(322.55)
61900 · Insurance:61901 · Tower and Equipment	14,513.00	15,000.00	(487.00)
61900 · Insurance:61902 · Workers Compensation	1,079.00	1,300.00	(221.00)
62000 · Supplies:62001 · Office Supplies	3,113.31	3,150.00	(36.69)
62000 · Supplies:62002 · Engineering Supplies	3,084.36	3,200.00	(115.64)
62000 · Supplies:62003 · Maintenance Supplies	-	-	-
62000 · Supplies:62004 · Radiothon Supplies	-	-	-
62000 · Supplies:62005 · Computer Supplies	2,207.82	3,200.00	(992.18)
62000 · Supplies:62006 · CD's and Records	-	-	-
62000 · Supplies:62007 · Promotional Supplies	645.26	1,200.00	(554.74)
62100 · Repairs and Maintenance	38.00	500.00	(462.00)
62200 · Utilities	-	-	-
62300 · Subscriptions	512.92	700.00	(187.08)
62400 · Capital Equipment	9,374.77	74,100.00	(64,725.23)
62500 · Equipment	11,582.11	12,800.00	(1,217.89)
62600 · Employee Benefits:62601 · Health Insurance	8,941.32	9,200.00	(258.68)
62600 · Employee Benefits:62602 · Vacation Pay Expense	3,348.84	5,600.00	(2,251.16)
62701 · Student Wages Operations Board	50,158.93	65,668.00	(15,509.07)
62702 · Student Wages Admin	3,681.36	13,860.00	(10,178.64)
62703 · Student Wages Engineering	24,129.36	27,625.00	(3,495.64)
62801 · Wages Non-Student Operations Board	23,011.72	30,600.00	(7,588.28)
62802 · Wages Non-Student Admim	96,700.11	103,690.00	(6,989.89)
62803 · Wages Non-Student Engineering	26,184.29	26,407.00	(222.71)
62900 · Wage Taxes Student	2,204.43	2,500.00	(295.57)
63001 · Non Student Wage Taxes FICA	11,566.78	12,289.00	(722.22)
63002 · Non Student Wage Taxes SUTA	286.00	338.00	(52.00)
63100 · Miscellaneous Expense	-	-	-
Total Expenses	\$ 440,322.66	\$ 610,532.00	\$ (170,209.34)
Profit / (Loss)	\$ 87,041.55		

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

TESTIMONY OF

W. TUCKER McCRADY

Associate Counsel, Digital Legal Affairs
Warner Music Group

Public Version

Witness for SoundExchange, Inc.

SX Trial Ex. 7

Public Version

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
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Docket No. 2009-1
CRB Webcasting III

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W. TUCKER McCRADY

Associate Counsel, Digital Legal Affairs
Warner Music Group

September 2009

Public Version

**STATEMENT OF W. TUCKER McCRADY
WARNER MUSIC GROUP**

Background and Qualifications

I am Associate Counsel, Digital Legal Affairs at Warner Music Group (WMG). In that role, I am responsible for handling a range of digital legal issues, a majority of which involve negotiating digital deals on behalf of WMG. I have negotiated deals for downloads, streaming (both audio and video, and both ad-supported and subscription-based), ringtones, custom radio and many others, with providers such as Apple, Amazon, Google, Rhapsody, MTV, Yahoo, Last.fm and Slacker. I have worked at WMG in this capacity since early 2006.

I am also a member of the Board of Directors and the Licensing Committee of SoundExchange. This committee, among other things, is directly responsible for negotiating and approving any settlements related to statutory licenses on behalf of SoundExchange.

I hold a bachelors degree from Harvard, a diploma in drama from The Juilliard School, and a JD from Columbia Law.

About Warner Music Group

Warner Music Group Corp. is the only stand-alone music company to be publicly traded in the United States. WMG is home to some of the best-known labels in the recorded music industry including: Asylum, Atlantic, Cordless, East West, Elektra, Nonesuch, Reprise, Rhino, Roadrunner, Rykodisc, Sire, Warner Bros. and Word. Collectively, these labels encompass a global roster of vibrant artists and a diverse catalog of some of the world's most celebrated and popular recordings. Warner Music International, a leading company in national and international recorded music repertoire,

operates through numerous affiliates and licensees in more than 50 countries. WMG also includes Warner/Chappell Music, one of the world's leading music publishers, with a catalog of more than one million songs from more than 65,000 songwriters.

Overview

My testimony seeks to explain WMG's strategy with respect to negotiations with digital service providers outside the limitations of the statutory licensing framework. These agreements are the best evidence of how we, as a willing seller of copyrighted sound recordings, approach such negotiations. Understanding that approach is essential to the proper determination of the statutory rate for non-interactive webcasting, and the Copyright Royalty Judges relied on similar testimony to set statutory webcasting rates in the prior proceeding known as Webcasting II.

The Digital Distribution of Music

The overarching strategy of WMG with respect to digital agreements is to seek out and exploit all potential avenues for monetizing the musical experience. As a general matter, WMG is not interested in allowing its sound recordings to be used for free in the name of "promotion," because the ubiquity and high quality of digital distribution have fundamentally transformed the concept of "substitution." In the past, our primary concern was to protect sales of our CDs or other physical products. Today, we examine each new business model or proposal, not just for its likely substitutional impact on sales of physical products, but for its likely substitutional impact on other revenue sources. As a result, we must now be increasingly vigilant to ensure that any particular digital exploitation of our sound recordings does not damage potentially more lucrative digital exploitations of our sound recordings.

As for promotion, as a general matter we cannot afford to enter into free or low-revenue digital agreements, with the hope of promoting sales of CDs, or any other type of digital or physical music product. As we continue to explore new avenues for monetization, each digital business model needs to provide a distinct revenue stream that either contributes meaningfully to our bottom line, or helps to develop a business model that may, over time.

Audio Streaming Agreements

A. *Webcaster Settlement Act Settlements*

In 2008, Congress passed legislation designed to encourage settlements of royalty disputes for statutory webcasting royalty rates. The Webcaster Settlement Act of 2008 (“WSA”), which was extended by Congress and President Obama in 2009, specifically permitted SoundExchange and webcasters to negotiate settlements of ongoing disputes arising out of the royalty rates that were set by the Copyright Royalty Judges (“CRJs”) in 2007 covering the time period from 2006-2010 and which were the subject of an ongoing appeal at the time. The WSA also permitted SoundExchange to negotiate royalty rates to be applied from 2011-2015, the time period at issue in this proceeding. The WSA permits the following WSA settlements to be considered in this proceeding.

1. Broadcasters

In February of 2009, SoundExchange and the National Association of Broadcasters (“NAB”) reached the first such settlement under the WSA. Exhibit 1, Agreed Rates and Terms for Broadcasters, *available at* 74 Fed Reg. 9293, 9299 (Mar. 3, 2009) (the “Broadcasters settlement”). This settlement governs the webcasting activities of traditional terrestrial commercial broadcasters. These activities overwhelmingly

consist of internet simulcasts of over-the-air radio broadcast transmissions, although they also may include internet-only programming. Any broadcaster, as the term is defined by the agreement, can opt in. The Broadcasters settlement features the following royalty rate structure:

Year	Rate per performance
2006	\$0.0008
2007	\$0.0011
2008	\$0.0014
2009	\$0.0015
2010	\$0.0016
2011	\$0.0017
2012	\$0.0020
2013	\$0.0022
2014	\$0.0023
2015	\$0.0025

WMG believes that these rates are below what the webcasting rate would be in the open market, but nevertheless see this agreement with the broadcasters as a positive development.

Another feature of the Broadcasters settlement is a minimum fee of \$500 for each individual channel/station, with a \$50,000 annual cap on minimum fees for any single broadcaster. A minimum payment, which is also included in the other WSA settlements, is an important element of these deals from WMG's perspective because it ensures a minimum amount of compensation for the use of WMG's copyrighted sound recordings. The minimum included within this and the other WSA settlements, however, is substantially smaller and less valuable than the type of minimum payments and revenue guarantees that are generally included within WMG's digital deals, as discussed more fully below. It was obviously based on the statutory minimum, and is an example of how

negotiating in the context of a statutory licensing regime leads to below-market outcomes.

In addition to the per-play royalty rates and the minimum payment structure, the Broadcasters settlement also generally requires more comprehensive reporting than called for by the current regulations. Specifically, broadcasters that opt in to the Broadcasters settlement are usually required to provide reports of use to SoundExchange “on a census reporting basis (i.e., reports of use shall include every sound recording performed in the relevant month and the number of performances thereof).” Ex. 1, at § 5.2. However, small broadcasters have an option to avoid reporting.

a. Performance Complement Waivers

Separate and apart from the negotiated agreement between SoundExchange and the broadcasters, WMG negotiated with broadcasters on the issue of the sound recording performance complement (defined in 17 U.S.C. § 114(j)(13)), which limits the number and frequency of recordings by a given artist or from a given album that may be played within a specified time period. Terrestrial broadcasters have long maintained that the performance complement is, as a practical matter, incompatible with their traditional broadcasting practices, and operates as a strong motivating factor against a broadcaster entering into the webcasting business.

Although WMG was under no obligation to grant the waiver, we did so for the reasons set out below, which are unique to the business of terrestrial broadcasters, the only ones eligible to opt in to the Broadcasters settlement. Most importantly, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

For simulcasts, however, WMG was happy to offer the waiver, [REDACTED]

[REDACTED]

[REDACTED] Terrestrial radio has never been subjected to a

statutory requirement similar to the performance complement, and it has been asserted that some medium and small broadcasters lack the resources to program in strict compliance with it. But the standard programming practices of broadcasters already reflect principles that are similar in some respects to the performance complement.

Blocks of radio programming devoted to a single artist or album are the exception rather than the rule for terrestrial radio stations, and for good reason; rather than appealing to a geographically unlimited but extremely taste-specific audience, broadcasters' programming must appeal to as broad a range of listeners as possible, within a narrow geographic range. Thus, broadcasters tend to play a variety of music organized around a genre or format, such as Top 40, Hip-Hop, Oldies, Classic Rock, etc., that will appeal to a broad market segment.

To ensure that the waiver did not extend to unforeseen business practices, WMG included provisions in its complement waiver [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2. Commercial Webcasters

In July of 2009, SoundExchange also reached a settlement with Sirius XM Satellite Radio that is applicable to commercial webcasters. Exhibit 2, Agreed Rates and Terms for Webcasts by Commercial Webcasters, *available at* 74 Fed Reg. 40614 (Aug. 12, 2009) (the “Commercial Webcasters settlement”). The Commercial Webcasters settlement features the following royalty rate structure:

Year	Rate per performance
2009	\$0.0016
2010	\$0.0017
2011	\$0.0018
2012	\$0.0020
2013	\$0.0021
2014	\$0.0022
2015	\$0.0024

The Webcasters settlement includes a \$500 per channel minimum payment, with a \$50,000 minimum payment cap for a commercial webcaster with more than 100 channels. Unlike the Broadcasters settlement, the Commercial Webcasters settlement does not change the reporting obligations of the webcasters.

3. Noncommercial Educational Webcasters.

Also in July of 2009, SoundExchange reached a settlement with College Broadcasters, Inc. (“CBI”) that is applicable to noncommercial educational webcasters. Exhibit 3, Agreed Rates and Terms for Noncommercial Educational Webcasters, *available at* 74 Fed Reg. 40614, 40616 (2009) (the “Noncommercial Educational settlement”). The Noncommercial Educational settlement features the following royalty rate structure:

Year	Rate per performance
2011	\$0.0017
2012	\$0.0020
2013	\$0.0022
2014	\$0.0023
2015	\$0.0025

This per-performance rate is only applicable when a noncommercial educational webcaster transmits more than 159,140 Aggregate Tuning Hours (“ATH”) in a month on any individual channel or station. This is another instance of a WSA agreement being based on the statutory rate structure. Any webcaster that must pay these additional usage fees, but is unable to calculate the total number of performances (and not required to do so, as discussed below), can opt to pay the fees on the basis of ATH, by converting total ATH to performances at the rate of 12 performances per hour. The Noncommercial Educational settlement also includes a \$500 annual minimum fee for each individual channel. There is no cap on the aggregate minimum payments, because of the usage restriction built into the minimum fee.

The reporting requirements contained within the Noncommercial Educational settlement are different than those in the Broadcasters settlement. Specifically, noncommercial educational webcasters who opt in to the settlement can choose one of three reporting mechanisms. First, like small broadcasters, a qualifying webcaster that does not exceed 55,000 total ATH per channel for more than one month in the previous year and does not anticipate exceeding that amount in a single month in the applicable calendar year can pay a \$100 fee and be exempt from any usage reporting. The intention of the \$100 fee is to help pay for proxy data on usage which SoundExchange will need to either develop internally or acquire from a third party.

Second, a noncommercial educational webcaster that does not exceed 159,140 total ATH per channel for more than one month in the previous year and does not anticipate exceeding that amount in a single month in the applicable calendar year can submit reports of use on a sample basis, which is defined as a two-week period per calendar quarter, as governed by 37 C.F.R. § 370.3. Webcasters that elect to report on this basis are not required to report ATH or actual total performances, but are encouraged to do so. Finally, a qualifying webcaster that exceeds 159,140 total ATH in more than one month in the previous calendar year, or anticipates exceeding that amount in more than one month in the applicable calendar year, or did not otherwise elect to report usage under one of the other two options must provide quarterly Reports of Use on a census basis.

B. WMG Agreements

Outside of the statutory webcasting framework, WMG has negotiated an increasing number of deals for the digital exploitation of WMG's extensive catalog of copyrighted sound recordings. The U.S. deals that we have executed for online streaming services seem particularly relevant to the CRJs' task of determining the proper rate for statutory webcasting. These services fall into one of three broad categories:

(1) subscription on-demand streaming, (2) ad-supported streaming, and (3) custom radio. Each of these categories engenders unique concerns, and I will discuss each one below.

In these deals, there are a few important elements are of value to WMG, and important components of our negotiating strategy. The single most important aspect of negotiated marketplace agreements is that they feature a payment structure based on the greatest of three different amounts (or in some cases, the greater of two different

amounts). Specifically, WMG almost always requires audio streaming services to pay the greatest of [REDACTED]

[REDACTED] Our proportionate share is calculated as a percentage of the total streams that are WMG-owned or controlled sound recordings.

In the U.S., WMG does not have a single agreement with an audio streaming service where the payment amount is based solely on a per-play rate, as is the case with the statutory license. In all of our negotiated agreements we view the per-play minimum payment as the absolute floor for our revenue, a minimum protection for the value of the recordings we provide. The [REDACTED] represent the potential upside for our revenue. Although we negotiate the amounts of the per-play minimums, the [REDACTED] [REDACTED] with each streaming service, our ultimate goal in these negotiations is to ensure that WMG and its recording artists are fairly compensated for providing the one essential element without which an audio streaming service simply could not function – the music.

Another important component of negotiated deals is the non-refundable advance payments that WMG typically receives. Even when these advance payments are recoupable against future royalty payments, they essentially serve as minimum revenue guarantees, which can be significantly higher than the minimum payment requirements under the statutory rate and the WSA settlements.

WMG is also able to obtain important protections with respect to other aspects of audio streaming in its negotiated deals. For example, WMG requires adherence to strict security measures, limits the types of devices that can be used with a given service, and

specifies the audio quality of streams offered by a service. WMG also negotiates extensive and uniform reporting requirements for these services, along with technical and financial auditing rights, thus allowing WMG broad oversight over the exploitation of its copyrighted works.

All of these deal components are designed to ensure that each digital audio streaming service functions as a distinct product, offering a distinct method of monetization, and limit the substitution risk for other revenue sources (such as permanent digital downloads).

In its negotiated deals, WMG also has much more control over the recordings that are made available. This control is partially mandated by restrictions that WMG has with its artists regarding the use of their music. But WMG also negotiates holdback rights so that it can create exclusive deals for certain content, enabling WMG to derive greater value, including by way of lucrative sponsorship opportunities.

Finally, our negotiated agreements are typically of short duration, especially for new services. Thus, with any given service, WMG is able to commit to a particular deal structure in the short term, knowing that it will be able to re-assess the structure's long-term financial viability when technology and consumer preferences inevitably change.

Importantly, none of these valuable negotiated deal components is found in the statutory license. In fact, in the last rate-setting proceeding for webcasting in 2007, the CRJs specifically rejected arguments that the statutory rate should feature a "greater of" structure. The long term of the statutory license -- five years -- also means that there is no opportunity to correct for any undervaluation until the next rate-setting proceeding.

1. Subscription On-demand Services

Among the more established and profitable negotiated streaming deals that WMG has executed are those entered into with subscription on-demand streaming services. These services offer the height of the interactive experience for a subscriber – the ability to hear exactly the song the subscriber wants to hear when he or she wants to hear it (hence, “on-demand”). Not only can subscribers hear requested songs via audio stream online, these services also typically permit subscribers to conditionally download the songs to their PC hard drive or in some cases, to a portable device (depending on the service and the subscription purchased). The songs that have been downloaded by a subscriber from one of these services can be played on-demand, and remain accessible on the subscriber’s hard drive or portable device for as long as the subscriber maintains his or her paid subscription.

An example of the type of on-demand subscription agreement that WMG has entered into is the Subscription Services Agreement that we executed with Napster, LLC (“Napster”) for its subscription service in November of 2005 (the “Napster Subscription Agreement”) (Attached as Exhibit 4). This agreement is still in effect and its material terms remain unchanged, with the exception of the recently introduced bundled offer discussed in detail below. The specific royalty terms of the Napster agreement are as follows: [

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Although WMG's agreements with other subscription services vary in details such as [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In addition to this rate structure, the Napster agreement also features a number of the deal components I outlined above as valuable considerations in WMG's strategy for agreements with services. For example, [REDACTED]

[REDACTED]

[REDACTED]

As I explained above, the "greatest of" rate structure and the additional valuable deal components in our subscription on-demand agreements allow WMG to maximize the revenue potential of providing our recordings to on-demand subscription services. I have attached the May 2009 Subscription Earnings Statement provided by Napster to WMG that emphasizes just how valuable the "greatest of" structure really is to WMG (Exhibit 5). As shown on the report, [REDACTED]

[REDACTED]

[REDACTED].

The most important aspect of those figures is that neither of them is calculated based on the "per-play" fee of [REDACTED], as the "per-play" fee was not the "greatest of". Rather, [REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]] In other words, the agreement is functioning exactly the way WMG hoped it would when we negotiated the contract – we are receiving revenue in an amount that far exceeds the contractual floor of the per-play fee.

Recently we have negotiated agreements with two subscription on-demand services related to a new bundled offer they are making available to consumers. Specifically, this type of bundled offer, which both Napster and Microsoft (through its ZunePass service) have in some form, provides a subscriber a set number of monthly credits for permanent downloads along with the standard on-demand streaming and conditional download functionality of the service. These download credits are being offered essentially as a sales incentive, in an attempt to win over consumers who may continue to be uncomfortable with the idea of “renting” music that is associated with Napster and other such services, where access to music is dependent on continued membership, and users never possess the music on a permanent basis

I have attached as Exhibit 6, the Bundled Offer Agreement that WMG signed with Napster in May of 2009 for its bundled offer. I also have attached as Exhibit 7 the May 2009 Bundled Offer Royalty Statement provided to WMG by Napster. The statement shows that WMG [REDACTED]

[REDACTED]
[REDACTED]] Because of the relative newness of these bundled offers it is difficult to gauge just how successful they will be in attracting subscribers and driving revenue to WMG. But we are enthusiastic about the possibility that these types of

services represent for revenue growth. These are examples of the opportunities presented by free-market negotiations.

2. Ad-supported Services

In recent years WMG has explored an experimental business model involving free-to-the-user, on-demand, limited streaming of WMG content. Unlike the subscription services discussed above, these experimental services derive their revenue entirely from advertising, including audio and video ads. In the United States, WMG primarily has agreements with these types of services for video (rather than audio) streaming, but we do have uniquely structured agreements with a few ad-supported audio streaming services. However, we tend to view the ad-supported audio business model with caution, because it has yet to generate stable revenue streams.

The primary examples of ad-supported services with which WMG has agreements are imeem and MySpace Music, two social networking sites with significant scale, but (so far) limited ability to generate significant per-user revenue. Both deals represent WMG's licensing approach at its most experimental, as we seek to develop an alternate business model that is very much in demand (as evidenced by the services' popularity), but which is not yet mature. WMG also works closely with both imeem and MySpace to drive purchases of digital downloads, another business model that we do not yet believe has reached its full potential (despite its success to date), and [REDACTED]

[REDACTED] We do not yet know whether these services will succeed in the long run, but as is always the case with

experimental negotiated agreements, we will be able to revisit terms should the services not succeed as hoped.

3. Custom Radio

Finally, WMG has agreements with services that are not on-demand, but are, to a degree, customized to the listener's preferences. We generally refer to these services as "custom radio," although there are differences in functionality across the category. Many of these agreements arose as part of larger relationships such as those with Rhapsody, MySpace and others; but of our currently active agreements, our deal with Slacker (a stand-alone custom radio service) is perhaps the purest example of the category.

The most noticeable feature about custom radio deals is that they have traditionally included a per-play rate expressed as a percentage of the statutory webcasting rate. WMG has always believed that custom radio services, with their varying degrees and types of customization, ought to pay more than the terms in the agreements tend to indicate because the user experience of some of these services is so good that they probably substitute for on-demand services that tend to pay us more. On the other hand, some custom radio services have adamantly maintained that they are, in fact, statutory webcasters. As a result, the existence of the statutory licensing option has depressed the market rates for the use of copyrighted music in customized audio streaming deals.

This issue has been further complicated recently by the decision of the United States Court of Appeals for the Second Circuit in *Arista Records, et al. v. Launch Media, Inc.*, Docket No. 07-2576-cv (August 21, 2009) (the "*Launch* decision"), wherein the court held that Launch, which essentially operated as a custom radio service, fell within

the statutory definition of a non-interactive webcasting service. In the wake of this decision, I believe that we are likely to see a proliferation of customized webcasting services in the coming years that will be able to offer listeners a highly personalized entertainment experience, while paying only the statutory royalties the CRJs have established for more traditional, non-interactive, non-customized webcasting.

Examination of WMG's deal with one of these service providers, Slacker, demonstrates just how much variation there can be within even this seemingly small band of services. WMG has authorized Slacker to use WMG recordings in a number of different services. In this agreement, [REDACTED]

The agreement sets forth the following rate structure for each of the services:[

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Slacker's different service tiers all offer different user experiences. First, there is Slacker's Basic Radio Service which is free to consumers and allows users to create personalized stations based on a number of settings including a preference for newer versus older music, or popular versus relatively unknown music. Basic Radio features advertising and does not allow the user to play a specifically requested song. Moreover, Basic Radio stations must comply with the performance complement and users are limited to 6 forward skips per hour.

Second, Slacker offers a Premium Radio Service which is similar in most respects to the Basic Radio, but requires a subscription to use and allows for ad-free streaming. Premium Radio users are also allowed an unlimited number of forward skips. The other relevant feature of the Premium Radio is that users can save streams that they like to their cache and later access those streams on-demand.

Finally, the agreement includes rates for a non-portable on-demand service and a portable on-demand service. To my knowledge, Slacker does not actually offer either of these services.

As I mentioned above, the Second Circuit's *Launch* decision is likely to have far-reaching implications for deals like our agreement with Slacker, substantially weakening WMG's ability to negotiate fair rates for the use of our copyrighted sound recordings in these types of custom radio services. Under such circumstances, the importance of setting a reasonable statutory rate, designed to reflect the likely migration to customized webcasting services, is of paramount importance to WMG.

Role of the Collection Organization for Statutory Licensing

I offer one final note about the preferred mechanism for statutory royalty collection and distribution. WMG believes that in the interest of efficiency for both webcasters and those who receive revenue from the statutory license, there should be one unified licensing collective. SoundExchange, a nonprofit organization governed by an equally-weighted coalition of artists (and representatives of artist organizations) and representatives of recorded music organizations, has done an admirable job. It collects and distributes royalties from and to countless parties, persistently seeks out artists who may not be aware of monies being held for them, and has reached settlements covering the substantial majority of the industry, enabling multiple statutory business models to develop and thrive while protecting the economic value of the music on which these services are built. Based upon its track record, SoundExchange deserves to maintain its position as the only licensing collective. I see no benefit – and myriad potential drawbacks – to permitting multiple entries into the field of webcasting royalty collection, particularly when SoundExchange is embracing its challenging mission so fully.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: Sept. 23, 2009

W. Tucker McCrady
W. Tucker McCrady

Exhibits Sponsored by W. Tucker McCrady

Exhibit No.	Description
SX Ex. 101-DP	Webcaster Settlement Act Agreement for Broadcasters made between SoundExchange, Inc. and the National Association of Broadcasters, on behalf of its members
SX Ex. 102-DP	Webcaster Settlement Act Agreement for Commercial Webcasters made between SoundExchange, Inc. and Sirius XM Radio Inc.
SX Ex. 103-DP	Webcaster Settlement Act Agreement for Noncommercial Educational Webcasters made between SoundExchange, Inc. and College Broadcasters, Inc.
SX Ex. 104-DR	Subscription Services Agreement between Warner Music Inc. and Napster, LLC, Nov. 13, 2005 (RESTRICTED - not included in public version of direct case)
SX Ex. 105-DR	Napster Subscription Earnings Statement for Warner Music Inc., May 2009 (RESTRICTED - not included in public version of direct case)
SX Ex. 106-DR	Bundled Offer Agreement between Warner Music Inc. and Napster, LLC, May 18, 2009 (RESTRICTED - not included in public version of direct case)
SX Ex. 107-DR	Napster Bundled Offer Royalty Statement for Warner Music Inc., May 2009 (RESTRICTED - not included in public version of direct case)

EXHIBIT A – AGREED RATES AND TERMS FOR BROADCASTERS

ARTICLE 1 – DEFINITIONS

1.1 General. In general, words used in the rates and terms set forth herein (the “Rates and Terms”) and defined in 17 U.S.C. § 112(e) or 114 or 37 C.F.R. Part 380 shall have the meanings specified in those provisions as in effect on the date hereof, with such exceptions or clarifications set forth in Section 1.2.

1.2 Additional Definitions

(a) “Broadcaster” shall mean a webcaster as defined in 17 U.S.C. § 114(f)(5)(E)(iii) that (i) has a substantial business owning and operating one or more terrestrial AM or FM radio stations that are licensed as such by the Federal Communications Commission; (ii) has obtained a compulsory license under 17 U.S.C. §§ 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings; (iii) complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; and (iv) is not a noncommercial webcaster as defined in 17 U.S.C. § 114(f)(5)(E)(i).

(b) “Broadcaster Webcasts” shall mean eligible nonsubscription transmissions made by a Broadcaster over the internet that are not Broadcast Retransmissions.

(c) “Broadcast Retransmissions” shall mean eligible nonsubscription transmissions made by a Broadcaster over the internet that are retransmissions of terrestrial over-the-air broadcast programming transmitted by the Broadcaster through its AM or FM radio station, including ones with substitute advertisements or other programming occasionally substituted for programming for which requisite licenses or clearances to transmit over the internet have not been obtained. For the avoidance of doubt, a Broadcast Retransmission does not include programming transmitted on an internet-only side channel.

(d) “Eligible Transmission” shall mean either a Broadcaster Webcast or a Broadcast Retransmission.

(e) “Small Broadcaster” shall mean a Broadcaster that, for any of its channels and stations (determined as provided in Section 4.1) over which it transmits Broadcast Retransmissions, and for all of its channels and stations over which it transmits Broadcaster Webcasts in the aggregate, in any calendar year in which it is to be considered a Small Broadcaster, meets the following additional eligibility criteria: (i) during the prior year it made Eligible Transmissions totaling less than 27,777 aggregate tuning hours; and (ii) during the applicable year it reasonably expects to make Eligible Transmissions totaling less than 27,777 aggregate tuning hours; provided that, one time during the period 2006-2015, a Broadcaster that qualified as a Small Broadcaster under the foregoing definition as of January 31 of one year, elected Small Broadcaster status for that year, and unexpectedly made Eligible Transmissions on one or more channels or stations in excess of 27,777 aggregate tuning hours during that year, may choose to be treated as a Small Broadcaster during the following year notwithstanding clause (i) above if it implements measures reasonably calculated to ensure that that it will not make Eligible Transmissions exceeding 27,777 aggregate tuning hours during that following

year. As to channels or stations over which a Broadcaster transmits Broadcast Retransmissions, the Broadcaster may elect Small Broadcaster status only with respect to any of its channels or stations that meet all of the foregoing criteria.

(f) “SoundExchange” shall mean SoundExchange, Inc. and shall include its successors and assigns.

ARTICLE 2 – AGREEMENT PURSUANT TO WEBCASTER SETTLEMENT ACT OF 2008

2.1 Availability of Rates and Terms. Pursuant to the Webcaster Settlement Act of 2008, and subject to the provisions set forth below, Broadcasters may elect to be subject to the rates and terms set forth herein (the “Rates and Terms”) in their entirety, with respect to such Broadcasters’ Eligible Transmissions and related ephemeral recordings, for all of the period beginning on January 1, 2006, and ending on December 31, 2015, in lieu of other rates and terms from time to time applicable under 17 U.S.C. § 112(e) and 114, by complying with the procedure set forth in Section 2.2 hereof. Any person or entity that does not satisfy the eligibility criteria to be a Broadcaster must comply with otherwise applicable rates and terms.

2.2 Election Process in General. To elect to be subject to these Rates and Terms, in lieu of any royalty rates and terms that otherwise might apply under 17 U.S.C. §§ 112(e) and 114, for all of the period beginning on January 1, 2006, and ending on December 31, 2015, a Broadcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at <http://www.soundexchange.com>) by the later of (i) March 31, 2009; (ii) 30 days after publication of these Rates and Terms in the Federal Register; or (iii) in the case of a Broadcaster that is not making Eligible Transmissions as of the publication of these Rates and Terms in the Federal Register but begins doing so at a later time, 30 days after the Broadcaster begins making such Eligible Transmissions. On any such election form, the Broadcaster must, among other things, identify all its stations making Eligible Transmissions. If, subsequent to making an election, there are changes in the Broadcaster’s corporate name or stations making Eligible Transmissions, or other changes in its corporate structure that affect the application of these Rates and Terms, the Broadcaster shall promptly notify SoundExchange thereof. Notwithstanding anything else in these Rates and Terms, a person or entity otherwise qualifying as a Broadcaster that has participated in any way in any appeal of the Final Determination of the Copyright Royalty Judges concerning royalty rates and terms under Sections 112(e) and 114 of the Copyright Act for the period January 1, 2006, through December 31, 2010 published in the Federal Register at 72 Fed. Reg. 24084 (May 1, 2007) (the “Final Determination”) or any proceeding before the Copyright Royalty Judges to determine royalty rates and terms under Sections 112(e) and 114 of the Copyright Act for the period January 1, 2011, through December 31, 2015 (including Docket No. 2009–1 CRB Webcasting III and Docket No. 2009–2 CRB New Subscription II, as noticed in the Federal Register at 74 Fed. Reg. 318-20 (Jan. 5, 2009)) shall not have the right to elect to be treated as a Broadcaster or claim the benefit of these Rates and Terms, unless it withdraws from such proceeding prior to submitting to SoundExchange a completed and signed election form as contemplated by this Section 2.2.

2.3 Election of Small Broadcaster Status. A Broadcaster that elects to be subject to these Rates and Terms and qualifies as a Small Broadcaster may elect to be treated as a Small

Broadcaster for any one or more calendar years that it qualifies as a Small Broadcaster. To do so, the Small Broadcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at <http://www.soundexchange.com>) by no later than January 31 of the applicable year, except that election forms for 2006-2009 shall be due by no later than the date for the election provided in Section 2.2. On any such election form, the Broadcaster must, among other things, certify that it qualifies as a Small Broadcaster; provide information about its prior year aggregate tuning hours and the formats of its stations (e.g., the genres of music they use); and provide other information requested by SoundExchange for use in creating a royalty distribution proxy. Even if a Broadcaster has once elected to be treated as a Small Broadcaster, it must make a separate, timely election in each subsequent year in which it wishes to be treated as a Small Broadcaster.

2.4 Representation of Compliance and Non-waiver. By electing to operate pursuant to the Rates and Terms, an entity represents and warrants that it qualifies as a Broadcaster and/or Small Broadcaster, as the case may be. By accepting an election by a transmitting entity or payments or reporting made pursuant to these Rates and Terms, SoundExchange does not acknowledge that the transmitting entity qualifies as a Broadcaster or Small Broadcaster or that it has complied with the requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act (including these Rates and Terms). It is the responsibility of each transmitting entity to ensure that it is in full compliance with applicable requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act. SoundExchange is not in a position to, and does not, make determinations as to whether each of the many services that rely on the statutory licenses is eligible for statutory licensing or any particular royalty payment classification, nor does it continuously verify that such services are in full compliance with all applicable requirements. Accordingly, a Broadcaster agrees that SoundExchange's acceptance of its election, payment or reporting does not give or imply any acknowledgment that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms) and shall not be used as evidence that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms). SoundExchange and copyright owners reserve all their rights to take enforcement action against a transmitting entity that is not in compliance with all applicable requirements that are not inconsistent with these Rates and Terms.

ARTICLE 3 – SCOPE

3.1 In General. In consideration for the payment of royalties pursuant to Article 4 and such other consideration specified herein, Broadcasters that have made a timely election to be subject to these Rates and Terms as provided in Section 2.2 are entitled to publicly perform sound recordings within the scope of the statutory license provided by Section 114 by means of Eligible Transmissions, and to make related ephemeral recordings for use solely for purposes of such Eligible Transmissions within the scope of Section 112(e), in accordance with and subject to the limitations set forth in these Rates and Terms and in strict conformity with the provisions of 17 U.S.C. §§ 112(e) and 114 and their implementing regulations (except as otherwise specifically provided herein or waived by particular copyright owners with respect to their respective sound recordings), in lieu of other rates and terms from time to time applicable under 17 U.S.C. § 112(e) and 114, for all of the period beginning on January 1, 2006, and ending on December 31, 2015.

3.2 Applicability to All Eligible Services Operated by or for a Broadcaster. If a Broadcaster has made a timely election to be subject to these Rates and Terms as provided in Section 2.2, these Rates and Terms shall apply to all Eligible Transmissions made by or for the Broadcaster that qualify as a Performance under 37 C.F.R. § 380.2(i), and related ephemeral recordings. For the avoidance of doubt, a Broadcaster may not rely upon these Rates and Terms for its Eligible Transmissions of one broadcast channel or station and upon different Section 112(e) and 114 rates and terms for its Eligible Transmissions of other broadcast channels or stations.

3.3 No Implied Rights. These Rates and Terms extend only to electing Broadcasters and grant no rights, including by implication or estoppel, to any other person or except as specifically provided herein. Without limiting the generality of the foregoing, these Rates and Terms do not grant (i) any copyright ownership interest in any sound recording; (ii) any trademark or trade dress rights; (iii) any rights outside the United States (as defined in 17 U.S.C. § 101); (iv) any rights of publicity or rights to any endorsement by SoundExchange or any other person; or (v) any rights with respect to performances or reproductions outside the scope of these Rates and Terms or the statutory licenses under 17 U.S.C. §§ 112(e) and 114.

ARTICLE 4 – ROYALTIES

4.1 Minimum Fees. Each Broadcaster will pay an annual, nonrefundable minimum fee of \$500 for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year or part of a calendar year during 2006-2015 during which the Broadcaster is a licensee pursuant to licenses under 17 U.S.C. §§ 112(e) and 114, provided that a Broadcaster shall not be required to pay more than \$50,000 in minimum fees in the aggregate (for 100 or more channels or stations). For purposes of these Rates and Terms, each individual stream (e.g., HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum, except that identical streams for simulcast stations will be treated as a single stream if the streams are available at a single Uniform Resource Locator (URL) and performances from all such stations are aggregated for purposes of determining the number of payable performances hereunder. Upon payment of the minimum fee, the Broadcaster will receive a credit in the amount of the minimum fee against any royalties payable for the same calendar year for the same channel or station. In addition, an electing Small Broadcaster also shall pay a \$100 annual fee (the “Proxy Fee”) to SoundExchange for the reporting waiver discussed in Section 5.1.

4.2 Royalty Rates. Royalties for Eligible Transmissions made pursuant to 17 U.S.C. § 114, and the making of related ephemeral recordings pursuant to 17 U.S.C. § 112(e), shall, except as provided in Section 5.3, be payable on a per-performance basis, as follows:

<u>Year</u>	<u>Rate per Performance</u>
2006	\$0.0008
2007	\$0.0011
2008	\$0.0014
2009	\$0.0015
2010	\$0.0016
2011	\$0.0017
2012	\$0.0020
2013	\$0.0022
2014	\$0.0023
2015	\$0.0025

4.3 MFN. If at any time between publication of this Agreement in the Federal Register and December 31, 2015, SoundExchange enters into an agreement with a Broadcaster specifying terms and conditions for the public performance of sound recordings within the scope of the statutory license provided by Section 114 by means of Eligible Transmissions, and the making of related ephemeral recordings within the scope of Section 112(e), upon principal financial or other material terms that are more favorable to such Broadcaster than the principal financial or other material terms set forth in these Rates and Terms, then SoundExchange shall afford electing Broadcasters hereunder the opportunity, in each Broadcaster's sole discretion, to take advantage of the terms and conditions of such agreement, in their entirety, in lieu of these Rates and Terms, with respect to the Broadcaster's Eligible Transmissions, from the date such more favorable terms became effective under such other agreement and continuing until the earlier of (i) the expiration of such other agreement, or (ii) December 31, 2015.

4.4 Ephemeral Royalty. The royalty payable under 17 U.S.C. § 112(e) for any ephemeral reproductions made by a Broadcaster and covered hereby is deemed to be included within the royalty payments set forth above. SoundExchange has discretion to allocate payments hereunder between the statutory licenses under Sections 112(e) and 114 in the same manner as statutory webcasting royalties for the period 2011-2015, provided that such allocation shall not, by virtue of a Broadcaster's agreement to this Section 4.4, be considered precedent in any judicial, administrative, or other proceeding.

4.5 Payment. Payments of all amounts specified in these Rates and Terms shall be made to SoundExchange. Minimum fees and, where applicable, the Proxy Fee shall be paid by January 31 of each year. Once a Broadcaster's royalty obligation under Section 4.2 with respect to a channel or station for a year exceeds the minimum fee it has paid for that channel or station and year, thereby recouping the credit provided by Section 4.1, the Broadcaster shall make monthly payments at the per-performance rates provided in Section 4.2 beginning with the month in which the minimum fee first was recouped.

4.6 Monthly Obligations. Broadcasters must make monthly payments where required by Section 4.5, and provide statements of account and reports of use, for each month on the 45th day following the end of the month in which the Eligible Transmissions subject to the payments, statements of account, and reports of use were made.

4.7 Past Periods. Notwithstanding anything else in this Agreement, to the extent that a Broadcaster that elects to be subject to these Rates and Terms has not paid royalties for all or any part of the period beginning on January 1, 2006, and ending on February 28, 2009, any amounts payable under these Rates and Terms for Eligible Transmissions during such period for which payment has not previously been made shall be paid by no later than April 30, 2009, including late fees as provided in Section 4.8 from the original due date.

4.8 Late Fees. A Broadcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by SoundExchange in compliance with these Rates and Terms and applicable regulations by the due date. The amount of the late fee shall be 1.5% of a late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, compounded monthly, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully-compliant payment, statement of account or report of use is received by SoundExchange, provided that, in the case of a timely provided but noncompliant statement of account or report of use, SoundExchange has notified the Broadcaster within 90 days regarding any noncompliance that is reasonably evident to SoundExchange.

ARTICLE 5 – REPORTING, AUDITING AND CONFIDENTIALITY

5.1 Small Broadcasters. While SoundExchange's ultimate goal is for all webcasters to provide census reporting, requiring census reporting by the smallest Broadcasters at this time may present undue challenges for them, reduce compliance, and significantly increase SoundExchange's distribution costs. Accordingly, on a transitional basis for a limited time and for purposes of these Rates and Terms only, and in light of the unique business and operational circumstances currently existing with respect to these entities, electing Small Broadcasters shall not be required to provide reports of their use of sound recordings for Eligible Transmissions and related ephemeral recordings. The immediately preceding sentence applies even if the Small Broadcaster actually makes Eligible Transmissions for the year exceeding 27,777 aggregate tuning hours, so long as it qualified as a Small Broadcaster at the time of its election for that year. Instead, SoundExchange shall distribute the aggregate royalties paid by electing Small Broadcasters based on proxy usage data in accordance with a methodology adopted by SoundExchange's Board of Directors. In addition to minimum royalties hereunder, electing Small Broadcasters will pay to SoundExchange a \$100 Proxy Fee to defray costs associated with this reporting waiver, including development of proxy usage data. SoundExchange hopes that offering this option to electing Small Broadcasters will promote compliance with statutory license obligations and thereby increase the pool of royalties available to be distributed to copyright owners and performers. SoundExchange further hopes that selection of a proxy believed by SoundExchange to represent fairly the playlists of Small Broadcasters will allow payment to more copyright owners and performers than would be possible with any other reasonably available option. Small Broadcasters should assume that, effective January 1, 2016, they will be required to report their actual usage in full compliance with then-applicable regulations. Small Broadcasters are encouraged to begin to prepare to report their actual usage by that date, and if it is practicable for them to do so earlier, they may wish not to elect Small Broadcaster status.

5.2 Reporting by Other Broadcasters in General. Broadcasters other than electing Small Broadcasters covered by Section 5.1 shall submit reports of use on a per-performance basis in compliance with the regulations set forth in 37 C.F.R. Part 370, except that the following provisions shall apply notwithstanding the provisions of applicable regulations from time to time in effect:

(a) Broadcasters may pay for, and report usage in, a percentage of their programming hours on an aggregate tuning hour basis as provided in Section 5.3.

(b) Broadcasters shall submit reports of use to SoundExchange on a monthly basis.

(c) As provided in Section 4.6, Broadcasters shall submit reports of use by no later than the 45th day following the last day of the month to which they pertain.

(d) Except as provided in Section 5.3, Broadcasters shall submit reports of use to SoundExchange on a census reporting basis (i.e., reports of use shall include every sound recording performed in the relevant month and the number of performances thereof).

(e) Broadcasters shall either submit a separate report of use for each of their stations, or a collective report of use covering all of their stations but identifying usage on a station-by-station basis.

(f) Broadcasters shall transmit each report of use in a file the name of which includes (i) the name of the Broadcaster, exactly as it appears on its notice of use, and (ii) if the report covers a single station only, the call letters of the station.

(g) Broadcasters shall submit reports of use with headers, as presently described in 37 C.F.R. § 370.3(d)(7).

(h) Broadcasters shall submit a separate statement of account corresponding to each of their reports of use, transmitted in a file the name of which includes (i) the name of the Broadcaster, exactly as it appears on its notice of use, and (ii) if the statement covers a single station only, the call letters of the station.

5.3 Limited ATH-Based Reporting. Recognizing the operational challenge of census reporting, Broadcasters generally reporting pursuant to Section 5.2 may pay for, and report usage in, a percentage of their programming hours on an aggregate tuning hours basis, if (a) census reporting is not reasonably practical for the programming during those hours, and (b) if the total number of hours on a single report of use, provided pursuant to Section 5.2, for which this type of reporting is used is below the maximum percentage set forth below for the relevant year:

<u>Year</u>	<u>Maximum Percentage</u>
2009	20%
2010	18%
2011	16%
2012	14%

2013	12%
2014	10%
2015	8%

To the extent that a Broadcaster chooses to report and pay for usage on an aggregate tuning hours basis pursuant to this Section 5.3, the Broadcaster shall (i) report and pay based on the assumption that the number of sound recordings performed during the relevant programming hours is 12 per hour; (ii) pay royalties (or recoup minimum fees) at the per-performance rates provided in Section 4.2 on the basis of clause (i) above; (iii) include aggregate tuning hours in reports of use provided pursuant to Section 5.2; and (iv) include in reports of use provided pursuant to Section 5.2 complete playlist information for usage reported on the basis of aggregate tuning hours. SoundExchange may distribute royalties paid on the basis of aggregate tuning hours hereunder in accordance with its generally-applicable methodology for distributing royalties paid on such basis.

5.4 Verification of Information. The provisions of applicable regulations for the retention of records and verification of statutory royalty payments (presently 37 C.F.R. §§ 380.4(h) and 380.6) shall apply hereunder. The exercise by SoundExchange of any right under this Section 5.4 shall not prejudice any other rights or remedies of SoundExchange or sound recording copyright owners.

5.5 Confidentiality. The provisions of applicable regulations concerning confidentiality (presently 37 C.F.R. § 380.5 (and the applicable definitions provided in 37 C.F.R. § 380.2)) shall apply hereunder.

ARTICLE 6 – ADDITIONAL PROVISIONS

6.1 Applicable Regulations. To the extent not inconsistent with the Rates and Terms herein, all applicable regulations, including 37 C.F.R. Parts 370 and 380, shall apply to activities subject to these Rates and Terms.

6.2 Participation in Specified Proceedings. A Broadcaster that elects to be subject to these Rates and Terms agrees that it has elected to do so in lieu of any different statutory rates and terms that may otherwise apply during any part of the 2006-2015 period and in lieu of participating at any time in a proceeding to set rates and terms for any part of the 2006-2015 period. Thus, once a Broadcaster has elected to be subject to these Rates and Terms, it shall not at any time participate as a party, intervenor, *amicus curiae* or otherwise, or give evidence or otherwise support or assist, in *Intercollegiate Broadcasting Sys. v. Copyright Royalty Board* (D.C. Circuit Docket Nos. 07-1123, 07-1168, 07-1172, 07-1173, 07-1174, 07-1177, 07-1178, 07-1179), *Digital Performance Right in Sound Recordings and Ephemeral Recordings* (Copyright Royalty Judges' Docket No. 2009-1 CRB Webcasting III), *Digital Performance Right in Sound Recordings and Ephemeral Recordings for a New Subscription Service* (Copyright Royalty Judges' Docket No. 2009-2 CRB New Subscription II) or any successor proceedings to determine royalty rates and terms for reproduction of ephemeral phonorecords or digital audio transmission under Section 112(e) or 114 of the Copyright Act for all or any part of the period 2006-2015, including any appeal of the foregoing or any proceedings on remand from such an appeal, unless subpoenaed on petition of a third party (without any action by a Broadcaster to

encourage or suggest such a subpoena or petition) and ordered to testify or provide documents in such proceeding.

6.3 Use of Agreement in Future Proceedings.

(a) Consistent with 17 U.S.C. § 114(f)(5)(C), and except as specifically provided in Section 6.3(b), neither the Webcaster Settlement Act nor any provisions of these rates and Terms shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of musical works or sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Copyright Royalty Judges.

(b) Pursuant to 17 U.S.C. § 114(f)(5)(C), submission of these Rates and Terms in a proceeding under 17 U.S.C. § 114(f) is expressly authorized. For the avoidance of doubt, this Section 6.3(b) does not authorize participation in a proceeding by an entity that has agreed not to participate in the proceeding (pursuant to Section 6.2 or otherwise).

6.4 Effect of Direct Licenses. Any copyright owner may enter into a voluntary agreement with any Broadcaster setting alternative rates and terms governing the Broadcasters' transmission of copyrighted works owned by the copyright owner, and such voluntary agreement may be given effect in lieu of the Rates and Terms set forth herein.

6.5 Default. A Broadcaster shall comply with all the requirements of these Rates and Terms. If it fails to do so, SoundExchange may give written notice to the Broadcaster that, unless the breach is remedied within 30 days from the date of receipt of notice, the Broadcaster's authorization to make public performances and ephemeral reproductions under these Rates and Terms will be automatically terminated. No such cure period shall apply before termination in case of material noncompliance that has been repeated multiple times so as to constitute a pattern of noncompliance, provided that SoundExchange has given repeated notices of noncompliance. Any transmission made by a Broadcaster in violation of these Rates and Terms or Section 112(e) or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms), outside the scope of these Rates and Terms, or after the expiration or termination of these Rates and Terms shall be fully subject to, among other things, the copyright owners' rights under 17 U.S.C. § 106 and the remedies in 17 U.S.C. § 501-506, and all limitations, exceptions and defenses available with respect thereto.

ARTICLE 7 – MISCELLANEOUS

7.1 Acknowledgement.

(a) The parties acknowledge this agreement was entered into knowingly and willingly.

(b) This agreement is limited solely to webcasting royalties, and the parties acknowledge that it shall not be cited in connection with any efforts to obtain, and sets no precedent related to, over-the-air performance royalties.

(c) The parties further agree that the preceding acknowledgement in Section 7.1(a) does not in any way imply Broadcasters' agreement that the royalty rate standard set forth in 17 U.S.C. § 114(f)(2)(B) is an appropriate rate standard to apply to Broadcasters. Broadcasters shall never be precluded by virtue of such acknowledgement from arguing in the context of future legislation or otherwise that a different royalty rate standard should apply to them, and SoundExchange shall never rely upon by such acknowledgement as a basis for arguing that the royalty rate standard set forth in 17 U.S.C. § 114(f)(2)(B) should apply to Broadcasters.

7.2 Applicable Law and Venue. These Rates and Terms shall be governed by, and construed in accordance with, the laws of the District of Columbia (without giving effect to conflicts of law principles thereof). All actions or proceedings arising directly or indirectly from or in connection with these Rates and Terms shall be litigated only in the United States District Court for the District of Columbia located in Washington, D.C. SoundExchange and Broadcasters consent to the jurisdiction and venue of the foregoing court and consent that any process or notice of motion or other application to said court or a judge thereof may be served inside or outside the District of Columbia by registered mail, return receipt requested, directed to the person for which it is intended at its last known address (and service so made shall be deemed complete five (5) days after the same has been posted as aforesaid) or by personal service or in such other manner as may be permissible under the rules of that court.

7.3 Rights Cumulative. The rights, remedies, limitations, and exceptions provided in these Rates and Terms and available under applicable law shall be cumulative and shall not preclude assertion by any party of any other rights, defenses, limitations, or exceptions or the seeking of any other remedies against another party hereto. These Rates and Terms shall not constitute a waiver of any violation of Section 112 or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms). No failure to exercise and no delay in exercising any right, power or privilege shall operate as a waiver of such right, power or privilege. No single or partial exercise of any right, power or privilege granted under these Rates and Terms or available under applicable law shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. No waiver by any party of full performance by another party in any one or more instances shall be a waiver of the right to require full and complete performance of these Rates and Terms and of obligations under applicable law thereafter.

7.4 Entire Agreement. These Rates and Terms represent the entire and complete agreement between SoundExchange and a Broadcaster with respect to their subject matter and supersede all prior and contemporaneous agreements and undertakings of SoundExchange and a Broadcaster with respect to the subject matter hereof.

EXHIBIT A – AGREED RATES AND TERMS FOR WEBCASTS BY COMMERCIAL WEBCASTERS

ARTICLE 1 – DEFINITIONS

1.1 General. In general, words used in the rates and terms set forth herein (the “Rates and Terms”) and defined in 17 U.S.C. § 112(e) or 114 or 37 C.F.R. Part 380 shall have the meanings specified in those provisions as in effect on the date hereof, with such exceptions or clarifications set forth in Section 1.2.

1.2 Additional Definitions

(a) “Commercial Webcaster” shall mean a webcaster as defined in 17 U.S.C. § 114(f)(5)(E)(iii) that (i) has obtained a compulsory license under 17 U.S.C. §§ 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings; (ii) complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; (iii) is not a Broadcaster (as defined in Section 1.2(a) of the agreement published in the Federal Register on March 3, 2009 at 74 Fed. Reg. 9299); (iv) is not a noncommercial webcaster as defined in 17 U.S.C. § 114(f)(5)(E)(i); and (v) has not elected to be subject to any other rates and terms adopted pursuant to the Webcaster Settlement Act of 2008 or the Webcaster Settlement Act of 2009.

(b) “Eligible Transmission” shall mean an eligible nonsubscription transmission, or a transmission through a new subscription service, made by a Commercial Webcaster over the internet, that is in full compliance with the eligibility and other requirements of Sections 112(e) and 114 of the Copyright Act and their implementing regulations, except as expressly modified in these Rates and Terms, and of a type otherwise subject to the payment of royalties under 37 C.F.R. Part 380.

(c) “SoundExchange” shall mean SoundExchange, Inc. and shall include its successors and assigns.

ARTICLE 2 – AGREEMENT PURSUANT TO WEBCASTER SETTLEMENT ACT OF 2009

2.1 Availability of Rates and Terms. Pursuant to the Webcaster Settlement Act of 2009, and subject to the provisions set forth below, Commercial Webcasters may elect to be subject to these Rates and Terms in their entirety, with respect to such Commercial Webcasters’ Eligible Transmissions and related ephemeral recordings, for all of the period beginning on January 1, 2009, and ending on December 31, 2015, in lieu of other rates and terms from time to time applicable under 17 U.S.C. § 112(e) and 114, by complying with the procedure set forth in Section 2.2 hereof. Any person or entity that does not satisfy the eligibility criteria to be a Commercial Webcaster must comply with otherwise applicable rates and terms.

2.2 Election Process in General. To elect to be subject to these Rates and Terms, in lieu of any royalty rates and terms that otherwise might apply under 17 U.S.C. §§ 112(e) and 114, for all of the period beginning on January 1, 2009, and ending on December 31, 2015, a Commercial

Webcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at <http://www.soundexchange.com>) by the later of (i) 15 days after publication of these Rates and Terms in the Federal Register; or (ii) in the case of a Commercial Webcaster that is not making Eligible Transmissions as of the publication of these Rates and Terms in the Federal Register but begins doing so at a later time, 30 days after the Commercial Webcaster begins making such Eligible Transmissions. Notwithstanding anything else in these Rates and Terms, a person or entity otherwise qualifying as a Commercial Webcaster that is participating in any way in any appeal of the Final Determination of the Copyright Royalty Judges concerning royalty rates and terms under Sections 112(e) and 114 of the Copyright Act for the period January 1, 2006, through December 31, 2010 published in the Federal Register at 72 Fed. Reg. 24084 (May 1, 2007) (the "Final Determination"), any proceedings on remand from such appeal, Docket No. 2009-1 CRB Webcasting III, as noticed in the Federal Register at 74 Fed. Reg. 318-19 (Jan. 5, 2009), or any other proceedings to determine royalty rates and terms for Eligible Transmissions (as defined in Section 1.2(b)) or related ephemeral phonorecords under Section 112(e) or 114 of the Copyright Act for all or any part of the period January 1, 2006, through December 31, 2015 shall not have the right to elect to be treated as a Commercial Webcaster or claim the benefit of these Rates and Terms, unless it withdraws from such proceedings prior to submitting to SoundExchange a completed and signed election form as contemplated by this Section 2.2.

2.3 Representation of Compliance and Non-waiver. By electing to operate pursuant to these Rates and Terms, an entity represents and warrants that it qualifies as a Commercial Webcaster. By accepting an election by a transmitting entity or payments or reporting made pursuant to these Rates and Terms, SoundExchange does not acknowledge that the transmitting entity qualifies as a Commercial Webcaster or that it has complied with the eligibility or other requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act (including these Rates and Terms). It is the responsibility of each transmitting entity to ensure that it is in full compliance with applicable requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act. SoundExchange is not in a position to, and does not, make determinations as to whether each of the many services that rely on the statutory licenses is eligible for statutory licensing or any particular royalty payment classification, nor does it continuously verify that such services are in full compliance with all applicable requirements. Accordingly, a Commercial Webcaster agrees that SoundExchange's acceptance of its election, payment or reporting does not give or imply any acknowledgment that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms) and shall not be used as evidence that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms). SoundExchange and copyright owners reserve all their rights to take enforcement action against a transmitting entity that is not in compliance with all applicable requirements.

ARTICLE 3 – SCOPE

3.1 In General. Commercial Webcasters that have made a timely election to be subject to these Rates and Terms as provided in Section 2.2 are entitled to publicly perform sound recordings within the scope of the statutory license provided by Section 114 by means of Eligible Transmissions, and to make related ephemeral recordings for use solely for purposes of such Eligible Transmissions within the scope of Section 112(e), in accordance with and subject to the

limitations set forth in these Rates and Terms and in strict conformity with the provisions of 17 U.S.C. §§ 112(e) and 114 and their implementing regulations, in lieu of other rates and terms from time to time applicable under 17 U.S.C. § 112(e) and 114, for all of the period beginning on January 1, 2009, and ending on December 31, 2015.

3.2 Applicability to All Eligible Services Operated by or for a Commercial Webcaster. If a Commercial Webcaster has made a timely election to be subject to these Rates and Terms as provided in Section 2.2, these Rates and Terms shall apply to all Eligible Transmissions made by or for the Commercial Webcaster.

3.3 No Implied Rights. These Rates and Terms extend only to electing Commercial Webcasters and grant no rights, including by implication or estoppel, to any other person or except as specifically provided herein. Without limiting the generality of the foregoing, these Rates and Terms do not grant (i) any copyright ownership interest in any sound recording; (ii) any trademark or trade dress rights; (iii) any rights outside the United States (as defined in 17 U.S.C. § 101); (iv) any rights of publicity or rights to any endorsement by SoundExchange or any other person; or (v) any rights with respect to performances or reproductions outside the scope of these Rates and Terms or the statutory licenses under 17 U.S.C. §§ 112(e) and 114.

ARTICLE 4 – ROYALTIES

4.1 Minimum Fees. Each Commercial Webcaster will pay an annual, nonrefundable minimum fee of \$500 for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year or part of a calendar year during 2009-2015 during which the Commercial Webcaster is a licensee pursuant to licenses under 17 U.S.C. §§ 112(e) and 114, provided that a Commercial Webcaster shall not be required to pay more than \$50,000 in minimum fees in the aggregate (for 100 or more channels or stations) in any one year. Upon payment of the minimum fee, the Commercial Webcaster will receive a credit in the amount of the minimum fee against any royalties payable for the same calendar year for the same channel or station.

4.2 Royalty Rates. Royalties for Eligible Transmissions made pursuant to 17 U.S.C. § 114, and the making of related ephemeral recordings pursuant to 17 U.S.C. § 112(e), shall be payable on a per-performance basis, as follows:

<u>Year</u>	<u>Rate per Performance</u>
2009	\$0.0016
2010	\$0.0017
2011	\$0.0018
2012	\$0.0020
2013	\$0.0021
2014	\$0.0022
2015	\$0.0024

4.3 Ephemeral Royalty. The royalty payable under 17 U.S.C. § 112(e) for any ephemeral reproductions made by a Commercial Webcaster and covered hereby is deemed to be included

within the royalty payments set forth above. SoundExchange may allocate payments hereunder between the statutory licenses under Sections 112(e) and 114 in the same manner as statutory webcasting royalties for the period 2011-2015.

4.4 Payment. Payments of all amounts specified in these Rates and Terms shall be made to SoundExchange. Minimum fees shall be paid by January 31 of each year. Once a Commercial Webcaster's royalty obligation under Section 4.2 with respect to a channel or station for a year exceeds the minimum fee it has paid for that channel or station and year, thereby recouping the credit provided by Section 4.1, the Commercial Webcaster shall make monthly payments at the per-performance rates provided in Section 4.2 beginning with the month in which the minimum fee first was recouped.

4.5 Monthly Obligations. Commercial Webcasters must make monthly payments where required by Section 4.4 and provide statements of account and reports of use, for each month on the 45th day following the end of the month in which the Eligible Transmissions subject to the payments, statements of account, and reports of use were made.

4.6 Past Periods. Notwithstanding Sections 4.4 and 4.5, a Commercial Webcaster's first monthly payment after electing to be subject to these Rates and Terms shall be adjusted to reflect any differences between (i) the amounts payable under these Rates and Terms for all of 2009 to the end of the month for which the payment is made and (ii) the Commercial Webcaster's previous payments for all of 2009 to the end of the month for which the payment is made. Late fees under 37 C.F.R. § 380.4(e) shall apply to any payment previously due and not made on time, or to any late payment hereunder.

ARTICLE 5 – ADDITIONAL PROVISIONS

5.1 Applicable Regulations. To the extent not inconsistent with the Rates and Terms herein, all applicable regulations, including 37 C.F.R. Parts 370 and 380, shall apply to activities subject to these Rates and Terms.

5.2 Participation in Specified Proceedings. A Commercial Webcaster that elects to be subject to these Rates and Terms agrees that it has elected to do so in lieu of any different statutory rates and terms that may otherwise apply during any part of the 2009-2015 period and in lieu of participating at any time in a proceeding to set rates and terms for Eligible Transmissions and related ephemeral recordings for any part of the 2006-2015 period. Thus, once a Commercial Webcaster has elected to be subject to these Rates and Terms, it shall not at any time participate as a party, intervenor, *amicus curiae* or otherwise, or give evidence or otherwise support or assist, in *Intercollegiate Broadcasting Sys. v. Copyright Royalty Board* (D.C. Circuit Docket Nos. 07-1123, 07-1168, 07-1172, 07-1173, 07-1174, 07-1177, 07-1178, 07-1179), any proceedings on remand from such appeal, *Digital Performance Right in Sound Recordings and Ephemeral Recordings* (Copyright Royalty Judges' Docket No. 2009-1 CRB Webcasting III), or any other proceedings to determine royalty rates and terms for Eligible Transmissions and reproduction of related ephemeral phonorecords under Section 112(e) or 114 of the Copyright Act for all or any part of the period 2006-2015, including any appeal of the foregoing or any proceedings on remand from such an appeal, unless subpoenaed on petition of a third party (without any action by a Commercial Webcaster to encourage or suggest such a

subpoena or petition) and ordered to testify or provide documents in such proceeding.

5.3 Use of Agreement in Future Proceedings. Pursuant to 17 U.S.C. § 114(f)(5)(C), submission of these Rates and Terms in a proceeding under 17 U.S.C. § 114(f) is expressly authorized.

5.4 Effect of Direct Licenses. Any copyright owner may enter into a voluntary agreement with any Commercial Webcaster setting alternative rates and terms governing the Commercial Webcasters' transmission of copyrighted works owned by the copyright owner, and such voluntary agreement may be given effect in lieu of the Rates and Terms set forth herein.

ARTICLE 6 – MISCELLANEOUS

6.1 Acknowledgement. The parties acknowledge this agreement was entered into knowingly and willingly. The parties further acknowledge that any transmission made by a Commercial Webcaster in violation of these Rates and Terms or Section 112(e) or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms), outside the scope of these Rates and Terms or Section 112(e) or 114, or after the expiration or termination of these Rates and Terms shall be fully subject to, among other things, the copyright owners' rights under 17 U.S.C. § 106 and the remedies in 17 U.S.C. § 501-506, and all limitations, exceptions and defenses available with respect thereto.

6.2 Applicable Law and Venue. These Rates and Terms shall be governed by, and construed in accordance with, the laws of the District of Columbia (without giving effect to conflicts of law principles thereof). All actions or proceedings arising directly or indirectly from or in connection with these Rates and Terms shall be litigated only in the United States District Court for the District of Columbia located in Washington, D.C. SoundExchange and Commercial Webcasters consent to the jurisdiction and venue of the foregoing court, waive any objection thereto on forum *non conveniens* or similar grounds, and consent that any process or notice of motion or other application to said court or a judge thereof may be served inside or outside the District of Columbia by registered mail, return receipt requested, directed to the person for which it is intended at its last known address (and service so made shall be deemed complete five (5) days after the same has been posted as aforesaid) or by personal service or in such other manner as may be permissible under the rules of that court.

6.3 Rights Cumulative. The rights, remedies, limitations, and exceptions provided in these Rates and Terms and available under applicable law shall be cumulative and shall not preclude assertion by any party of any other rights, defenses, limitations, or exceptions or the seeking of any other remedies against another party hereto. These Rates and Terms shall not constitute a waiver of any violation of Section 112 or 114 or their implementing regulations. No failure to exercise and no delay in exercising any right, power or privilege shall operate as a waiver of such right, power or privilege. No single or partial exercise of any right, power or privilege granted under these Rates and Terms or available under applicable law shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. No waiver by any party of full performance by another party in any one or more instances shall be a waiver of the right to require full and complete performance of these Rates and Terms and of obligations under applicable law thereafter.

6.4 Entire Agreement. These Rates and Terms represent the entire and complete agreement between SoundExchange and a Commercial Webcaster with respect to their subject matter and supersede all prior and contemporaneous agreements and undertakings of SoundExchange and a Commercial Webcaster with respect to the subject matter hereof.

EXHIBIT A
AGREED RATES AND TERMS FOR
NONCOMMERCIAL EDUCATIONAL WEBCASTERS

ARTICLE 1 – DEFINITIONS

1.1 General. In general, words used in the rates and terms set forth herein (the “Rates and Terms”) and defined in 17 U.S.C. § 112(e) or 114 or 37 C.F.R. Part 380 shall have the meanings specified in those provisions as in effect on the date hereof, with such exceptions or clarifications set forth in Section 1.2.

1.2 Additional Definitions

1.2.1 “Noncommercial Educational Webcaster” shall mean a Noncommercial Webcaster (as defined in 17 U.S.C. § 114(f)(5)(E)(i)) that (i) has obtained a compulsory license under 17 U.S.C. §§ 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings; (ii) complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; (iii) is directly operated by, or is affiliated with and officially sanctioned by, and the digital audio transmission operations of which are staffed substantially by students enrolled at, a domestically-accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution, and (iv) is not a “public broadcasting entity” (as defined in 17 U.S.C. § 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. § 396.

1.2.2 “Eligible Transmission” shall mean an eligible nonsubscription transmission made by a Noncommercial Educational Webcaster over the internet.

1.2.3 “SoundExchange” shall mean SoundExchange, Inc. and shall include its successors and assigns.

1.2.4 “ATH” or “Aggregate Tuning Hours” shall mean the total hours of programming that a Noncommercial Educational Webcaster has transmitted during the relevant period to all listeners within the United States over all channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions, including from any archived programs, less the actual running time of any sound recordings for which the Noncommercial Educational Webcaster has obtained direct licenses apart from 17 U.S.C. § 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a Noncommercial Educational Webcaster transmitted one hour of programming to 10 simultaneous listeners, the Noncommercial Educational Webcaster’s Aggregate Tuning Hours would equal 10. If three minutes of that hour consisted of transmission of a directly licensed recording, the Noncommercial Educational Webcaster’s Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a Noncommercial Educational Webcaster for 10 hours (and none of the recordings transmitted during that time was directly licensed), the Noncommercial Educational Webcaster’s Aggregate Tuning Hours would equal 10.

ARTICLE 2 – AGREEMENT PURSUANT TO WEBCASTER SETTLEMENT ACT OF 2009

2.1 Availability of Rates and Terms. Pursuant to the Webcaster Settlement Act of 2009, and subject to the provisions set forth below, Noncommercial Educational Webcasters may elect to be subject to the rates and terms set forth herein in their entirety, with respect to Eligible Transmissions and related ephemeral recordings, for all of any one or more calendar years during the period beginning on January 1, 2011, and ending on December 31, 2015 (the “Term”), in lieu of other rates and terms from time to time applicable under 17 U.S.C. § 112(e) and 114, by complying with the procedure set forth in Section 2.2.1 hereof. In addition, Noncommercial Educational Webcasters may elect to be subject to the provisions of Article 5 only, for all of the period beginning on January 1, 2009, and ending on December 31, 2010 (the “Special Reporting Term”), in lieu of reporting under 37 C.F.R. Part 370.3, by complying with the procedure set forth in Section 2.2.3 hereof. Any person or entity that does not satisfy the eligibility criteria to be a Noncommercial Educational Webcaster must comply with otherwise applicable rates and terms.

2.2 Election Process.

2.2.1 In General. To elect to be subject to these Rates and Terms, in their entirety, in lieu of any royalty rates and terms that otherwise might apply under 17 U.S.C. §§ 112(e) and 114, for any calendar year during the Term, a Noncommercial Educational Webcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at <http://www.soundexchange.com>) by January 31st of each such calendar year or, in the case of a Noncommercial Educational Webcaster that has not made Eligible Transmissions as of January 31st of a calendar year within the Term but begins doing so at a later time that year and seeks to be subject to these Rates and Terms for that year, 45 days after the end of the month in which the Noncommercial Educational Webcaster begins making such Eligible Transmissions. Even if an entity has once elected to be treated as a Noncommercial Educational Webcaster, it must make a separate, timely election in each subsequent calendar year in which it wishes (and is eligible) to be treated as such. A Noncommercial Educational Webcaster may instead elect other available rates for which it is eligible. However, a Noncommercial Educational Webcaster may not elect different rates for a given calendar year after it has elected to be subject to these Rates and Terms or for any year in which it has already paid royalties.

2.2.2 Contents of Election Form. On its election form(s) pursuant to Section 2.2.1, the Noncommercial Educational Webcaster must, among other things, provide a certification, signed by an officer or another duly authorized faculty member or administrator of the institution with which the Noncommercial Educational Webcaster is affiliated, on a form provided by SoundExchange, that the Noncommercial Educational Webcaster (i) qualifies as a Noncommercial Educational Webcaster for the relevant year, and (ii) did not exceed 159,140 total ATH in any month of the prior year for which the Noncommercial Educational Webcaster did not submit a Statement of Account and pay required Usage Fees. At the same time the Noncommercial Educational Webcaster must

identify all its stations making Eligible Transmissions. If, subsequent to making an election, there are changes in the Noncommercial Educational Webcaster's corporate name or stations making Eligible Transmissions, or other changes in its corporate structure that affect the application of these Rates and Terms, the Noncommercial Educational Webcaster shall promptly notify SoundExchange thereof. On its election form(s), the Noncommercial Educational Webcaster must, among other things, identify which of the reporting options set forth in Section 5.1 it elects for the relevant year (provided that it must be eligible for the option it elects).

2.2.3 Election for Special Reporting Term. A Noncommercial Educational Webcaster may elect to be subject to the provisions of Article 5 only, for all of the Special Reporting Term, in lieu of reporting under 37 C.F.R. Part 370.3 as it may from time to time exist. To do so, the Noncommercial Educational Webcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at <http://www.soundexchange.com>), which SoundExchange may combine with its form of Statement of Account. Such form must be submitted with timely payment of the Noncommercial Educational Webcaster's minimum fee for 2010 under 37 C.F.R. § 380.4(d) and the Proxy Fee described in Section 5.1.1 for both 2009 and 2010 if applicable. On any such election form, the Noncommercial Educational Webcaster must, among other things, provide (i) a certification, signed by an officer or another duly authorized faculty member or administrator of the institution with which the Noncommercial Educational Webcaster is affiliated, that the Noncommercial Educational Webcaster qualifies as a Noncommercial Educational Webcaster for the Special Reporting Term, and (ii) identification of all its stations making Eligible Transmissions and which of the reporting options set forth in Section 5.1 it elects for the Special Reporting Term (provided that it must be eligible for the option it elects for the entire Special Reporting Term).

2.2.4 Participation in Specified Proceedings. Notwithstanding anything else in these Rates and Terms, a person or entity otherwise qualifying as a Noncommercial Educational Webcaster that has participated or is participating in any way in any appeal of the Final Determination of the Copyright Royalty Judges concerning royalty rates and terms under Sections 112(e) and 114 of the Copyright Act for the period January 1, 2006, through December 31, 2010 published in the Federal Register at 72 Fed. Reg. 24084 (May 1, 2007) (the "Final Determination"), any proceedings on remand from such appeal, *Digital Performance Right in Sound Recordings and Ephemeral Recordings* (Copyright Royalty Judges' Docket No. 2009-1 CRB Webcasting III), *Digital Performance Right in Sound Recordings and Ephemeral Recordings for a New Subscription Service* (Copyright Royalty Judges' Docket No. 2009-2 CRB New Subscription II), or any other proceeding to determine royalty rates or terms under Sections 112(e) or 114 of the Copyright Act for all or any part of the period January 1, 2006, through December 31, 2015 (all of the foregoing, including appeals of the proceedings identified above, collectively "Specified Proceedings") shall not have the right to elect to be treated as a Noncommercial Educational Webcaster or claim the benefit of these Rates and Terms, unless it withdraws from such proceeding(s) prior to submitting to SoundExchange a completed and signed election form as contemplated by

Section 2.2.1 or 2.2.3, as applicable. In addition, once a Noncommercial Educational Webcaster has elected to be subject to these Rates and Terms, either for the Special Reporting Term or any part of the Term, it shall not at any time participate as a party, intervenor, *amicus curiae* or otherwise, or give evidence or otherwise support or assist, in any Specified Proceeding, unless subpoenaed on petition of a third party (without any action by a Noncommercial Educational Webcaster to encourage or suggest such a subpoena or petition) and ordered to testify or provide documents in such proceeding.

2.3 Representation of Compliance and Non-Waiver. By electing to operate pursuant to the Rates and Terms, either for the Special Reporting Term or any part of the Term, an entity represents and warrants that it qualifies as a Noncommercial Educational Webcaster and is eligible for the reporting option set forth in Section 5.1 that it elects. By accepting an election by a transmitting entity pursuant to these Rates and Terms or any payments or reporting made by a transmitting entity, SoundExchange does not acknowledge that the transmitting entity qualifies as a Noncommercial Educational Webcaster or for a particular reporting option or that it has complied with the eligibility or other requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act (including these Rates and Terms). It is the responsibility of each transmitting entity to ensure that it is eligible for the statutory licenses under Sections 112(e) and 114 of the Copyright Act and in full compliance with applicable requirements thereof. SoundExchange is not in a position to, and does not, make determinations as to whether each of the many services that rely on the statutory licenses is eligible for statutory licensing or any particular royalty payment classification, nor does it continuously verify that such services are in full compliance with all applicable requirements. Accordingly, a transmitting entity agrees that SoundExchange's acceptance of its election, payment or reporting does not give or imply any acknowledgment that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms) and shall not be used as evidence that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms). SoundExchange and copyright owners reserve all their rights to take enforcement action against a transmitting entity that is not in compliance with all applicable requirements that are not inconsistent with these Rates and Terms.

ARTICLE 3 – SCOPE

3.1 In General. Noncommercial Educational Webcasters that have made a timely election to be subject to these Rates and Terms as provided in Section 2.2.1 are entitled to publicly perform sound recordings within the scope of the statutory license provided by Section 114 by means of Eligible Transmissions, and to make related ephemeral recordings for use solely for purposes of such Eligible Transmissions within the scope of Section 112(e), in accordance with and subject to the limitations set forth in these Rates and Terms and in strict conformity with the provisions of 17 U.S.C. §§ 112(e) and 114 and their implementing regulations (except as otherwise specifically provided herein), in lieu of other rates and terms from time to time applicable under 17 U.S.C. § 112(e) and 114, for each calendar year within the Term that they have made a timely election to be subject to these Rates and Terms.

3.2 Applicable to All Services Operated by or for a Noncommercial Educational Webcaster. If a Noncommercial Educational Webcaster has made a timely election to be subject to these Rates and Terms as provided in Section 2.2.1, these Rates and Terms shall apply to all Eligible

Transmissions made by or for the Noncommercial Educational Webcaster and related ephemeral recordings. For clarity, a Noncommercial Educational Webcaster may not rely upon these Rates and Terms for its Eligible Transmissions of one broadcast channel or station and upon different Section 112(e) and 114 rates and terms for its Eligible Transmissions of other broadcast channels or stations. However, a single educational institution may have more than one webcasting station making Eligible Transmissions. If so, each such station may determine individually whether it elects to be subject to these Rates and Terms as a Noncommercial Educational Webcaster. It is expressly contemplated that within a single educational institution, one or more Noncommercial Educational Webcasters and one or more public broadcasting entities (as defined in 17 U.S.C. § 118(g)) may exist simultaneously, each paying under a different set of rates and terms.

3.3 No Implied Rights. These Rates and Terms extend only to electing Noncommercial Educational Webcasters and grant no rights, including by implication or estoppel, to any other person or entity, or except as specifically provided herein. Without limiting the generality of the foregoing, these Rates and Terms do not grant (i) any copyright ownership interest in any sound recording; (ii) any trademark or trade dress rights; (iii) any rights outside the United States (as defined in 17 U.S.C. § 101); (iv) any rights of publicity or rights to any endorsement by SoundExchange or any other person; or (v) any rights with respect to performances or reproductions outside the scope of these Rates and Terms or the statutory licenses under 17 U.S.C. §§ 112(e) and 114.

ARTICLE 4 – ROYALTIES

4.1 Minimum Fee. Each Noncommercial Educational Webcaster shall pay an annual, nonrefundable minimum fee of \$500 (the “Minimum Fee”) for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year it elects to be subject to these Rates and Terms. For clarity, each individual stream (e.g., HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum. In addition, a Noncommercial Educational Webcaster electing the reporting waiver described in Section 5.1.1 shall pay a \$100 annual fee (the “Proxy Fee”) to SoundExchange.

4.2 Additional Usage Fees. If, in any month, a Noncommercial Educational Webcaster makes total transmissions in excess of 159,140 Aggregate Tuning Hours (“ATH”) on any individual channel or station, the Noncommercial Educational Webcaster shall pay additional usage fees (“Usage Fees”) for the Eligible Transmissions it makes on that channel or station after exceeding 159,140 total ATH at the following per-performance rates:

<u>Year</u>	<u>Rate per Performance</u>
2011	\$0.0017
2012	\$0.0020
2013	\$0.0022
2014	\$0.0023
2015	\$0.0025

For a Noncommercial Educational Webcaster unable to calculate actual total performances and not required to report ATH or actual total performances under Section 5.1.3, the Noncommercial Educational Webcaster may pay Usage Fees on an ATH basis, provided that the Noncommercial Educational Webcaster shall pay Usage Fees at the per-performance rates provided above in this Section 4.2 based on the assumption that the number of sound recordings performed is 12 per hour. SoundExchange may distribute royalties paid on the basis of ATH hereunder in accordance with its generally-applicable methodology for distributing royalties paid on such basis.

A Noncommercial Educational Webcaster offering more than one channel or station shall pay Usage Fees on a per channel or station basis.

4.3 Ephemeral Royalty. The royalty payable under 17 U.S.C. § 112(e) for any ephemeral reproductions made by a Noncommercial Educational Webcaster and covered hereby is deemed to be included within the royalty payments set forth above. SoundExchange may allocate payments hereunder between the statutory licenses under Sections 112(e) and 114 in the same manner as statutory webcasting royalties for the period 2011-2015.

4.4 Statements of Account and Payment.

4.4.1 Minimum Fee. Noncommercial Educational Webcasters shall submit the Minimum Fee, and Proxy Fee if applicable, accompanied by a statement of account in a form available on the SoundExchange Web site at <http://www.soundexchange.com> ("Statement of Account") by the date specified in Section 2.2.1 for making the Noncommercial Educational Webcaster's election to be subject to these Rates and Terms for the applicable calendar year.

4.4.2 Usage Fees. Noncommercial Educational Webcasters required to pay Usage Fees shall submit a Minimum Fee and Statement of Account in accordance with Section 4.4.1, and in addition, a Statement of Account accompanying any Usage Fees owed pursuant to Section 4.2. Such a Statement of Account and accompanying Usage Fees shall be due 45 days after the end of the month in which the excess usage occurred.

4.4.3 Identification of Statements of Account. Noncommercial Educational Webcasters shall include on each of their Statements of Account (i) the name of the Noncommercial Educational Webcaster, exactly as it appears on its notice of use, and (ii) if the Statement of Account covers a single station only, the call letters or name of the station.

4.4.4 Payment. Payments of all amounts specified in these Rates and Terms shall be made to SoundExchange.

4.5 Late Fees. A Noncommercial Educational Webcaster shall pay a late fee for each instance in which any payment, any Statement of Account or any Report of Use (as defined in Section 5.1 below) is not received by SoundExchange in compliance with these Rates and Terms and applicable regulations by the due date. The amount of the late fee shall be 1.5% of the late payment, or 1.5% of the payment associated with a late Statement of Account or Report of Use, per month, compounded monthly, or the highest lawful rate, whichever is lower. The late fee

shall accrue from the due date of the payment, Statement of Account or Report of Use until a fully compliant Payment, Statement of Account or Report of Use (as applicable) is received by SoundExchange, provided that, in the case of a timely provided but noncompliant Statement of Account or Report of Use, SoundExchange has notified the Noncommercial Educational Webcaster within 90 days regarding any noncompliance that is reasonably evident to SoundExchange.

ARTICLE 5 – REPORTING

5.1 Provision of Reports of Use. Noncommercial Educational Webcasters shall have the following three options, as applicable, with respect to provision of reports of use of sound recordings (“Reports of Use”):

5.1.1 Reporting Waiver. In light of the unique business and operational circumstances currently existing with respect to these services, a Noncommercial Educational Webcaster that did not exceed 55,000 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 55,000 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to pay a nonrefundable, annual Proxy Fee of \$100 in lieu of providing Reports of Use for the calendar year. In addition, a Noncommercial Educational Webcaster that unexpectedly exceeded 55,000 total ATH on one or more channels or stations for more than one month during the immediately preceding calendar year may elect to pay the Proxy Fee and receive the reporting waiver described in this Section 5.1.1 during a calendar year, if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 55,000 total ATH per month during that calendar year. SoundExchange shall distribute the aggregate royalties paid by electing Noncommercial Educational Webcasters based on proxy usage data in accordance with a methodology adopted by SoundExchange’s Board of Directors. The Proxy Fee is intended to defray SoundExchange’s costs associated with this reporting waiver, including development of proxy usage data. The Proxy Fee shall be paid by the date specified in Section 2.2.1 for making the Noncommercial Educational Webcaster’s election to be subject to these Rates and Terms for the applicable calendar year (or in the case of the Special Reporting Term, by the date specified in Section 2.2.3) and shall be accompanied by a certification on a form provided by SoundExchange, signed by an officer or another duly authorized faculty member or administrator of the applicable educational institution, stating that the Noncommercial Educational Webcaster is eligible for the Proxy Fee option because of its past and expected future usage, and if applicable, measures to ensure that it will not make excess Eligible Transmissions in the future.

5.1.2 Sample-Basis Reports. A Noncommercial Educational Webcaster that did not exceed 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 159,140 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect (as described in Section 2.2.2) to provide Reports of Use on a sample basis (two weeks per calendar quarter) in accordance with the regulations at 37 C.F.R. § 370.3 as they existed at January 1, 2009, except that

notwithstanding 37 C.F.R. § 370.3(c)(2)(vi), such an electing Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances and may in lieu thereof provide channel or station name and play frequency (i.e., number of spins). Notwithstanding the foregoing, a Noncommercial Educational Webcaster that is able to report ATH or actual total performances is encouraged to do so. These Reports of Use shall be submitted to SoundExchange no later than January 31st of the year immediately following the year to which they pertain.

5.1.3 Census-Basis Reports. If any of the following three conditions is satisfied, a Noncommercial Webcaster must report pursuant to this Section 5.1.3: (i) the Noncommercial Educational Webcaster exceeded 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year, (ii) the Noncommercial Educational Webcaster expects to exceed 159,140 total ATH for any individual channel or station for any calendar month in the applicable calendar year, or (iii) the Noncommercial Educational Webcaster otherwise does not elect (as described in Section 2.2.2) to be subject to Section 5.1.1 or 5.1.2. A Noncommercial Educational Webcaster required to report pursuant to this Section 5.1.3 shall provide Reports of Use to SoundExchange quarterly on a census reporting basis (i.e., Reports of Use shall include every sound recording performed in the relevant quarter), containing information otherwise complying with applicable regulations (but no less information than required by 37 C.F.R. § 370.3 as of January 1, 2009), except that notwithstanding 37 C.F.R. § 370.3(c)(2)(vi), such a Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances, and may in lieu thereof provide channel or station name and play frequency (i.e., number of spins), during the first calendar year it is required to report in accordance with this Section 5.1.3. For the avoidance of doubt, after a Noncommercial Educational Webcaster has been required to report in accordance with this Section 5.1.3 for a full calendar year, it must thereafter include ATH or actual total performances in its Reports of Use. All Reports of Use under this Section 5.1.3 shall be submitted to SoundExchange no later than the 45th day after the end of each calendar quarter.

5.2 Delivery of Reports. Reports of Use submitted by Noncommercial Educational Webcasters shall conform to the following additional requirements:

5.2.1 Noncommercial Educational Webcasters shall either submit a separate Report of Use for each of their stations, or a collective report of use covering all of their stations but identifying usage on a station-by-station basis.

5.2.2 Noncommercial Educational Webcasters shall transmit each Report of Use in a file the name of which includes (i) the name of the Noncommercial Educational Webcaster, exactly as it appears on its notice of use, and (ii) if the Report of Use covers a single station only, the call letters or name of the station.

5.2.3 Noncommercial Educational Webcasters shall submit reports of use with headers, as such headers are described in 37 C.F.R. § 370.3(d)(7).

5.3 Server Logs. To the extent not already required by the current regulations set forth in 37 C.F.R. Part 380, as they existed on January 1, 2009, Noncommercial Educational Webcasters shall retain for a period of at least three full calendar years server logs sufficient to substantiate all information relevant to eligibility, rate calculation and reporting hereunder. To the extent that a third-party web hosting or service provider maintains equipment or software for a Noncommercial Educational Webcaster and/or such third party creates, maintains, or can reasonably create such server logs, the Noncommercial Educational Webcaster shall direct that such server logs be created and maintained by said third party for a period of at least three full calendar years and/or that such server logs be provided to, and maintained by, the Noncommercial Educational Webcaster.

ARTICLE 6 – ADDITIONAL PROVISIONS

6.1 Applicable Regulations. To the extent not inconsistent with the Rates and Terms herein, all applicable regulations, including 37 C.F.R. Parts 370 and 380, shall apply to activities subject to these Rates and Terms. Without limiting the foregoing, the provisions of applicable regulations for the retention of records and verification of statutory royalty payments (presently 37 C.F.R. §§ 380.4(h) and 380.6) shall apply hereunder. Noncommercial Educational Webcasters shall cooperate in good faith with any such verification, and the exercise by SoundExchange of any right with respect thereto shall not prejudice any other rights or remedies of SoundExchange or sound recording copyright owners.

6.2 Use of Agreement in Future Proceedings. Pursuant to 17 U.S.C. § 114(f)(5)(C), submission of these Rates and Terms in a proceeding under 17 U.S.C. § 114(f) by any participant in such proceeding is expressly authorized.

6.3 Effect of Direct Licenses. Any copyright owner may enter into a voluntary agreement with any Noncommercial Educational Webcaster setting alternative rates and terms governing the Noncommercial Educational Webcaster's transmission of copyrighted works owned by the copyright owner, and such voluntary agreement may be given effect in lieu of the Rates and Terms set forth herein.

6.4 Default. A Noncommercial Educational Webcaster shall comply with all the requirements of these Rates and Terms. If it fails to do so, SoundExchange may give written notice to the Noncommercial Educational Webcaster that, unless the breach is remedied within 30 days from the date of receipt of notice, the Noncommercial Educational Webcaster's authorization to make public performances and ephemeral reproductions under these Rates and Terms may be terminated by further written notice; provided, however, that such period shall be 60 (rather than 30), in the case of any such notice sent by SoundExchange between May 15 and August 15 or between December 1 and January 30. No such cure period shall apply before termination in case of material noncompliance that has been repeated multiple times so as to constitute a pattern of noncompliance, provided that SoundExchange has given at least two notices of noncompliance. Any transmission made by a Noncommercial Educational Webcaster in violation of these Rates and Terms or Section 112(e) or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms), outside the scope of these Rates and Terms or Section 112(e) or 114, or after the expiration or termination of these Rates and Terms shall be fully subject to, among other things,

the copyright owners' rights under 17 U.S.C. § 106 and the remedies in 17 U.S.C. §§ 501-506, and all limitations, exceptions and defenses available with respect thereto.

ARTICLE 7 – MISCELLANEOUS

7.1 Acknowledgement. The parties acknowledge these Rates and Terms were entered into knowingly and willingly.

7.2 Applicable Law and Venue. These Rates and Terms shall be governed by, and construed in accordance with, the laws of the District of Columbia (without giving effect to conflicts of law principles thereof). All actions or proceedings arising directly or indirectly from or in connection with these Rates and Terms shall be litigated only in the United States District Court for the District of Columbia located in Washington, D.C. SoundExchange and each Noncommercial Educational Webcaster consent to the jurisdiction and venue of the foregoing court and consent that any process or notice of motion or other application to said court or a judge thereof may be served inside or outside the District of Columbia by registered mail, return receipt requested, directed to the person for which it is intended at its last known address (and service so made shall be deemed complete five (5) days after the same has been posted as aforesaid) or by personal service or in such other manner as may be permissible under the rules of that court.

7.3 Rights Cumulative. The rights, remedies, limitations, and exceptions provided in these Rates and Terms and available under applicable law shall be cumulative and shall not preclude assertion by any party of any other rights, defenses, limitations, or exceptions or the seeking of any other remedies against another party hereto. These Rates and Terms shall not constitute a waiver of any violation of Section 112 or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms). No failure to exercise and no delay in exercising any right, power or privilege shall operate as a waiver of such right, power or privilege. No single or partial exercise of any right, power or privilege granted under these Rates and Terms or available under applicable law shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. No waiver by any party of full performance by another party in any one or more instances shall be a waiver of the right to require full and complete performance of these Rates and Terms and of obligations under applicable law thereafter.

7.4 Entire Agreement. These Rates and Terms represent the entire and complete agreement between SoundExchange and a Noncommercial Educational Webcaster with respect to their subject matter and supersede all prior and contemporaneous agreements and undertakings of SoundExchange and a Noncommercial Educational Webcaster with respect to the subject matter hereof.



February 2010

INVOICE

No. 10-3076 N

367 Windsor Highway, New Windsor, NY 12553-7900

E-mail: ibs@ibsradio.org Ph (845) 565-0003 FAX (845) 565-7446

If required by your Business Office:

Purchase Order # _____

Date of PO _____

Please note any address changes:

Radio Station

Join IBS Radio Station - Webcasting Membership

Through December 31, 2010, Payable by check, or credit card - **VISA - MasterCard - Discover**

Intercollegiate Broadcasting System Membership Dues for One Year	\$125.00
Radio Station Membership in IBS includes:	
IBS 24/365 Radio Information (http://www.collegeradio.tv) (ibs@ibsradio.org) Save \$80 registration IBS on international convention: March 5-7, 2010 - NYC IBS facilitated Webcasting License for 2010 IBS Student Radio Network, by Backbone - reduced rates! IBS SRN Coast to coast IBS Fall Conferences- registration \$25/person including lunch IBS Publications, Music service assistance, engineering/ technical assistance FCC Info on License Assistance, Public File, Underwriting, Ownership & LPFM Annual Subscription to IBS Newsletter printed in color and mailed	

Includes First (1st) delegate FREE registration. Save \$80 - IBS International Radio Conference. IBS International Convention - Friday - Sunday, March 5 - 7, 2010 - NY City at Hotel Pennsylvania 70th annual with over 115 seminars by top academic, broadcasting and government professionals!

Reduced (\$25/person registration) IBS Conference- Oct. 9, 2010, Boston/Brookline, MA
Reduced (\$25/person registration) IBS Conference- Oct. 23, 2010, Chicago, IL
Reduced (\$25/person registration) IBS Conference- Dec. 4, 2010, Los Angeles/Claremont, CA

IBS is a not for profit education corporation, association, and foundation with 70 years of continuous service to the over 1,000 IBS Members Worldwide!

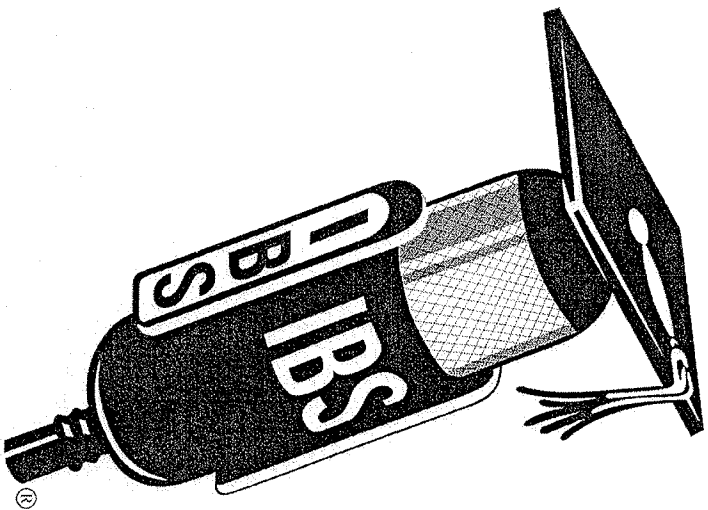
Intercollegiate Broadcasting System, Inc. Federal ID is: # 23 705 9805

Please enclose with your check either the top portion of this invoice or IBS invoice number and mail to:

IBS

367 Windsor Highway

New Windsor, NY 12553-7900



2006-2007

IBS

Intercollegiate
Broadcasting
System

This is to Certify that

KUR 88.3 FM/1670 AM

Kutztown University of Pennsylvania

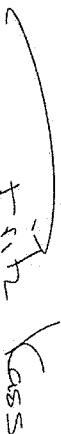
Kutztown

Pennsylvania

has an IBS facilitated

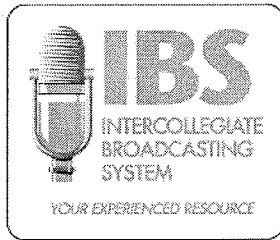
Webcasting License

to stream music and radio over the Internet
and is an IBS Member in good standing of the
Intercollegiate Broadcasting System, Inc.



Fritz Kass

Treasurer and Chief Operating Officer



**IBS - college radio, TV, webcasting, podcasting, streaming, and high school radio!
Trusted resource for radio, TV, webcasting, podcasting, and streaming information!
68 Years of continuous Service for over 1,000 USA IBS Members!**



**IBS legally represents ONLY IBS Members!
Join IBS Today, to have YOUR webcasting protected by the IBS Washington, DC,
LEGAL TEAM!**

It pays to be an IBS Member! IBS Membership has MANY Privileges!

**BREAKING News! BREAKING News! BREAKING News!
Library of Congress Register of Copyrights
says CRB Webcasting Rate Decision is **FLAWED!**
See below: PDF copy of February 19, 2008, US Federal Register**

**US Court of Appeals Case:
Intercollegiate Broadcasting System vs. Copyright Royalty Board
Consolidated Case 07-1123, Court has granted a delay in the
briefing schedule (submissions) for IBS
and all other Appellants until March 10, 2008.**

IBS vs. CRB (Case 07-1123) US Court of Appeals Schedule:

- March 10, 2008 Appellants' Brief(s)**
- May 9, 2008 Appellee's Brief**
- May 29, 2008 Intervenor's Brief**
- June 26, 2008 Appellants' Reply Brief(s)**
- July 10, 2008 Deferred Appendix**
- July 24, 2008 Printed briefs**

**IBS & Appellants file briefs on March 10, 2008
(Copies - pdf- of public briefs are below)**

**• IBS, et. al., vs. CRB, US Court of Appeals Case 07-1123
Public Copy (pdf) of Joint Noncommercial Webcaster Brief**

SX Trial Ex. 10

[click here](#)

- [IBS, et. al., vs. CRB, US Court of Appeals Case 07-1123](#)
[Public Copy \(pdf\) of Joint Commercial Webcaster Brief](#)

[DiMA - ACCURADIO, LLC, DIGITALLY IMPORTED, INC., RADIOIO.COM LLC, AND](#)
[RADIO PARADISE, INC.](#)

[click here](#)

- [IBS, et. al., vs. CRB, US Court of Appeals Case 07-1123](#)
[Public Copy \(pdf\) of Royalty Logic Brief](#)

[click here](#)

- [IBS, et. al., vs. CRB, US Court of Appeals Case 07-1123](#)
[Public Copy \(pdf\) of Broadcasters that webcast brief](#)
[including NAB Intervenor brief](#)

[click here](#)

CRB, Copyright Royalty Board, in Washington, DC,
announces webcasting rates for 2006 - 2010, March 2, 2007.

For non-IBS Members the CRB settlement is Monday, July 16, 2007.

IBS - RIAA/SoundExchange announce that IBS and performance copyright holders are in negotiation for rates and terms for IBS Members for 2006 - 2010.

Some IBS Members May Decide to Defer Impracticable Royalty and Reporting Terms Pending Conclusion of IBS - RIAA/SoundExchange Negotiations

IBS Members should keep webcasting, enjoy the education benefits of webcasting, and relax.

IBS - SoundExchange/RIAA are discussing fair, nondiscriminatory, reasonable, rates for artists/labels for the use of their valuable performances by our 1,000 IBS Members. We will also work out a reasonable, defensible, and economically practical system to disburse IBS copyright fees to the labels/artists (recordkeeping/reporting).

It pays to be an IBS Member!
IBS Membership has MANY Privileges!



May 3, 2007, IBS Legal Team files a request for review (Appeal) of Copyright Royalty Board, CRB, Decision of March 2, 2007, to US Court of Appeals - DC Circuit (IBS vs. CRB Case # 07-1123)

Intercollegiate Broadcasting System, Inc., et al., vs. Copyright Royalty Board (CRB)

- [PDF copy of May 3, 2007, IBS Appeal to US Court of Appeals - DC Circuit \(IBS vs. CRB\) 07-1123 click here](#)
- [PDF copy of May 22, 2007, Royalty Logic Appeal click here](#)
- [PDF copy of May 31, 2007, SoundExchange motion to intervene on behalf of the CRB click here](#)
- [PDF copy of May 31, 2007, National Religious Broadcaster Noncomm Music Lic. Comm. Appeal click here](#)

- [PDF copy of June 5, 2007, US Court of Appeals Consolidation Order - IBS vs. CRB click here](#)
- [PDF copy of June 5, 2007, "CORRECTED" DiMA, et. al., motion for STAY PENDING APPEAL click here](#)
- [PDF copy of June 18, 2007, CRB/USDOJ Motion in Opposition to DiMA/NPR Motion for STAY PENDING APPEAL click here](#)
- [PDF copy of June 18, 2007, SoundExchange Intervenor in Opposition to DiMA/NPR Motion for STAY PENDING APPEAL click here](#)
- [PDF copy of June 20, 2007, National Association of Broadcasters \(NAB\) granted Intervenor status in IBS v. CRB Case #07-1123.click here](#)
- [PDF copy of June 22, 2007, DiMA, NPR, et al., Reply Brief in support of DiMA, NPR, et al., Motion for STAY PENDING APPEAL click here](#)
- [PDF copy of July 11, 2007, US Court of Appeals, DiMA/NPR Motion Denied for STAY PENDING APPEAL click here](#)
- DiMA/NPR failed to meet standard four part test for judicial stay, including irreparable injury.
- [PDF copy of November, 2007, US Court of Appeals, Schedule for Consolidated Case 07-1123 Intercollegiate Broadcasting System vs. Copyright Royalty Board click here](#)
- IBS, et. al. vs. CRB Brief Schedule for 2008.
- [PDF copy of February 19, 2008, US Federal Register, Register of Copyright announcement that the Copyright Royalty Board \(CRB\) rate and term decision of March 2007, is \(fatally\) flawed in reference to 112. IBS has informed the US Department of Justice and they are considering the matter. The CRB may be forced, either by the US Court of Appeals, or common sense, to set aside the rates/terms for webcasting for 2008 - 2010 and rehear the case.](#)
- US Court of Appeals, Intercollegiate Broadcasting System vs. Copyright Royalty Board Consolidated Case 07-1123, the Court has granted a delay in the briefing schedule (submissions) for IBS and all other parties until March 10, 2008.
- [IBS, et. al. vs. CRB, US Court of Appeals Case 07-1123 Public Copy \(pdf\) of Joint Noncommercial Webcaster Brief IBS - NPR - NRBNLC - CB click here](#)
- [IBS, et. al. vs. CRB, US Court of Appeals Case 07-1123 Public Copy \(pdf\) of Joint Commercial Webcaster Brief DiMA - ACCURADIO, LLC, DIGITALLY IMPORTED, INC., RADIOIO.COM LLC, AND RADIO PARADISE, INC. click here](#)
- [IBS, et. al. vs. CRB, US Court of Appeals Case 07-1123 Public Copy \(pdf\) of Royalty Logic Brief click here](#)
- [IBS, et. al. vs. CRB, US Court of Appeals Case 07-1123 Public Copy \(pdf\) of Broadcasters that webcast brief including NAB Intervenor brief click here](#)

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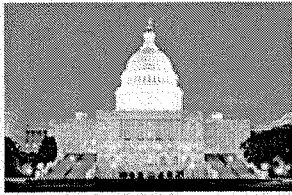
May 1, 2007, Federal Register today publishes, Copyright Royalty Board, Library of Congress, CRB Decision of March 2, 2007

- [PDF copy of Federal Register for May 1, 2007, Copyright Royalty Board, Library of Congress click here](#)

May 21, 2007, Washington, DC, CRB/CRJ Orders!

- Broadcasters Motion for clarification (and change) of CRB May 1, 2007 published rates is GRANTED!
- [click here for pdf copy of CRB Order](#)

- Although this is a small clerical error in commercial rates, now corrected by the CRB, it is significant to noncommercial webcasters
- because the CRB acted on the motion within the month of May, the CRB preserved Monday, July 16, 2007, as settlement date, pending IBS Appeal.

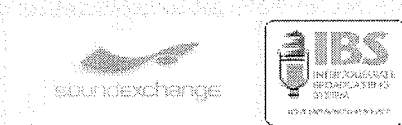


May 9, 2007, U.S. SENATE introduces their version of Internet Radio Equality Act (S-1353) to to set aside CRB decision.

- [PDF copy of Senate Bill S - 1353 click here](#)
- The major difference between the House and Senate Bills is in the noncommercial webcaster area.
- The House uses a 1.5 times factor over the 2004 rate, the Senate uses 1.05 times factor over the 2004 noncommercial rate.

April 26, 2007, Internet Radio Equality Act H.R. 2060 is introduced in U.S. House of Representatives to set aside the Copyright Royalty Board (CRB) decision.

- [PDF copy of H.R. 2060 - Internet Radio Equality Act. click here](#)



- [PDF copy of May 31, 2007, SX letter to noncomms making offer. click here](#)
- SX responds to House Judiciary Committee Chairman Berman to make a settlement offer and avoid the Internet Radio Equality Act (IREA)HR-2060.
- [PDF copy of June 19, 2007, IBS reply to SX letter/offer click here](#)
- IBS responds to SoundExchange General Counsel Michael Huppe, Esq., for a Webcast Rates/Terms settlement, avoiding the Internet Radio Equality Act (IREA).

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March 2, 2007, the Copyright Royalty Board (CRB) has announced its decision on Internet radio royalty rates, rejecting all of the arguments made by Webcasters and instead adopting the "per play" rate proposal put forth by SoundExchange, a digital music fee collection body created and controlled by the RIAA, Recording Industry Association of America.

- [PDF copy of the CRB March 2, 2007, 115 page decision. click here](#)

April 16, 2007, the Copyright Royalty Board (CRB) has announced its decision to deny all motions for rehearing the the CRJ determination of rates and terms. (see above)

The CRB did say the IBS Motion for relief from recordkeeping and reporting requirements established in the initial determination will be addressed in a future proceeding.

- [PDF copy of the CRB April 16, 2007, decision to deny motions for rehearing. click here](#)

Commercial Rates ordered on March 2, 2007, by the CRJ are as follows:

2006 -- \$.0008 per play
 2007 -- \$.0011 per play
 2008 -- \$.0014 per play
 2009 -- \$.0018 per play
 2010 -- \$.0019 per play

The minimum fee is \$500 per channel per year.

For noncommercial webcasters, the fee will be \$500 per channel, for up to 159,140 ATH (aggregate tuning hours) per month.

Above 159,140 ATH all webcasters, noncommercial and commercial, pay the commercial rate.

IBS Notes on the above decision:

IBS Members remain protected by IBS.
IBS Members should do nothing until they receive written advice from IBS.
IBS is a party to the CRB proceedings and has many options open.
IBS will, when necessary, appeal the CRJ decision to the U.S. Court of Appeals, DC Circuit.
Our 1,000 IBS school/college IBS Members WILL BE PROTECTED!
Nonmembers not part of IBS are on their own. Join IBS TODAY!
Membership has privileges!

- [JOIN IBS in YOUR Fight for FREEDOM. JOIN IBS TODAY! click here](#)

What is IBS's position on Webcasting?

1. IBS believes there is tremendous educational and operational value for educational stations to stream their audio (and video) signal over the Internet.
2. IBS believes every educational station should continue to stream their audio signal!
3. IBS believes the benefits of streaming/webcasting are so great that your radio station should continue to stream on the Internet even with DMCA copyright discussions taking place.
4. IBS believes that every station that is not now streaming should start streaming! Learning the techniques and technology of digital communications is vital for today's graduates. Competitive knowledge of Internet/ Webcasting communications is an important skill set in the world of today.

The value of streaming for an IBS Member Radio Station is:

Education-

To learn and practice the techniques and technology of digital communications. America's Sons and Daughters must compete in a global digital world. Vital communication skills are being learned by webcasting at USA schools and colleges.

Operations-

To be able to reach out to alumni, parents, friends and other audiences with information and programming that cannot be provided by other broadcasting technology.

Constitutional FREEDOM-

The right to free speech and expression of views by American Education Entities and their faculty and students is vital to a FREE United States of America. Our GREAT NATION cannot long endure if we allow a foreign controlled music oligopoly to shut down school and college webcasts with impossible to meet recordkeeping and unrealistic rates that apply to music and NON-MUSIC programming. Why should RIAA/SoundExchange be paid based on FREE SPEECH, non-music listenership?

Keep webcasting, learning and reaching out to a wider audience!
IBS will keep member stations informed.

Go to IBS First Website Page - click here!



Links and content being added - stop back and visit again.
Please send us your comments, suggestions and critiques.

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*Web site design and content by
Jeff Tellis, September 15, 1941 -- March 14, 2006*

<http://www.frontiernet.net/~ibs/DCMA.html>

JENNER & BLOCK

April 8, 2008

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Re: Improper Statutory Licensing Information on IBS Website

Dear Fritz and Bill:

I am writing to you on behalf of SoundExchange to follow-up on the various conversations you have had with SoundExchange regarding some of the statutory licensing information posted on the IBS website (<http://www.frontiernet.net/~ibs/DCMA.html>).

While SoundExchange recognizes and appreciates that you have changed some of the misleading information posted on the website about IBS members' legal obligations under the statutory license for paying royalties to SoundExchange, the current content remains equally problematic and deceptive. It continues to mislead your constituents, essentially counseling them to break the law. Moreover, it wrongfully implies that SoundExchange condones this behavior, and that SoundExchange is granting some sort of waiver as part of the pending negotiations. These improper statements must be corrected immediately.

First, the website in no uncertain terms authorizes IBS members to withhold payment of their royalties to SoundExchange, stating that "Some IBS Members May Decide to Defer Impracticable Royalty and Reporting Terms Pending Conclusion of IBS-RIAA/SoundExchange Negotiations." And it provides this counsel while telling constituents that "IBS Members should keep webcasting, enjoy the education benefits of webcasting, and relax." This reckless advice, if followed, places IBS members in violation of their statutory obligations. That means that they can be held liable for copyright infringement because, absent compliance with the statutory license or some other license, they have no right to webcast sound recordings.

Second, the website advises IBS members to "do nothing until they receive written advice from IBS," and juxtaposes this instruction with a statement that "IBS is a party to the

Fritz Kass
William Malone
April 8, 2008
Page 2

CRB proceedings and has many options open.” Collectively, this advice signals to IBS members that they need not pay the royalty rates that they are statutorily required to pay.

Indeed, based on these inaccurate postings, multiple IBS members have informed SoundExchange that they do not have to pay the webcasting royalties *because IBS told them they did not have to as a result of their IBS membership*. They cite language on IBS’s website to support their noncompliance with the copyright regulations. These communications signal to SoundExchange that IBS members are heeding the faulty advice IBS is providing and, as a result, are placing themselves in serious risk of legal repercussions.

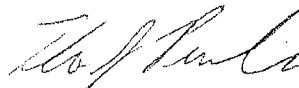
SoundExchange also finds problematic IBS’s posting of this inaccurate information on a website that includes reference to the ongoing negotiations between SoundExchange and IBS, and that contains -- without permission -- SoundExchange’s trademarked logo. This juxtaposition wrongfully gives the impression that the advice you impart -- authorizing your members to violate their statutory obligations -- is sanctioned by SoundExchange. Nothing could be further from the truth, as your numerous discussions with SoundExchange have made clear.

While it is true that SoundExchange desires to continue to engage in good faith negotiations with IBS to resolve outstanding issues, these ongoing negotiations in no way alter the fact that IBS members are required to comply with the statutory mandate of §§ 114 and 112 as established by the CRB’s May 1, 2007 ruling. That ruling is and remains the governing law and requires all webcasters to comply with the royalty fees and terms set forth in the CRB’s order. IBS members are thus obligated to pay SoundExchange for the royalties owed under the regulations, as well as to file the appropriate reports. Any advice to the contrary is simply authorizing illicit activity.

SoundExchange once again demands that you immediately remove from the IBS website the misleading and inaccurate language identified above, and that you take any corrective measures necessary to inform your constituents of their legal obligations under the governing regulations.

Should you have any questions about any of this information or wish to speak further, please do not hesitate to contact me.

Sincerely,



Thomas J. Perrelli

JENNER & BLOCK

October 7, 2008

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Re: False Information on IBS Website

Dear Fritz and Bill:

I am writing to respond to your June 16, 2008 letter in response to SoundExchange's multiple letters. Your continued refusal to remove misleading and inaccurate information from the IBS website is unacceptable. It completely fails to address SoundExchange's concerns or the fact that IBS is placing its members at risk of legal action for failing to comply with governing regulations. To date, you have done nothing to correct this inaccurate information -- brought to your attention over six months ago. And what's worse, you continue to post the message in conjunction with SoundExchange's logo even though SoundExchange demanded that you remove the logo. Despite your contrary characterization, you have not made any substantive changes, in "good faith" or otherwise, to this information.

In total disregard of the gravity of this matter, you attempt to transform IBS's improper encouragement of its members to act unlawfully into a mere difference of opinion between SoundExchange and IBS that can be cleared up through a SoundExchange posting on your website. This is not a simple "disagree[ment] with the views expressed" on IBS's website. Rather, as SoundExchange has explained in clear and unambiguous terms, this is about IBS's blatant disregard of its members' legal obligation to pay royalties under the governing law and its encouragement of those members to defy the law.

Yet rather than correct the mis-information on your website when brought to your attention and given the opportunity (not once, but twice) to do so, you continue to encourage your members to ignore the Copyright Royalty Judges' Order and to withhold any royalty payments until you instruct them otherwise. This is unethical and unacceptable and has led to at least some of your members to violate the law, claiming that you told them to do so.

Fritz Kass and William Malone
October 7, 2008
Page 2

JENNER & BLOCK

SoundExchange has given you several opportunities to make corrections and to inform your members that they must pay royalties according to the governing law. You have failed to do so, and instead continue to post this erroneous content. Accordingly, SoundExchange is going to contact directly IBS members -- those that have already been in touch with SoundExchange as well as all others -- to inform them in no uncertain terms of the legal obligation each station has to pay royalties under the current law. In addition, SoundExchange will make exceeding clear that they risk legal action should they fail to comply with these obligations. And finally, SoundExchange will highlight the fallacy (posted on your website) that membership in IBS provides any sort of protection from legal action or exemption from these royalty obligations, and will make them each aware of the risk that IBS has exposed them to by advising them to withhold their statutorily mandated royalty payments.

We tried on multiple occasions to reach an amicable outcome to this matter, but your persistent refusal to engage in any reasonable discussion -- as evidenced by your June 16 letter and prior non-responsive correspondence -- has left us with no other choice.

Sincerely,



Thomas J. Perrelli

cc: Michael J. Huppe
Colin Rushing

BEFORE THE COPYRIGHT ROYALTY BOARD

LIBRARY OF CONGRESS

WASHINGTON, D.C.

---oOo---

In the Matter of:)	DOCKET NO.
DIGITAL PERFORMANCE RIGHT)	2009-1, CRB
IN SOUND RECORDINGS and)	WEBCASTING III
EPHEMERAL RECORDINGS)	
)	

DEPOSITION OF N. MARK LAM
San Francisco, California
Tuesday, January 28, 2010

Reported by:
LUCY CARRILLO-GRUBBS, RMR, CRR, RPR, CRP, CSR
Job No. 18609

SX Trial Ex. 13**Public Version**

2	4
<p>1 BE IT REMEMBERED THAT, pursuant to the laws 2 pertaining to the taking and use of depositions, and 3 on January 28, 2010, commencing at the hour of 9:36 4 a.m. thereof, at the offices of DAVIS, WRIGHT 5 TREMAINE, 505 Montgomery Street, 8th Floor, San 6 Francisco, California, before me, LUCY 7 CARRILLO-GRUBBS, CRP, RMR, CRR, RPR, CSR No. 6766, a 8 Certified Shorthand Reporter in and for the State of 9 California, personally appeared 10 11 N. MARK LAM 12 13 being called as a witness by the SoundExchange, who, 14 having been by me first duly sworn, was thereupon 15 examined and interrogated as hereinafter set forth. 16 17 18 19 20 21 22 23 24 25</p>	<p>1 A P P E A R A N C E S 2 CO-COUNSEL FOR LIVE365.COM: 3 DAVID ROSENBERG, ESQ. 4 LIVE365.COM 5 950 Tower Lane, Suite 1550 6 Foster City, CA 94404 7 Tel: 650.345.7400 8 Fax: 650.345.7497 9 Email: drosenberg@live365.com 10 11 REPRESENTING REALNETWORKS: 12 CHRISTOPHER J. WRIGHT, ESQ. 13 WILTSHIRE & GRANNIS, LLP 14 1200 18th Street, NW 15 Suite 1200 16 Washington, DC 20036 17 Tel: 202.730.1325 18 Fax: 202.730.1301 19 -oOo- 20 21 22 23 24 25</p>
3	5
<p>1 A P P E A R A N C E S 2 REPRESENTING SOUNDEXCHANGE: 3 MICHAEL B. DeSANCTIS, ESQ. 4 JENNER & BLOCK, LLP 5 1099 New York Avenue, NW 6 Suite 900 7 Washington, DC 20001 8 Tel: 202.639.6000 9 Fax: 202.661.4828 10 Email: mdesanctis@jenner.com 11 12 REPRESENTING LIVE365: 13 ANGUS MacDONALD, ESQ. 14 HOVANESIAN & HOVANESIAN 15 301 E. Colorado Boulevard, Suite 514 16 Pasadena, CA 91101 17 Tel: 626.737.7288 18 Fax: 626.737.0318 19 Email: angusm@hovlaw.com 20 21 (CONTINUED) 22 23 24 25</p>	<p>1 I N D E X 2 3 EXAMINATION BY PAGE 4 Examination by Mr. DeSanctis 8 5 P.M. SESSION 122 6 Examination Resumed by Mr. DeSanctis 122 7 Examination by Mr. MacDonald 236 8 9 10 11 EXHIBITS 12 NO. Description Page 13 Exhibit 1 Written Direct Testimony by N. Mark 23 14 Lam 15 Exhibit 2 Three-page letter dated May 28, 83 16 2008 17 Exhibit 3 Two-page letter dated August 20, 100 18 2009 19 Exhibit 4 Document entitled Rate Proposal for 114 20 Live365, Inc. 21 Exhibit 5 Table entitled Table 1-Allocated 155 22 Costs of Live365 for Webcasting to 23 US Listeners (FY 2008). 24 25</p>

6	8
1 EXHIBITS (Continued)	1 San Francisco, California, January 28, 2010
2 Exhibit 6 Five-Page document, dated March 184	2 9:36 a.m. - 4:54 p.m.
3 15, 2007	3 -oOo-
4 Exhibit 7 Document entitled Live365 187	4 EXAMINATION
5 Five-Year Financial Historical	5 BY MR. DeSANCTIS:
6 Trend and Comparison	6 Q. Good morning. Could you please state and
7 Exhibit 8 E-mail dated July 30, 2007 with 192	7 spell your full legal name for the record?
8 attachments	8 A. Last name is Lam, L-a-m, first name
9 Exhibit 9 Document entitled Live365.com 195	9 Nam-Yeng, but I generally use N, N. Mark Lam.
10 Balance Sheet as of September 30,	10 Q. Okay.
11 2009	11 Could you spell that first name for the
12 Exhibit 10 Document entitled Management 198	12 record?
13 Discussion and Analysis September	13 A. N-a-m, dash, Y-e-n-g.
14 2009	14 Q. Mr. Lam, have you ever been deposed before?
15 Exhibit 11 Multi-page document, bearing the 202	15 A. Yes.
16 Bates range LIVE 1068 through	16 Q. When was that?
17 LIVE 1091	17 A. That was a while ago.
18 Exhibit 12 Document entitled VIP Membership 205	18 Q. How many times?
19 Review and Forecast	19 A. It be a couple times, yeah.
20 Exhibit 13 Document entitled Financial 209	20 Q. Do you recall what proceedings those were
21 Review, Company Meeting, October	21 in?
22 10, 2008	22 A. That was in -- I think it involved some sort
23 Exhibit 14 Document entitled Net Music Radio 217	23 of a real estate lease.
24 2007 through 2010: Listening	24 Q. Okay.
25 hour analysis by site and brand	25 A. Some years ago.
7	9
1 EXHIBITS (Continued)	1 Q. Was that while you were at Live365?
2 Exhibit 15 Document entitled Live365 221	2 A. No, that's before I was at Live365.
3 Business Decisions Affecting ATH	3 Q. Okay.
4 Exhibit 16 Document entitled Live365: 230	4 Have you ever been deposed while at Live365
5 Historical US Internet Radio	5 for anything?
6 Network Revenue	6 A. I don't remember that being the case.
7 Exhibit 17 Document entitled Live365: 231	7 Q. Okay.
8 Historical Operating Income	8 With whom were you employed when you were
9 Statement	9 deposed?
10	10 A. I had my --
11	11 MR. MacDONALD: Objection, lacks foundation.
12	12 MR. DeSANCTIS: Maybe you weren't employed.
13	13 Q. But if -- why don't I ask you this -- well,
14	14 were you employed at the time of your prior
15	15 depositions?
16	16 A. Yes.
17	17 Q. With whom?
18	18 A. My own firm.
19	19 Q. Which firm was that?
20	20 A. That's Pristine Law Offices.
21	21 Q. And what was the subject matter of the
22	22 dispute?
23	23 A. Having something to do with the lease.
24	24 Q. The lease of what?
25	25 A. I remember it was a real estate lease.

10

1 Q. Of the -- of the building in which the law
2 firm was in?
3 A. Yes.
4 Q. And do you recall whether the law firm was
5 the plaintiff or the defendant in that action?
6 A. I don't even remember, it was just a very
7 small matter.
8 Q. Okay.
9 You said there were two depositions that --
10 that you recall having given, were they both in --
11 in relation to that real estate dispute?
12 A. I say a couple loosely, I remember roughly
13 that years ago I may have been deposed another time,
14 but I'm not sure. And I don't even remember what it
15 was, the subject matter.
16 Q. Okay.
17 The one that you do recall, the real estate
18 action.
19 A. Yeah.
20 Q. Roughly when was that?
21 A. Probably about ten years ago.
22 Q. Okay.
23 Do you recall whether that case went to
24 trial or whether it settled?
25 A. It didn't go to trial, I believe.

11

1 Q. Okay.
2 What did you -- what did you do -- what, if
3 anything, did you do to prepare for today's
4 deposition? And I'm not asking for the substance of
5 any communications with counsel, I'm just asking
6 what you did to prepare.
7 MR. MacDONALD: I'm also going to object on
8 the record to the extent that it calls for
9 privileged or any mental impressions of counsel with
10 respect to your preparation for your deposition.
11 So please don't reveal any communications or
12 anything that reflects mental impressions of your
13 counsel in preparation for your deposition.
14 But go ahead.
15 THE WITNESS: I read my direct statements.
16 MR. DeSANCTIS: Uh-hmm.
17 THE WITNESS: I also reviewed Mr. Floater's
18 direct statement, and I review Dr. Fratrick's
19 statement, and then -- and then with counsel, you
20 know, we did the prep for this deposition.
21 BY MR. DeSANCTIS:
22 Q. Did you meet with Mr. Floater?
23 MR. MacDONALD: Objection, vague, lacks
24 foundation.
25 MR. DeSANCTIS: Okay.

12

1 Q. Did you meet with Mr. Floater to prepare for
2 this deposition?
3 A. No.
4 Q. Did you read the transcript of Mr. Floater's
5 deposition before this deposition?
6 A. No.
7 Q. Did you review any documents other than the
8 testimony that you mentioned during your prep
9 meeting for this deposition?
10 A. Excuse me, could you reask the question?
11 Q. Sure.
12 During your prep meeting for this deposition
13 that you mentioned, did you review any documents,
14 other than the three pieces of testimony that you
15 mentioned?
16 MR. MacDONALD: I'm just going to object on
17 the record to the extent that it calls for any
18 mental impressions of counsel, which may invade the
19 attorney work product doctrine.
20 THE WITNESS: I have -- I have -- I review
21 also my prior testimony in CRB proceeding.
22 MR. DeSANCTIS: Okay.
23 Q. Written testimony or the transcript of your
24 oral testimony?
25 A. Transcript, transcript.

13

1 Q. Okay.
2 Any -- any other documents?
3 A. I think that's it.
4 Q. And again, I'm not asking for the substance
5 of any communications, but I'll ask who was at that
6 meeting that you referred to in preparation for
7 today's deposition?
8 A. Mr. MacDonald, Mr. Yacobian, Mr. Rosenberg.
9 Q. Uh-hmm.
10 A. And a consultant of ours, Mr. Ho,
11 Yueshun Ho.
12 Q. Eugene Ho?
13 A. Yueshun Ho.
14 Q. Can you spell that first name?
15 A. Y-u-e-s-h-u-n.
16 Q. And then Ho, H-o?
17 A. Yeah.
18 Q. What is he a consultant for or what does he
19 do for Live365?
20 MR. MacDONALD: Objection, vague, ambiguous.
21 THE WITNESS: He was a consultant that help
22 us with -- he was a consultant that was brought in
23 to -- to help us prepare the case and --
24 BY MR. DeSANCTIS:
25 Q. I'm sorry, go ahead.

14

1 A. Because --
2 Q. Is he a lawyer?
3 A. No, he's not a lawyer.
4 Q. Is he an economist?
5 A. No, he's not an economist.
6 Q. What is his area of specialty, if he has
7 one?
8 MR. MacDONALD: Objection, vague.
9 THE WITNESS: He has an MBA, and he was
10 business -- previously employed by Adobe.
11 BY MR. DeSANCTIS:
12 Q. Did he consult for Live365 prior to the time
13 at which you began preparations for this proceeding?
14 MR. MacDONALD: Objection, lacks foundation.
15 THE WITNESS: I brought him in with a view
16 toward preparing for the CRB.
17 MR. DeSANCTIS: Okay.
18 Q. Was any employee or representative of
19 RealNetworks present at your meeting at which you
20 prepared for today's deposition?
21 A. No.
22 Q. Have you ever met with anyone from
23 RealNetworks to discuss this litigation?
24 MR. MacDONALD: Objection, vague.
25 THE WITNESS: I don't remember that I met

15

1 with anybody to discuss this litigation.
2 MR. DeSANCTIS: Okay.
3 Q. Did you have -- do you recall any phone
4 conversations with anyone from RealNetworks to
5 discuss this litigation?
6 A. Let me think.
7 Q. Sure, take all the time you need.
8 A. I think early on there may have been a phone
9 conversation about whether to proceed with the CRB
10 or not, I think --
11 Q. Do you recall who that conversation was
12 with?
13 A. That was quite some time ago. I'm not sure
14 but I think it could have been with their counsel,
15 their in-house counsel.
16 Q. With RealNetworks' in-house counsel?
17 A. Yeah.
18 Q. Who was on the phone, if anyone, other than
19 you from Live365?
20 A. I think Mr. Floater could have been on the
21 phone, Mr. Floater. I think that was it.
22 Q. Okay.
23 Do you recall whether there was anyone -- an
24 employee of RealNetworks on the phone as opposed to
25 just their counsel who you mentioned?

16

1 A. I don't remember.
2 Q. And do you recall when this conversation
3 occurred? I'll remind you the written direct
4 statements in this case were filed at the end of
5 September of 2009.
6 A. I think that was sometime last year, in
7 2009.
8 Q. Prior to September 2009?
9 A. Yes.
10 Q. Okay.
11 Let me just back up a little bit. You're --
12 you're a lawyer, right?
13 A. Correct, was a lawyer.
14 Q. You were a lawyer. Once a lawyer, always a
15 lawyer, no?
16 MR. MacDONALD: Not if you're not paying
17 your dues.
18 MR. DeSANCTIS: I suppose that's right.
19 Q. Were you a litigator?
20 A. I did some litigation.
21 Q. Okay.
22 What other kinds of law did you practice?
23 A. I represented mostly manufacturers.
24 Q. You said that you used to be a litigator, or
25 you used to be a lawyer?

17

1 A. Yeah.
2 Q. In your -- does that mean that you would not
3 describe your duties at Live365 now as legal work?
4 MR. MacDONALD: Objection, vague, confusing,
5 compound.
6 THE WITNESS: Could you reask the question,
7 please?
8 BY MR. DeSANCTIS:
9 Q. I'm sorry?
10 A. Could you reask the question?
11 Q. Sure. I was just following up on when you
12 said you used to be a lawyer.
13 A. Yeah.
14 Q. I was wondering, if by that you meant that
15 what you do now at Live365 is not work in the
16 capacity as a lawyer but as some other capacity?
17 A. Correct.
18 Q. So you're the CEO of Live365, do you have
19 any other titles there?
20 A. No.
21 Q. Do you provide legal advice to the company?
22 A. No.
23 Q. So you've mentioned that you've been in a
24 couple depositions before but they were a long time
25 ago. I'll just briefly give a few ground rules.

18

1 If -- as you can see, I ask questions, you
 2 give answers. You've already asked me to clarify a
 3 question and that's great, I want you to do that any
 4 time you don't understand the question. It's --
 5 doesn't serve any purpose if you and I are on
 6 different pages.
 7 If you want to take a break, you can
 8 whenever you like, let me know and maybe I'll have
 9 one or two more questions to ask and I'll certainly
 10 try to accommodate any request for a break.
 11 If -- if there's anything about my questions
 12 that you don't understand, please definitely speak
 13 up and let me know.
 14 We need audible responses, and that's a
 15 tough thing to remember, but -- so the court
 16 reporter can record your answers, she can't get nods
 17 of the head or this kind of thing, so we need oral
 18 responses to all of my questions.
 19 Okay?
 20 A. Understood.
 21 Q. Is there any reason, Mr. Lam, that would
 22 prevent you from offering full and accurate and
 23 honest testimony today? Are you -- are you ill, are
 24 you on any medications, anything like that?
 25 MR. MacDONALD: Objection, compound.

19

1 BY MR. DeSANCTIS:
 2 Q. Are you ill?
 3 A. I'm not ill but I need more sleep.
 4 Q. Fair enough.
 5 MR. MacDONALD: Don't we all.
 6 BY MR. DeSANCTIS:
 7 Q. Are you on any medications?
 8 A. No.
 9 Q. Are you aware, Mr. Lam, that the parties in
 10 this case have exchanged requests for the production
 11 of documents?
 12 A. Yes.
 13 Q. Were you -- have you seen the request for
 14 the production of documents that SoundExchange
 15 served on Live365?
 16 A. Would you please reask the question, do you
 17 mean -- do you mean that have I seen, in what sense?
 18 Q. Well, the document requests are -- are a
 19 document.
 20 A. Yup.
 21 Q. Have you seen the document?
 22 A. For the document request?
 23 Q. Yes.
 24 A. Well, I -- I don't remember seeing it. I
 25 think the attorneys are handling that.

20

1 Q. Okay.
 2 A. Yeah.
 3 Q. Were you consulted when Live365 was
 4 preparing its responses and collecting documents?
 5 MR. MacDONALD: Objection, vague, lacks
 6 foundation as well.
 7 BY MR. DeSANCTIS:
 8 Q. Were you involved in the process in any way?
 9 MR. MacDONALD: Same objections.
 10 THE WITNESS: Would you please reask the
 11 question, when you say consulted, in what sense?
 12 MR. DeSANCTIS: Sure.
 13 THE WITNESS: Consult is a really broad
 14 word.
 15 MR. DeSANCTIS: Sure.
 16 Q. Let me put it this way: Are you aware of
 17 the fact that in response to SoundExchange's request
 18 for the production of documents Live365 produced
 19 documents to SoundExchange?
 20 A. Yes, I'm aware.
 21 Q. And also produced written responses?
 22 A. Yes.
 23 Q. Were you involved in any way with the
 24 collection of those documents and the preparation of
 25 the written responses?

21

1 MR. MacDONALD: Objection, compound.
 2 THE WITNESS: Could you perhaps ask one
 3 question at a time so I could answer?
 4 BY MR. DeSANCTIS:
 5 Q. Were you involved in any way in the
 6 collection of documents for purposes of producing
 7 documents to SoundExchange?
 8 A. I gave instruction to staff to cooperate
 9 with -- fully with our attorneys and to turn over
 10 whatever document that we have in our possession.
 11 Q. Did you personally look for documents that
 12 were responsive to the requests?
 13 MR. MacDONALD: I'm just going to object to
 14 the extent it calls for a legal analysis as to which
 15 documents were responsive to which requests.
 16 THE WITNESS: I think I ask -- when they
 17 asked me for certain documents, I generally direct
 18 them to -- you know, to go to whoever's involved
 19 that have possession of the documents.
 20 MR. DeSANCTIS: Okay.
 21 Q. Do you know what requests for
 22 interrogatories are?
 23 A. Yes.
 24 Q. Are you aware of the fact that SoundExchange
 25 has served requests for -- has served

22

1 interrogatories on Live365 in this case?
2 A. I think so. I mean, I've been told, yeah.
3 Q. And are you aware of the fact that Live365
4 has provided responses to those interrogatories?
5 A. That I am not sure.
6 Q. Okay.
7 They did.
8 A. Okay. I'm not sure because -- you know.
9 Q. And my next question was whether you were
10 involved in any way in the preparation of Live365's
11 responses to SoundExchange's interrogatories?
12 MR. MacDONALD: Objection, vague.
13 MR. DeSANCTIS: It's broad, I'm asking if
14 you were involved in any way, and if you were, we
15 can talk about it some more.
16 MR. MacDONALD: Same objection.
17 THE WITNESS: You know, I think counsel and
18 I had some brief discussions on the interrogatories.
19 BY MR. DeSANCTIS:
20 Q. Did you actually draft any of the responses?
21 A. Physically, no.
22 Q. Okay.
23 Did you personally review any of the
24 responses before they were submitted to
25 SoundExchange?

23

1 A. I think I -- I don't remember whether I did
2 or not, because in a typical day, you know, I have a
3 lot of things that come from my desk, so many
4 documents sometimes. It's funny, I was talking to a
5 friend, just the other day, and he said, didn't you
6 just call me this afternoon or something? I said,
7 did I? I'm sorry, you know.
8 Q. It's quite all right.
9 A. Yeah, it's --
10 Q. I understand. It's a -- that's the way it
11 goes.
12 A. Yeah.
13 Q. You submitted written testimony in this
14 proceeding, correct?
15 A. Correct.
16 (Lam Exhibit No. 1 was marked for
17 identification.)
18 BY MR. DeSANCTIS:
19 Q. Let me show you, Mr. Lam, what has been
20 marked as Lam Exhibit 1. Is that the written direct
21 testimony that you submitted in this case? You can
22 take a moment to flip through it if you like.
23 (Witness reviews document.)
24 I'll -- go ahead, I'll let you finish
25 reading through it before I ask you any questions

24

1 about anything specific, though, I'll point you to
2 exactly what I'm talking about.
3 Okay?
4 A. Okay.
5 Q. Is that your signature on the last page of
6 what's been marked as Exhibit 1?
7 A. Looks to be.
8 Q. So have -- is this your written direct
9 testimony that you submitted in this case?
10 A. Yes.
11 Q. Okay.
12 In it, right in the first paragraph there,
13 you say that Live365 consists of two businesses, you
14 call one broadcast services and you call the other
15 Internet radio. Can you describe just very briefly
16 and -- and generally what those two lines of
17 businesses -- what those two lines of business are?
18 A. Okay.
19 The broadcast services actually is a
20 platform, technology platform that consists of
21 proprietary software as well as off-the-shelf
22 software such as Oracle. It provides broadcasting
23 tools, listening tools, many different type of
24 tools, meaning tools are not hardware tools, but
25 software tools. And it also provides bandwidth,

25

1 and, you know, all the service that make the thing
2 work, and the various components.
3 In fact, those consist of -- I won't bore
4 you with some details. Various types -- various
5 types of servers, you know, because we heard about
6 service all the time, but, you know, for example, to
7 make our system work, it will require application
8 servers, streaming servers, database servers,
9 dataware servers, and many other servers which has
10 both components of hardware and software to
11 enable -- and then as well -- as well the tracking
12 software for this to work.
13 So, in essence, it's a platform composing of
14 many parts, roughly when we calculated it, probably
15 in terms of component, you know, really, really many
16 components.
17 Q. Okay.
18 A. So that we could service the broadcasters
19 when they want to broadcast or we should say
20 webcast. So it's a -- you know, so through the
21 years, you know, we -- many people have broadcast,
22 use us as a platform and we're generally pretty well
23 known in this area.
24 There are companies such as Stream Guys,
25 StreamTheWorld, Epicast, and quite a few others.

26

1 Q. Those are other companies that provide
2 similar --
3 A. Yeah.
4 Q. -- broadcast services?
5 A. Yeah.
6 Q. And when you provide those broadcast
7 services to a customer, for lack of a better word,
8 what is -- what is the -- how do you identify -- how
9 do you refer to the customer to whom you're -- you
10 are providing the broadcast service? Just so we
11 have common vocabulary for the rest of the day --
12 A. Sure.
13 Q. -- do you call them broadcasters,
14 webcasters, customers?
15 MR. MacDONALD: I'm just going to object,
16 it's vague, it's compound.
17 THE WITNESS: It's compound.
18 MR. DeSANCTIS: It is.
19 Q. But I'm just asking how you refer to them so
20 you and I can talk about it and know what we're
21 talking about.
22 A. Generally we refer to them as broadcasters.
23 Q. Broadcasters.
24 Are there broadcasters for whom Live365
25 provides the technology that you have been

27

1 discussing, but no further services, no royalty
2 collection, they are not listed on the Live365
3 website as a Live365 channel, where you're just
4 providing the technology services? Do you have any
5 of those kinds of relationships with broadcasters?
6 MR. MacDONALD: Objection, compound, vague
7 and ambiguous.
8 THE WITNESS: Could you reask the question?
9 MR. DeSANCTIS: Well, sure, I'll get back to
10 it in another way.
11 Q. Can you also describe for me now, what the
12 Internet radio business is that you referred to in
13 paragraph 1 of your testimony?
14 A. Okay, Internet service is where we actually
15 provide customers the ability to listen to thousands
16 of broadcasters. And they were -- you know, we have
17 a directory, we have a website and a directory --
18 Q. Uh-hmm.
19 A. -- that allows people to come to www.Live365
20 and, you know, listen to -- to all the music.
21 Q. And how do you refer to those customers who
22 are -- who stream as part of your Internet service?
23 Do you also refer to them as broadcasters or do you
24 refer to them some other way? Again, just so we
25 have a common vocabulary.

28

1 A. Sure, sure.
2 MR. MacDONALD: I'm going to object, the
3 question was vague and ambiguous, and it's confusing
4 as well.
5 THE WITNESS: Yeah, confusing, could you
6 reask it to be specific?
7 MR. DeSANCTIS: Well, right.
8 Q. I asked about who your broadcast service
9 customers are.
10 A. Yeah.
11 Q. You said you call them broadcasters.
12 A. Yup.
13 Q. On the Internet radio service side, how do
14 you refer to your customers there? How do you refer
15 to your webcasters?
16 MR. MacDONALD: Objection, confusing.
17 THE WITNESS: It's confusing.
18 On the -- on the listening side, you know,
19 people -- there are millions of people who come to
20 listen to us, those are listeners.
21 MR. DeSANCTIS: Okay.
22 Q. How about the people who are actually
23 programming the streams?
24 MR. MacDONALD: Objection, lacks foundation.
25 BY MR. DeSANCTIS:

29

1 Q. How do you refer to them?
2 MR. MacDONALD: Same objection.
3 BY MR. DeSANCTIS:
4 Q. The actual webcasters?
5 A. Okay, the webcasters -- okay, let me make
6 sure I get it right. Could you reask the question?
7 Q. Yeah. Look at paragraph 1 of your
8 testimony.
9 A. Okay.
10 Q. In the last sentence there's a No. 2 in
11 parenthesis.
12 A. Correct.
13 Q. It says, "Internet radio, which provides
14 over 260 genres of high-quality streaming music and
15 other audio content to millions of listeners through
16 its network of aggregated webcasters."
17 A. Uh-hmm.
18 Q. Who are the aggregated webcasters?
19 A. Those are the broadcasters.
20 Q. Meaning they receive your broadcast
21 services?
22 A. Correct.
23 Q. Do all aggregated webcasters on Live365 also
24 receive your broadcast services?
25 MR. MacDONALD: Objection, vague.

1 THE WITNESS: Please reask the question.
 2 BY MR. DeSANCTIS:
 3 Q. What about it don't you understand?
 4 A. Because you use, I think, broadcasters and
 5 webcasters and -- if you could just reask another
 6 way.
 7 Q. This is exactly what I'm trying to avoid,
 8 I'm trying to get some common dialogue here.
 9 A. Yeah.
 10 Q. Common definitions so we can have a
 11 discussion, okay?
 12 A. Sure.
 13 Q. I asked you who you consider your customers
 14 to be for your broadcast services and you said
 15 broadcasters, okay?
 16 A. Yeah.
 17 Q. Now I'm asking you, based on the way you
 18 used aggregated webcasters here in paragraph 1.
 19 A. Uh-hmm.
 20 Q. Are those the webcasters that webcast over
 21 the Live365 service?
 22 A. Yes.
 23 Q. Okay.
 24 Do all of the aggregated webcasters also use
 25 the broadcast services that we discussed a moment

1 ago?
 2 A. Yes, I believe so.
 3 Q. Okay.
 4 Do any not? Or is it a -- is it a
 5 requirement that they do?
 6 MR. MacDONALD: Objection, compound.
 7 BY MR. DeSANCTIS:
 8 Q. Let me ask it this way: If a broadcaster
 9 wants Live365 broadcast services but they do not
 10 want to become an aggregated webcaster, they just
 11 want to webcast on their own.
 12 A. Uh-hmm.
 13 Q. Would Live365 provide those broadcast
 14 services?
 15 MR. MacDONALD: Objection to the extent it
 16 calls for speculation.
 17 MR. DeSANCTIS: I don't want you to
 18 speculate.
 19 Q. I'm asking, does that occur in your
 20 business?
 21 A. I think it's possible, I'm not sure whether
 22 that actually occurs or not.
 23 Q. Okay.
 24 A. Yeah.
 25 Q. Let me turn your attention to page 3,

1 paragraph 7. Would you read that paragraph and then
 2 I'll ask you some questions about it.
 3 A. I'm done, go ahead, yeah.
 4 Q. The last sentence reads: "Live -- since
 5 2002, Live365's service has aggregate and made
 6 available to the public over 38,000 paying
 7 webcasters," and then it continues.
 8 Do you see that?
 9 A. Yup.
 10 Q. What do you mean by made available? In
 11 other words, what does it mean that Live365's
 12 service has aggregated and made available to the
 13 public 38,000 paying webcasters?
 14 A. I think 38,000 paying webcasters have -- use
 15 our -- I mean, operate during this period of time,
 16 since 2002.
 17 Q. What do you mean paying webcasters? Do
 18 the -- you mean webcasters pay Live365?
 19 A. Yes, yeah, the webcasters do.
 20 Q. Okay, what do they pay Live365?
 21 A. Various amount, depending on the -- you
 22 know, which packages they choose.
 23 Q. Various technology packages?
 24 A. Yes, and also -- yes.
 25 Q. Can you describe those various packages?

1 A. If you -- you know, we're pricing for
 2 different levels of use, features, memory,
 3 bandwidth, you know, that type of stuff. So -- so
 4 it's priced according to really -- you know, what
 5 kind of services they -- they choose to use.
 6 Q. Do any of the packages not include the
 7 royalty servicing services?
 8 MR. MacDONALD: Objection, lacks foundation.
 9 THE WITNESS: Some broadcasters or
 10 webcasters choose to take care of their own royalty.
 11 MR. DeSANCTIS: Okay.
 12 Q. For those webcasters, the ones that choose
 13 to take care of their own royalties, are they still
 14 considered aggregated webcasters of Live365?
 15 A. I believe so.
 16 Q. Okay.
 17 Do you know how many or roughly what
 18 percentage of the aggregated webcasters take care of
 19 their royalties by themselves, pay their own
 20 royalties to whoever it is they pay them to?
 21 A. I don't have that information.
 22 Q. Do you know roughly?
 23 MR. MacDONALD: I'm going to object to the
 24 extent it calls for speculation.
 25 THE WITNESS: Yeah, I really don't have that

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1 number.
2 BY MR. DeSANCTIS:
3 Q. And I don't -- I don't want you to guess --
4 A. Yeah.
5 Q. -- at a number, but are we talking about
6 roughly half or is it more or less than half, do you
7 know that much?
8 A. I think I don't feel comfortable guessing,
9 so, you know.
10 Q. It's a guess?
11 Let me put it this way, do you know whether
12 it's more or less than half? I'm not asking for a
13 specific number, but -- or do you not know whether
14 or not it's more or less than half?
15 A. We have a lot of packages, so I -- I really
16 don't know, okay?
17 Q. Okay.
18 The aggregated webcasters on Live365 are
19 responsible for programming their own channels,
20 correct?
21 A. Correct.
22 MR. MacDONALD: Objection, vague.
23 THE WITNESS: Okay, could you reask the
24 question?
25 MR. DeSANCTIS: Well, you started to answer

35

1 it before your counsel objected.
2 Can we have the question read back?
3 (The Reporter read back as follows:
4 "Question: The aggregated webcasters
5 on Live365 are responsible for
6 programming their own channels,
7 correct?)
8 BY MR. DeSANCTIS:
9 Q. And if it's unclear, what I was getting at
10 is whether Live365 is involved in programming your
11 webcasters channels.
12 MR. MacDONALD: Objection, it's vague.
13 THE WITNESS: If your question is whether we
14 program any other channels.
15 BY MR. DeSANCTIS:
16 Q. That would be my question, yes.
17 A. No.
18 Q. So in what sense, then, does Live365 make
19 available to the public the webcasters channels, the
20 way you use that phrase in paragraph 7 of your
21 testimony?
22 MR. MacDONALD: I'm going to object to the
23 extent it mischaracterizes written testimony with
24 respect to channels. I don't -- I don't see that
25 term in that particular sentence.

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1 MR. DeSANCTIS: I don't think it was part of
2 my question either, but maybe it was.
3 Q. You testified that Live365 does not program
4 the webcasters channels, correct, or did I
5 misunderstand?
6 A. You mean the stations?
7 Q. Their stations, yes.
8 A. No.
9 Q. But your testimony says that Live365's
10 service has made available to the public over 38,000
11 paying webcasters. And my question is: In what
12 sense did Live365 make available the 38,000 paying
13 webcasters?
14 A. Okay.
15 MR. MacDONALD: I'm going to object, again,
16 to the extent it mischaracterizes the written
17 testimony.
18 MR. DeSANCTIS: Okay, let me put it this
19 way:
20 Q. Well, did you understand the question?
21 A. Yeah, roughly, but, you know, let's ask
22 specifically.
23 Q. Okay, your words here, okay?
24 A. Yeah.
25 Q. "Live365's service has aggregated and made

37

1 available to the public over 38,000 paying
2 webcasters."
3 A. Uh-hmm.
4 Q. My question, what did you mean by "made
5 available"?
6 MR. MacDONALD: I'm going to object, I think
7 this question was asked and answered about ten
8 minutes ago.
9 MR. DeSANCTIS: It probably was asked, I
10 doubt it was answered.
11 Q. Go ahead.
12 A. You know, as we say -- as I said earlier,
13 we -- we have a website and we have a directory of
14 all webcasters, so I think that's what -- what that
15 means.
16 Q. Okay.
17 So it's making it available on the Live365
18 site?
19 A. Yup. On the directory, just like SHOUTcast,
20 makes available something like 30,000 stations
21 available on their directory.
22 Q. Okay.
23 A. Or there may be others out there that does
24 the same thing.
25 Q. Other what?

38

1 A. Like SHOUTcast.
2 Q. Other services?
3 A. Yeah, they basically act as a directory.
4 Q. Okay.
5 Would you call those other services
6 aggregators?
7 A. Yes, in a sense, yes.
8 Q. Do you have any reason to think that if a
9 particular Live365 aggregated webcaster was not
10 signed up with Live365, that they wouldn't use one
11 of the other services? In other words, is the
12 aggregating services that you provide
13 interchangeable with the other services you
14 mentioned or does Live365 do something unique and
15 special that they don't?
16 MR. MacDONALD: I'm going to object, it's
17 compound, calls for speculation.
18 THE WITNESS: Could you reask the question?
19 BY MR. DeSANCTIS:
20 Q. Yeah. You just mentioned a number of
21 aggregating services with whom you compete.
22 A. Uh-hmm.
23 Q. Do they provide the same services to
24 webcasters that Live365 provides or is there
25 something different that Live365 provides that your

39

1 competitors don't?
2 MR. MacDONALD: Objection, this calls for
3 speculation.
4 THE WITNESS: I try my best to -- to see if
5 I could get to your question and answer it
6 straightforwardly.
7 I think every service -- I think, I don't
8 know this for a fact and I haven't played with every
9 service out there, but most services are slightly
10 different one way or the other. So I really don't
11 know, you know, really what people would or would
12 not do. I mean, really -- so I think my answer to
13 that question is really, you know, I -- I really
14 don't know.
15 BY MR. DeSANCTIS:
16 Q. You don't know whether Live365 does anything
17 unique that any of your competitors don't do?
18 MR. MacDONALD: Objection, vague.
19 BY MR. DeSANCTIS:
20 Q. And I'm talking about with whatever services
21 you provide to your webcasters.
22 A. Yeah, I think we have some uniqueness.
23 Q. What is that?
24 A. I think we -- like I said, we provide a
25 fairly comprehensive set of services that probably

40

1 some others don't. But on the other hand, I really
2 don't know if there are other out there that also --
3 that provide more or less than we do because I
4 haven't checked every service out there.
5 Q. Okay.
6 A. If you don't mind in a few minutes, could we
7 take a little break?
8 Q. Yeah, now is a fine time to take a break.
9 A. Now is --
10 MR. DeSANCTIS: We'll go off the record.
11 (Recess.)
12 BY MR. DeSANCTIS:
13 Q. Let's go back on the record.
14 Staying with Exhibit 1, which is in front of
15 you, Mr. Lam, let me direct you to page 4, paragraph
16 11. Why don't you read that and I'll ask you some
17 questions about it.
18 (Witness reviews document.)
19 Okay. In this paragraph you use the term
20 "aggregate tuning hours," which you abbreviate as
21 ATH. Can you just describe for me very briefly what
22 aggregate tuning hours are?
23 A. I think aggregate tuning hours is a term of
24 art that have been used by the industry to capture
25 the hours that webcasting services -- to -- to

41

1 capture, you know, how many hours of listening that
2 occurs.
3 Q. So do you know what -- how one ATH is
4 defined, one tuning hour?
5 A. Yes, it's when a person listens to a webcast
6 for one hour, that's one aggregated tuning hour.
7 Q. Okay.
8 In the second sentence in that paragraph you
9 write, "Current statutory rates force Live365 to cap
10 its aggregate tuning hours."
11 What are you referring to by "the current
12 statutory rates"?
13 A. The current statutory rates is the CRB rate,
14 I think that was announced in March 2007.
15 Q. Okay.
16 And that covered the period 2006 through
17 2010?
18 A. Correct.
19 Q. So how is it that the current statutory
20 rates force Live365 to cap its aggregate tuning
21 hours?
22 A. Because the current statutory rates is much
23 more than the old rate, from 2006, for example, the
24 old rate up to 2005, was .000762. The CRB rate
25 went -- take it all the way up .00019, in 2010. No,

42	<p>1 001920.</p> <p>2 Q. Do you remember what it was for 2006?</p> <p>3 A. Yes, I think it was .0008.</p> <p>4 Q. Okay.</p> <p>5 So, then, how did the current statutory</p> <p>6 rates -- sorry, let me start over.</p> <p>7 What do you mean in this sentence that the</p> <p>8 current statutory rates force Live365 to cap its</p> <p>9 aggregate tuning hours? And actually let me break</p> <p>10 that down.</p> <p>11 What did Live365 do to cap its aggregate</p> <p>12 tuning hours?</p> <p>13 A. I think we took a number of actions.</p> <p>14 Q. What were they?</p> <p>15 A. One of them was to put the parking meter on</p> <p>16 ability of people to listening.</p> <p>17 Q. What is the parking -- how does that work?</p> <p>18 A. That we would stop their listening at a</p> <p>19 certain point in time in the stream.</p> <p>20 Q. Even if the listener wants to continue</p> <p>21 listening?</p> <p>22 A. Yes, they would have -- yeah.</p> <p>23 Q. So why would you stop the stream if the</p> <p>24 listener wants to keep listening?</p> <p>25 A. Because otherwise for every hour stream we</p>	44	<p>1 30 percent, you know, or more.</p> <p>2 Q. Okay.</p> <p>3 So does it -- what do you call this, this</p> <p>4 system that you implemented?</p> <p>5 A. We generally just call it the parking meter.</p> <p>6 Q. Parking meter?</p> <p>7 A. Yeah.</p> <p>8 Q. Okay.</p> <p>9 So the parking meter was intended to save</p> <p>10 Live365 money?</p> <p>11 MR. MacDONALD: Objection, vague.</p> <p>12 BY MR. DeSANCTIS:</p> <p>13 Q. You can answer.</p> <p>14 A. Yes, it tries to contain costs.</p> <p>15 Q. And how does it contain costs, exactly?</p> <p>16 A. Because royalty is a fairly important</p> <p>17 component of our cost, okay?</p> <p>18 Q. Right. So how does the parking meter reduce</p> <p>19 royalty costs?</p> <p>20 A. If we cannot generate enough revenue to</p> <p>21 cover the additional costs, there's no reason for us</p> <p>22 to be -- you know, we have to do something about it.</p> <p>23 Q. And with your parking meter, if the</p> <p>24 listener -- if the stream is stopped to the</p> <p>25 listener, the listener wants to continue listening,</p>
43	<p>1 have to pay more royalty.</p> <p>2 Q. So -- so you changed the system so that the</p> <p>3 listener might be listening and then the stream just</p> <p>4 stops. Does it ever start up again?</p> <p>5 A. They have to do something to start it up.</p> <p>6 Q. Like what?</p> <p>7 A. They have to go to the website and take</p> <p>8 proactive action to find the -- you know, some</p> <p>9 button to push in order to -- to listen to it.</p> <p>10 Q. Okay.</p> <p>11 And you did this -- well, let me ask you:</p> <p>12 Why did you -- why did you institute the system that</p> <p>13 you just described in terms of stopping ATH?</p> <p>14 MR. MacDONALD: I'm going to object, lacks</p> <p>15 foundation, and it's vague as to who "you" is</p> <p>16 referring to.</p> <p>17 BY MR. DeSANCTIS:</p> <p>18 Q. You, I just mean Live365, not you</p> <p>19 personally.</p> <p>20 A. Okay. Because as I said, the cost just went</p> <p>21 up quite a bit for us, because of the new statutory</p> <p>22 rate.</p> <p>23 Q. The cost of .0002 versus .0008?</p> <p>24 A. It's not just that that's the first year but</p> <p>25 subsequent years it kept going up, in increments of</p>	45	<p>1 he or she does that by, you said, going to the</p> <p>2 website?</p> <p>3 A. Yes.</p> <p>4 Q. And what do they do at the website?</p> <p>5 A. They have to find somewhere in small print</p> <p>6 to say -- to do something to contain -- to -- to --</p> <p>7 and then click on something to -- to continue to</p> <p>8 listen.</p> <p>9 Q. To continue listening?</p> <p>10 A. Yeah.</p> <p>11 Q. Okay.</p> <p>12 Is it correct to say that the parking meter</p> <p>13 is intended to reduce streaming when the listener is</p> <p>14 not actually listening?</p> <p>15 A. I think that's one part of it. But the</p> <p>16 other part is also that -- that -- that the royalty</p> <p>17 costs was so expensive, unless we have ways to</p> <p>18 recoup the cost --</p> <p>19 Q. Uh-hmm.</p> <p>20 A. -- there's no reason for us to -- to have --</p> <p>21 the listeners listen to more, but -- it's just like</p> <p>22 any business, if you have a restaurant business, the</p> <p>23 cost of your food is more than what you're able to</p> <p>24 charge for, you know, you would do something about</p> <p>25 it too.</p>

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1 Q. Okay.
2 So is it true that the parking meter was
3 intended to reduce Live365's royalty costs?
4 MR. MacDONALD: Objection, vague.
5 BY MR. DeSANCTIS:
6 Q. Isn't that the bottom line purpose of the
7 parking meter?
8 A. Yes, I think by and large.
9 Q. And the parking meter also would have
10 reduced Live365's royalty costs under the old rate
11 of .000762, correct?
12 MR. MacDONALD: Objection, calls for
13 speculation.
14 THE WITNESS: Yes, most likely.
15 BY MR. DeSANCTIS:
16 Q. Well, most likely. Is there -- is there a
17 reason why it wouldn't have? I was confused by your
18 answer.
19 A. I say yes, most likely. I -- there may be
20 corner cases that I can't think of right now that --
21 I mean, there are many variables, it's not -- a
22 business is not so simple.
23 Q. Has the parking meter reduced Live365's
24 royalty costs?
25 A. I think yes, to -- to -- yes.

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1 Q. By what extent, do you know?
2 A. Could you clarify your question as what do
3 you mean by to what extent?
4 Q. How much has it reduced Live365's royalty
5 costs, if you know?
6 A. I don't have the exact number, but I -- I
7 don't have the percentage either, but it did -- you
8 know, let me rephrase my answer before.
9 It really depends on the rate. When you say
10 did it reduce your royalty costs, it may not have,
11 because we may -- because the rate was much higher,
12 even though we have less -- we were delivering less
13 ATH, actually could have cost us more.
14 Q. Oh, sure, because the rate changed.
15 A. Correct, the rates is basically as of 2010
16 is two and a half times the rate.
17 Q. Right. Okay.
18 So, then, has the parking meter been
19 successful in reducing the royalty rates under the
20 current rates as compared to what they would have
21 been without the parking meter?
22 MR. MacDONALD: Objection, compound, vague.
23 THE WITNESS: I think I would use the word
24 "contained," I don't think I would say -- I'm not
25 sure about the reduced, yeah.

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1 MR. DeSANCTIS: Okay.
2 Q. But they have contained royalty costs, the
3 parking meter has?
4 A. Yes, to a certain extent, yeah.
5 Q. Okay.
6 I asked you what Live365 has done to cap its
7 aggregate tuning hours and you said numerous things,
8 one of which was instituting the parking meter.
9 A. Yeah.
10 Q. What other things were there?
11 A. I think we were at one point in time more
12 aggressive in being listed on different platforms.
13 Q. I'm sorry, of being listed on different
14 platforms?
15 A. Yeah. Being -- having our content made
16 available, our content to different platforms.
17 Q. What does that mean, what do you mean
18 different platforms?
19 A. For example, instead of website, you know,
20 we will also -- some of our stations will also
21 listened to on iTunes.
22 Q. You could just -- you mean a listener could
23 stream some of your stations from the iTunes
24 website?
25 A. From the -- actually, iTunes Radio, yeah.

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1 Q. Okay.
2 And Live365 stopped doing that?
3 A. No, we didn't stop doing that, but we
4 basically, you know, took measure that removed I
5 think most of our stations that -- we took measures
6 to -- to -- to make sure that it would not cost us
7 in terms of royalty.
8 Q. Well, my -- so how does this -- first of
9 all, what did you remove? What did Live365 remove
10 from the iTunes website?
11 A. I think we used to have more stations on
12 iTunes.
13 Q. How did you decide -- meaning Live365
14 affirmatively removed some from iTunes or they went
15 away for some other reason?
16 A. Yeah.
17 Q. And Live365 affirmatively removed some
18 stations from iTunes Radio?
19 A. Yeah.
20 Q. Okay.
21 But not all of them?
22 A. Not all.
23 Q. How was it determined which would be removed
24 and which would stay?
25 A. Specifically, I'm not the one to do that.

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1 Somebody in charge of broadcasting in the company
2 made the decision.
3 Q. Who would that have been?
4 A. I think Jason Stoddard.
5 Q. Do you know if it was based on an analysis
6 of which stations were more profitable, more -- or
7 more popular versus other stations?
8 A. I don't know --
9 MR. MacDONALD: Objection, vague.
10 THE WITNESS: Okay.
11 Could you reask the question?
12 BY MR. DeSANCTIS:
13 Q. Can you answer the question?
14 A. I think I don't know exactly what the
15 criteria that he used or, you know, whoever was
16 involved used.
17 Q. Okay.
18 A. But I'm sure they must have considered a
19 number of factors.
20 Q. Like what, if you know?
21 A. You're asking me to speculate, I don't know
22 for certain.
23 Q. Don't speculate.
24 A. Yeah.
25 Q. So you don't know?

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1 A. Yeah.
2 Q. Do you know whether webcasters -- whether
3 Live365's webcasters pay to have their stations
4 listed on iTunes Radio?
5 MR. MacDONALD: I'm going to object to the
6 extent it calls for speculation.
7 BY MR. DeSANCTIS:
8 Q. I'm asking if you know.
9 A. The question is whether they pay to -- to --
10 Q. Well, specifically let me ask -- let me
11 withdraw it and ask it this way: Do you know
12 whether webcasters pay Live365 to have their
13 stations listed on iTunes Radio?
14 MR. MacDONALD: I'm just going to object,
15 again, to the extent it calls for speculation.
16 THE WITNESS: I -- I don't know. But I
17 think your question was specifically do they pay
18 specifically to get listed on iTunes Radio, correct?
19 BY MR. DeSANCTIS:
20 Q. Right.
21 A. I really don't know, but I don't think so.
22 Q. Okay.
23 So how does taking certain channels off
24 iTunes Radio decrease Live365's ATH?
25 A. Because the stations listed on iTunes Radio

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1 have a tendency to get listened to a lot.
2 Q. And so there's less listening --
3 A. Yeah.
4 Q. -- if you take it off?
5 A. Yeah.
6 Q. So with -- by delisting channels from iTunes
7 Radio, Live365 actually wanted to discourage
8 listening hours?
9 MR. MacDONALD: Objection, vague, lacks
10 foundation.
11 BY MR. DeSANCTIS:
12 Q. I'm just trying to get at what the
13 motivation was.
14 A. Contain costs as a result of the high
15 royalty.
16 Q. Not to affirmatively discourage listening
17 hours?
18 MR. MacDONALD: Objection, vague.
19 THE WITNESS: If I get your question
20 correctly, I mean, it's the same thing, so as I told
21 you more than once, cost containment was critical,
22 given this -- the high rates of royalty.
23 BY MR. DeSANCTIS:
24 Q. So you've mentioned now the parking meter?
25 A. Uh-hmm.

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1 Q. And the delisting of iTunes Radio?
2 A. Uh-hmm.
3 Q. You describe them both as measures to
4 contain costs?
5 A. Uh-hmm.
6 Q. Okay.
7 Do you know whether they also reduced
8 Live365's revenues?
9 A. It depends.
10 Q. On what?
11 A. It depends on whether -- on the costs were
12 contained, there were revenues that are associated
13 with the cost, and then whether the revenue was
14 greater than the cost or less than the cost.
15 Q. Okay, I asked you whether these measures
16 reduced Live365's revenues and you said it depends
17 on whether -- whether the revenue was greater than
18 the cost or less than the cost?
19 A. Maybe -- maybe I didn't answer correctly.
20 I think it depends on whether they were
21 revenue associated with this cost or not, okay?
22 Q. Uh-hmm.
23 A. So if -- if it is, if there are revenue
24 associated with the cost, then of course the revenue
25 would be -- would be down. But if there's no

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1 revenue associated with cost, then it wouldn't have
2 impacted.
3 Q. Right.
4 And wasn't it the idea in -- in implementing
5 these measures, to reduce cost in ways where the
6 cost was not contributing to revenue?
7 A. Or not contributing sufficiently to cover
8 the additional cost brought on by the higher royalty
9 rate.
10 Q. Okay.
11 So these were measures, is it fair to say,
12 that were intended to make Live365 more efficient?
13 MR. MacDONALD: Objection, vague.
14 BY MR. DeSANCTIS:
15 Q. Can you answer the question?
16 A. When you say efficient, maybe could you
17 ask -- could you be more specific about what do you
18 mean by efficient.
19 Q. I'm using it in the general sense that a
20 business is -- businesses try to be efficient by
21 cutting costs and maximizing revenue.
22 A. Okay.
23 Q. Were these measures, the parking meter and
24 the delisting of channels on iTunes Radio, intended
25 to make Live365 more efficient?

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1 A. Yes.
2 Q. Okay.
3 In terms of measures that Live365 took to
4 cap its aggregate tuning hours, you mentioned the
5 parking meter and delisting of certain channels off
6 of iTunes Radio, were there any other measures that
7 Live365 took in order to cap its aggregate tuning
8 hours?
9 A. No. I think there must be other measures,
10 because we constantly try to optimize and improve
11 and all that. But, you know, there are a lot of
12 things we -- we did also but, you know, I don't
13 remember exactly when, what was done, and how they
14 did it. Because that's operation matters that --
15 you know, we have people doing that.
16 Q. Okay.
17 Do you know whether the parking meter and
18 the delisting of channels on iTunes Radio have
19 succeeded in containing Live365's royalty costs?
20 A. When you say succeeded, it's a very loaded
21 word.
22 Q. Okay.
23 What makes it difficult for you to answer?
24 A. Because success, definition of success can
25 be measured many ways.

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1 Q. Okay.
2 Well, I'm not asking for the extent to which
3 they might have contained costs. Is it -- are they
4 work -- are they helping to contain costs or are
5 they not working, are they not helping to contain
6 costs?
7 A. To a certain extent, as I explained to you,
8 I mean, we have a very complicated business, okay?
9 So it's -- to the extent, to the best of our
10 knowledge, using most prudent judgment, it has.
11 Q. Okay.
12 Your -- today in 2010, Live365 pays
13 royalties to SoundExchange, correct?
14 A. Correct.
15 Q. At what rate?
16 A. We are paying at .000762.
17 Q. Has Live365 -- or has Live365 ever paid
18 SoundExchange at a rate higher than that?
19 A. We have been paying at this rate.
20 Q. So if you've been paying at the -- what I'll
21 call the old rate, the 762 rate, how is it that the
22 current statutory rates which you're not paying have
23 forced you to make these adjustments in ATH?
24 MR. MacDONALD: Objection, it's compound and
25 lacks foundation.

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1 BY MR. DeSANCTIS:
2 Q. Well, your testimony, Mr. Lam, the written
3 testimony, says the current rates forced Live365 to
4 cap its ATH. You then testified that you are not
5 paying the current rates and never have, correct?
6 A. Uh-hmm.
7 Q. So my question is: If you have never paid
8 the current rates, how is it that the current rates
9 forced Live365 to cap ATH?
10 A. Because we have been accruing at the CRB
11 rate.
12 Q. What do you mean by accruing?
13 A. Okay, we have treated as if that -- you
14 know, that in the worst -- under the worst
15 circumstance, we have to pay under the CRB rate.
16 Q. And that would be retroactive back to 2006?
17 A. Correct.
18 Q. So you've been accruing retroactive to 2006
19 on your books as if you were paying at the rate set
20 by the CRB?
21 A. Yes. All this while a lot of things were
22 happening, you know, there was this long, drawn-out
23 negotiation that we were hoping fervently that we
24 could become a party to, and then there was this
25 appeal, and then there was all these things

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1 happening, and to this day we are still trying to
2 negotiate settlement.
3 Q. Okay.
4 So if Live365 was accruing on its books at
5 the rates set by the CRB.
6 A. Yup.
7 Q. But it wasn't paying that money to
8 SoundExchange, what was it doing with that money?
9 Is it -- was it setting it aside?
10 A. Yeah.
11 Q. In -- in -- where? In an account?
12 A. The bank.
13 Q. In an escrow account?
14 A. Yeah, in the bank.
15 Q. In a bank?
16 A. Yeah.
17 Q. Okay.
18 In -- is it in an account earmarked
19 specifically for these purposes or are the funds
20 intermingled with other funds in that bank?
21 MR. MacDONALD: Objection, compound and
22 vague.
23 BY MR. DeSANCTIS:
24 Q. Do you understand the question?
25 A. Yes, I understand the question.

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1 Q. Okay.
2 A. Yeah, we set aside the money in the bank
3 account.
4 Q. In -- and I'm asking, is that money
5 segregated from all other Live365 money that might
6 be in accounts at that bank?
7 A. As you know -- yes, by and large, yes.
8 Q. Okay.
9 Do you know how much money is in that
10 account, currently?
11 A. It's [REDACTED] I don't
12 have the exact number. I say [REDACTED]
13 [REDACTED]
14 Q. [REDACTED]?
15 A. [REDACTED]
16 Q. [REDACTED]
17 A. I don't know.
18 Q. Okay.
19 And is that your best estimate --
20 A. Yeah.
21 Q. -- of what -- of not only what's in the
22 account, but is that your best estimate of what
23 Live365 owes SoundExchange in back pay due to the
24 rate increase set by the CRB?
25 MR. MacDONALD: Objection, vague, lacks

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1 foundation, and I'm going to ask you, Mr. Lam, try
2 to let Mr. DeSanctis finish his question before you
3 answer.
4 THE WITNESS: Okay.
5 BY MR. DeSANCTIS:
6 Q. Is that also your best estimate of what
7 Live365 owes SoundExchange?
8 A. Roughly, but I don't have the exact figures.
9 I mean, accounting, they do the bookkeeping, so I --
10 Q. When does Live365 intend to pay
11 SoundExchange that money?
12 A. We --
13 MR. MacDONALD: Hold on. I'm going to
14 object here, to the extent it calls for privileged
15 communications. So I'm going to caution you not to
16 get into -- not to reveal the substance of any
17 privileged communications. So if you feel like you
18 can answer that without getting into privileged
19 communications, go ahead.
20 But if not, then I'm going to instruct you
21 not to -- not to reveal these communications.
22 THE WITNESS: We have had discussion with
23 SoundExchange about settlement all along. And so it
24 would come to some sort of a settlement, we would
25 like to square everything up.

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1 BY MR. DeSANCTIS:
2 Q. Absent a settlement, is -- do you have a
3 plan to pay SoundExchange what you owe it under the
4 CRB rates by a certain date?
5 MR. MacDONALD: Again, I'm going to caution
6 the witness not to reveal --
7 MR. DeSANCTIS: I'm not asking for any
8 privileged communications, nothing in my question
9 asked for any communication with any lawyer.
10 Q. I'm just asking what Live365's plan is in
11 terms of -- is there a date by which Live365 plans
12 to pay SoundExchange, if there's no settlement?
13 A. We --
14 MR. MacDONALD: Hold on. Objection, I'm
15 going to make the same admonitions, to the extent
16 you're revealing any privileged communications,
17 I'm -- I'm asking you to be very, very cautious with
18 this.
19 THE WITNESS: Okay.
20 MR. MacDONALD: Go ahead.
21 THE WITNESS: We are in continued
22 discussions with our counsel about settlement.
23 BY MR. DeSANCTIS:
24 Q. Discussions with Live365's counsel?
25 A. Yeah.

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1 Q. Or with SoundExchange's counsel?
2 A. Live365 counsel, and our counsel have been
3 in contact with them too.
4 Q. Your counsel has been --
5 A. With SoundExchange, about settlement.
6 Q. When was the last time your counsel
7 contacted SoundExchange about settlement?
8 A. I don't remember exactly when, but not too
9 long ago.
10 Q. Can you -- roughly?
11 A. I think -- I think within the last month or
12 two.
13 Q. The last month or two?
14 A. Yeah.
15 Q. Do you know who at SoundExchange they
16 contacted?
17 A. I don't -- I really don't know, per se, but
18 I think -- I have to ask my counsel for that.
19 Q. Was an offer of settlement made? I mean,
20 was -- was there some offer made by Live365 to
21 SoundExchange?
22 A. Yes, I believe offer of settlement was made.
23 Q. And do you know how SoundExchange reacted?
24 MR. MacDONALD: Objection, calls for
25 speculation.

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1 BY MR. DeSANCTIS:
2 Q. Do you know if SoundExchange accepted your
3 offer?
4 A. To my knowledge, no. But it's in
5 discussion.
6 Q. It's in continuing discussions?
7 A. That's -- I believe so.
8 Q. How do you define continuing discussions?
9 If Live365 representatives continue to call
10 SoundExchange, is that alone how you define
11 continuing discussions?
12 MR. MacDONALD: Objection, vague and lacks
13 foundation and assumes facts that aren't necessarily
14 established.
15 BY MR. DeSANCTIS:
16 Q. Well, I'm trying to understand what you mean
17 by continuing discussions. Has there been another
18 discussion planned or a meeting set up?
19 A. My understanding is that our counsel had
20 contacted SoundExchange's counsel and that -- last I
21 heard, that somebody at SoundExchange had actually
22 discussed with other counsel about settling. I
23 think that's as late as a few weeks ago.
24 Q. So is it your position that Live365 will not
25 pay SoundExchange what it owes under the CRB

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1 webcasting rates if settlement discussions are
2 continuing?
3 MR. MacDONALD: I'm going to object to the
4 extent it mischaracterizes Mr. Lam's testimony.
5 BY MR. DeSANCTIS:
6 Q. I'm asking if that's Live365's position?
7 MR. MacDONALD: Same objection.
8 BY MR. DeSANCTIS:
9 Q. I asked you before -- let me withdraw that
10 question.
11 I asked you earlier today, when you planned
12 on paying, and you said we are still in settlement
13 discussions with them.
14 A. Uh-hmm.
15 Q. Do you remember that?
16 A. Uh-hmm.
17 Q. Okay.
18 My question is: Is it Live365's position
19 that they will not pay SoundExchange what it owes
20 under the CRB rates as long as there are settlement
21 discussions continuing?
22 MR. MacDONALD: And I'm going to make the
23 same objection as before.
24 BY MR. DeSANCTIS:
25 Q. Is that Live365's position?

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1 MR. MacDONALD: I'm also going to object to
2 the extent it lacks foundation, as to whether or not
3 Live365 has actually formulated a position.
4 THE WITNESS: This is in discussion with our
5 counsel, okay, so --
6 BY MR. DeSANCTIS:
7 Q. And I don't want you to discuss any advice
8 that counsel gave you.
9 A. Uh-hmm.
10 Q. But you've been talking about discussions
11 with SoundExchange, those are not privileged. I'm
12 asking you when Live365 plans to pay the money it
13 owes SoundExchange.
14 MR. MacDONALD: Hold on.
15 I'm going to object, again, lacks
16 foundation, and again, caution the witness to not
17 reveal the substance of any privileged
18 communications.
19 MR. DeSANCTIS: Okay, I actually appreciated
20 that objection, and you're right, perhaps it did
21 lack foundation.
22 Q. Does Live365 intend ever to pay
23 SoundExchange what it owes it under the CRB
24 webcasting rates?
25 MR. MacDONALD: Objection, vague.

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1 THE WITNESS: This is something that with
2 our counsel we've been discussing.
3 MR. DeSANCTIS: Okay.
4 Q. And I don't want -- I don't want to hear --
5 A. Yeah, so, I mean, you know, we -- you know,
6 we -- you know, we -- we have been discussing with
7 our counsel on how to proceed with this.
8 Q. Okay.
9 A. Okay. So we haven't taken a particular
10 position, it's on advice of counsel whether we do or
11 don't do certain things.
12 Q. So Live365 -- is it your testimony that
13 Live365, as you sit here today, has not decided
14 whether it will ever pay SoundExchange the money it
15 owes it under the CRB webcasting rates?
16 MR. MacDONALD: Objection, mischaracterizes
17 testimony and it's vague.
18 BY MR. DeSANCTIS:
19 Q. Well, I --
20 A. I didn't say that.
21 Q. Okay.
22 A. I really didn't say that.
23 Q. Well, then, has Live365 decided whether it
24 will ever pay SoundExchange what it owes it under
25 the rates set by the CRB?

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1 MR. MacDONALD: Objection, vague.
2 THE WITNESS: We are in continued discussion
3 with counsel on this point.
4 MR. DeSANCTIS: Okay.
5 Q. With your own counsel?
6 A. Yes.
7 Q. So I take that as a no, I don't know -- I'm
8 not sure how -- if I asked you have you decided and
9 you said you're under continuing discussions with
10 your counsel, that means no, you haven't decided,
11 correct?
12 MR. MacDONALD: I'm going to object.
13 BY MR. DeSANCTIS:
14 Q. Or have you? It's a pretty simple question.
15 MR. MacDONALD: I'm going to object, this is
16 starting to get argumentative and also the question
17 was compound.
18 THE WITNESS: As I said before, you know,
19 we've been discussing with counsel on how to settle
20 the case, and it's ongoing, it's been so --
21 BY MR. DeSANCTIS:
22 Q. If SoundExchange does not agree to any sort
23 of settlement, would Live365 pay what it owes to
24 SoundExchange under the webcasting rates set by the
25 CRB?

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1 MR. MacDONALD: Objection, calls for
2 speculation.
3 THE WITNESS: Could you reask the question?
4 MR. DeSANCTIS: Yes.
5 Q. I'll reask it this way: If no settlement is
6 reached between Live365 and SoundExchange, will
7 Live365 pay what it owes SoundExchange under the
8 webcasting rates set by the CRB?
9 MR. MacDONALD: Objection, calls for
10 speculation, and again, to the extent this gets into
11 communications that you've had with counsel about
12 settlement, I'm instructing you not to reveal the --
13 those communications.
14 THE WITNESS: As I said before, we have been
15 discussing with the counsel, whatever counsel
16 concerned at this point.
17 BY MR. DeSANCTIS:
18 Q. That doesn't answer the question.
19 I understand you've been -- you're
20 discussing all of this with counsel, I understand.
21 A. This information.
22 Q. I don't want to know about the discussions
23 with counsel.
24 A. Uh-hmm.
25 Q. That's privileged.

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1 A. Uh-hmm, correct.
2 Q. I'm asking about Live365's current plans
3 today.
4 A. Our plan is necessarily dependent on our
5 discussion and consultation with counsel.
6 Q. Yes.
7 A. We rely on -- we look to them and rely on
8 their advice and council, so at this point in time,
9 we really have to look to our counsel for the
10 answers. We have not formulated one way or the
11 other.
12 And we are continued to believe that we
13 would -- you know, we are trying to get a
14 settlement, as many other parties have.
15 Since the beginning, since the CRB, even
16 before the CRB rate came down, we have been out
17 there, you know, we have actually gone to
18 SoundExchange and said, you know, we -- applicator,
19 you know, our broadcasters, many of them are very
20 small, you know, broadcasters, they are much smaller
21 than the definition of small broadcasters, that, you
22 know, we, you know -- we would like to -- you to
23 consider -- I mean, SoundExchange make available the
24 rates to our broadcasters, okay?
25 And that discussion have been going on, in

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1 fact, you know, we have been kept saying that, well,
2 we're business with this party, that party, when we
3 settle with that party, we will turn to you. Okay?
4 And so final -- I mean, you know, so
5 that's -- and then in the interim there was an
6 appeal and in the interim there are other things
7 that happened, and we really are eagerly awaiting to
8 see if we can get a settlement.
9 Q. And is it -- this indicates that Live365
10 will not pay what it owes SoundExchange unless or
11 until there's a settlement, is that your position?
12 And I am not asking for any discussions with
13 counsel, I'm asking is that your position now?
14 MR. MacDONALD: Objection, calls for
15 speculation and it -- same cautionary instruction.
16 THE WITNESS: I don't know what I would do.
17 We really are discussing this with our counsel, this
18 has been discussed.
19 BY MR. DeSANCTIS:
20 Q. Has anyone at SoundExchange ever told you
21 that it was okay not to pay while there was
22 discussions going on?
23 MR. MacDONALD: Objection, vague.
24 THE WITNESS: John Simpson had basically in
25 the public said that, you know, as long as there's

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1 discussion of settlement.
2 BY MR. DeSANCTIS:
3 Q. What?
4 A. As long as there's settlement discussions,
5 that -- that -- let me rephrase this.
6 Q. Okay.
7 A. John Simpson I think had in the public
8 stated it, as long as there are discussions going
9 on, that he would not take actions against parties.
10 Q. That he would not take action against
11 parties?
12 A. Yup.
13 Q. When did he say that?
14 A. I was advised by counsel that was the
15 position of SoundExchange.
16 Q. When -- when did John Simpson make the
17 statement you're referring to?
18 A. I don't know. I don't know when.
19 Q. When were you advised by counsel that he had
20 made that statement?
21 A. Some time ago.
22 Q. Can you estimate when?
23 A. I don't remember, but it's a while ago.
24 Q. Was it in 2009?
25 A. I don't really remember, but it's over a

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1 period of time.
2 Q. Well, I'm -- was that the first time you had
3 heard of Mr. Simpson's statement that you're
4 referring to, when -- when your counsel told you
5 about it?
6 A. I don't remember whether it's 2009 or not.
7 Q. Okay, but was the first time you heard about
8 Mr. Simpson's statement, when your counsel told you
9 about it, or had you heard about it some other way?
10 A. I heard it from my counsel some -- some
11 while ago, okay?
12 Q. Okay.
13 A. And still -- I mean, counsel still take the
14 position that's the case.
15 Q. Okay.
16 Do you recall -- and all I'm asking the
17 year, do you recall what year you first heard about
18 Mr. Simpson's statement?
19 A. No, I don't.
20 Q. Okay.
21 Do you remember where this public statement
22 was made?
23 A. No, I don't.
24 Q. Did Mr. Simpson ever make the same statement
25 to you personally?

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1 A. I don't remember. The last time I saw
2 Mr. Simpson was quite a while ago, maybe in 2007.
3 Q. Are you aware of anyone at SoundExchange
4 demanding payment from Live365 under the -- payment
5 under the rates set by the CRB, notwithstanding
6 Mr. Simpson's public statement?
7 MR. MacDONALD: Objection, vague, compound.
8 THE WITNESS: Could you reask the question?
9 MR. DeSANCTIS: Sure.
10 Q. You -- you -- you testified that you were
11 told by your counsel that Mr. Simpson made a
12 particular statement.
13 A. Uh-hmm.
14 Q. Actually, let me ask a couple foundational
15 questions first.
16 You said the statement was, if settlement
17 discussions were going on, SoundExchange would not
18 take action?
19 A. (Nods head up and down.)
20 Q. Did you interpret that to mean that you had
21 no obligation to pay under the rates set by the CRB?
22 MR. MacDONALD: Objection, vague.
23 THE WITNESS: We have always believed this.
24 We have always believed that -- that in paying
25 others, you know, performers and these people, okay?

1 We just believe that in our case, we actually, as I
2 told you earlier, made up of broadcasters, small
3 webcasters, and, you know, they actually should be
4 paying a certain rate. [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED] and we have been in
8 good faith trying to negotiate and say, look, let's
9 see if we can come to some sort of, you know, agreement,
10 so that, you know, it's reasonable for everybody.

11
12 It's the same music, just because we happen
13 to aggregate a lot of broadcasters, that our
14 broadcasters that are very small broadcasters are
15 being penalized.

16 MR. DeSANCTIS: Could I have my question
17 read back, please?

18 (The Reporter read back as follows:
19 "Question: Did you interpret that
20 to mean that you had no obligation
21 to pay under the rates set by the
22 CRB?)

23 MR. DeSANCTIS: Could I get the prior
24 question read as well, I think the question came out
25 in two parts.

1 (The Reporter read back as follows:
2 "Question: You said the statement
3 was, if settlement discussions were
4 going on, SoundExchange would not
5 take action, did you interpret that
6 to mean that you had no obligation
7 to pay under the rates set by the
8 CRB?)

9 BY MR. DeSANCTIS:

10 Q. Can you answer that question, please?

11 MR. MacDONALD: Objection, compound and
12 vague.

13 BY MR. DeSANCTIS:

14 Q. Do you understand the question?

15 A. Okay, which question would you like me to
16 answer, the first or the second?

17 Q. I'm not sure that actually was two
18 questions, it was just split up the way it was
19 reported. Let me just -- let me ask it this way.

20 A. Okay.

21 Q. Can you repeat for me again what the
22 statement was from John Simpson?

23 MR. MacDONALD: Objection, asked and
24 answered.

25 MR. DeSANCTIS: Well, I'm trying to get some

1 clarity in the transcript here.

2 Q. What was the statement from John Simpson?

3 A. I think he -- he -- I mean, he basically is
4 that if parties are under negotiations, they don't
5 have to pay the royalty yet at that point in time.

6 And we know of the fact that in this -- in a
7 situation, you know, people in the industry, when
8 the rates wasn't exactly set yet, you know, they
9 continued to pay under the old rate.

10 Q. And is it your understanding that regardless
11 of how long any discussions took, SoundExchange did
12 not expect Live365 to pay under the webcasting II
13 rates set by the CRB?

14 MR. MacDONALD: Objection, calls for
15 speculation, it's vague as well.

16 BY MR. DeSANCTIS:

17 Q. Well, I'm asking for your understanding of
18 the statement. Did you interpret it as open-ended,
19 no matter how long discussions went on,
20 SoundExchange did not expect Live365 to pay under
21 the web II rates?

22 A. We have been getting in the queue forever to
23 try to discuss with them to rev up the settlement if
24 we could, every time we approached them, we've been
25 told, we got this more -- this thing is more

1 important, we're going to do it now, and get back to
2 the queue.

3 I mean, it's very frustrating for us as
4 well.

5 Q. Are you aware of SoundExchange ever
6 demanding payment from Live365 under the web II
7 rates set by the CRB?

8 A. Yes, I've heard it from counsel.

9 Q. You've heard it from counsel?

10 A. Yeah.

11 Q. What counsel? And I don't want the
12 discussion, I want the name.

13 A. There have been letter that's written to
14 counsel.

15 Q. Uh-hmm.

16 A. Okay.

17 Q. So who told you? Who told you that
18 SoundExchange has demanded payment under the web II
19 rates?

20 A. I think it's Abraham Yacobian or is it
21 David Rosenberg who told me that, I don't recall,
22 you know, but one of these.

23 Q. It was one of those two?

24 A. Yeah.

25 Q. Do you recall whether anyone at

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1 SoundExchange -- actually, let me back up.
2 Who is Mr. Chang, C-h-a-n-g, at Live365?
3 A. C-h-a-n-g?
4 Q. Maybe I have that wrong.
5 Steve Chang, do you know Steve Chang?
6 A. Yup.
7 Q. Are you aware of -- has he ever told you
8 that SoundExchange demanded payment from him, from
9 Live365 -- sorry, let me rephrase that.
10 Has Mr. Chang ever told you that
11 SoundExchange made a demand to him that Live365 pay
12 SoundExchange under the web II rates?
13 A. I think what he did was when he received the
14 letter, you know, he talked to counsel, and the
15 counsel was the one who told me.
16 Q. Okay.
17 What letter are you referring to?
18 A. I think there's some demand, you know, I
19 don't remember exactly when or -- you know, when or
20 where.
21 Q. Have you ever seen that letter?
22 A. Yeah, I think I glance at it.
23 Q. Okay.
24 Did you discuss it with Mr. Chang?
25 A. I discuss it with counsel.

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1 Q. Did you discuss it with Mr. Chang?
2 A. No. I mean, I discuss it with counsel, the
3 counsel is the one who gave me the -- you know, I --
4 as I said, our counsel had been trying to conduct,
5 you know, settlement with -- with SoundExchange for
6 some time now, trying to.
7 Q. I understand.
8 SoundExchange sent a letter to Mr. Chang,
9 correct?
10 A. I don't know -- I don't remember who they
11 sent it to, okay?
12 Q. Uh-hmm.
13 A. I really don't remember.
14 Q. The letter you were referring to, I didn't
15 mention a letter, you mentioned a letter.
16 A. You're the one who brought up the letter,
17 didn't you?
18 Q. No, you did.
19 MR. MacDONALD: Is there a question pending?
20 MR. DeSANCTIS: I'm not even sure anymore.
21 Q. Do you know whether Mr. Chang received a
22 letter from SoundExchange demanding payment under
23 the web II rates?
24 A. I don't know whether it's Mr. Chang or
25 counsel who received the letter.

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1 Q. Okay.
2 But you know there was a letter?
3 A. Yes, I was told that it was a letter.
4 Q. Did you ever discuss that letter with
5 Mr. Chang?
6 A. No, I discussed it with counsel.
7 Q. Okay.
8 And after receiving that letter -- do you
9 recall when it was?
10 A. I don't remember.
11 Q. And after receiving that letter, Live365
12 still has not paid SoundExchange under the web II
13 rates, correct?
14 A. I believe so, but that's based on discussion
15 with counsel.
16 Q. How is that based on discussion with
17 counsel? I asked since receiving the letter --
18 A. Yeah.
19 Q. -- Live365 has not paid SoundExchange at the
20 rate set by the CRB.
21 A. Correct.
22 Q. Is that correct?
23 A. Correct.
24 Q. Okay.
25 Why, after receiving a letter demanding

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1 payment has Live365 not paid under the rates set by
2 the CRB?
3 MR. MacDONALD: I'm going to object to the
4 extent it calls for privilege, so I'm instructing
5 you, Mr. Lam, not to reveal any communications that
6 you've had with counsel about this subject matter.
7 THE WITNESS: Because there was actually
8 discussion with counsel.
9 BY MR. DeSANCTIS:
10 Q. Discussions with your counsel?
11 A. Yeah.
12 Q. And that's why you decided not to pay?
13 A. We were -- we have discussion about -- with
14 the counsel about what to do. Okay, the discussion
15 is ongoing, I mean...
16 Q. I'm sorry, I'm very confused as to the
17 timeline of events here.
18 A. Yeah.
19 Q. You said you were informed that Mr. Simpson
20 made a statement about not taking action against
21 webcasters if good faith settlement negotiations
22 were ongoing.
23 A. Uh-hmm.
24 Q. Correct?
25 A. Yes.

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1 Q. Were you told of that before or after you
2 received -- before or after you were told of the
3 letter sent from SoundExchange to Live365 demanding
4 payment?
5 A. I don't remember.
6 Q. So, then, my question is: Once you received
7 the letter -- once Live365 received the letter
8 demanding payment, why did Live365 continue not to
9 pay at the rate set by the CRB?
10 MR. MacDONALD: I'm going to make the same
11 cautionary instruction about not revealing any
12 privileged communications.
13 MR. DeSANCTIS: And I don't want the
14 communications with lawyers.
15 THE WITNESS: Yeah.
16 BY MR. DeSANCTIS:
17 Q. Let me put it this way, was the letter
18 ambiguous?
19 A. No, because any decision, really, is
20 dependent on our discussion with counsel, under the
21 advice and consultation of counsel.
22 Q. Was the letter ambiguous?
23 MR. MacDONALD: Objection, vague as to which
24 letter.
25 BY MR. DeSANCTIS:

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1 Q. The letter that SoundExchange sent to
2 Live365 demanding payment, was that letter
3 ambiguous?
4 A. I remember that I discuss with counsel,
5 right, and the counsel's position is, you know, why
6 we take this action.
7 Q. So you were told by counsel not to pay at
8 the web II rates? I mean, is that what you just
9 testified to?
10 MR. MacDONALD: I'm going --
11 MR. DeSANCTIS: No, look, look, that's fine,
12 that's fair, I asked that in a way that -- that
13 clearly does call for privileged communications and
14 I -- and I apologize for that.
15 MR. MacDONALD: So are you withdrawing the
16 question?
17 MR. DeSANCTIS: I withdraw the question.
18 MR. MacDONALD: Okay.
19 (Lam Exhibit No. 2 was marked for
20 identification.)
21 BY MR. DeSANCTIS:
22 Q. Let me show you what's been marked
23 Exhibit 2.
24 While the witness looks at the document to
25 familiarize himself with it, I will state for the

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1 record that this is a three-page letter dated
2 May 28, 2008 on SoundExchange letterhead from
3 Colin Rushing, R-u-s-h-i-n-g, to Steve Chang,
4 C-h-a-n-g, re notice of noncompliance: Live365's
5 webcasting service.
6 Have you ever seen this letter before,
7 Mr. Lam?
8 A. I actually have not.
9 Q. Were you informed about this letter by
10 Mr. Chang?
11 A. I'm not sure.
12 Q. Were you informed about the letter by
13 anybody else?
14 A. I actually I --
15 Q. The question is, were you informed about --
16 A. Yeah, I'm trying to think. I'm trying to
17 think, because I don't recall, 2008, that I -- it's
18 quite a while ago, two years ago, so...
19 As I stated earlier, when legally, really,
20 this stuff, when -- when Mr. Chang receives
21 something, he usually talks to counsel, because
22 oftentimes I'm traveling, you know, have business
23 meeting, out of town, that kind of stuff, and this
24 type of stuff, the counsel would be, you know, the
25 one who basically talks to me about this.

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1 Q. Do you know if Live365 responded to
2 SoundExchange in any way to this letter?
3 A. I don't know about that, but I'm sure they
4 must -- I mean, Live -- the counsel must have one
5 way or the other.
6 Q. You don't -- were you involved in
7 formulating that response?
8 A. I --
9 MR. MacDONALD: Objection. Hold on, hold
10 on, lacks foundation as to whether a response was
11 actually made.
12 THE WITNESS: Like I said, I don't really
13 remember.
14 BY MR. DeSANCTIS:
15 Q. You don't remember whether there was a
16 response or whether you were involved?
17 A. I don't remember whether actually -- I said,
18 you know, something like this happen, unless Steve
19 dropped the ball, I'm sure he must have given it to
20 counsel and counsel must have somehow grab a hold of
21 me to talk to me about, but I don't have
22 recollection of conversations or anything regarding
23 this letter, per se, because I don't remember seeing
24 this three-page letter.
25 Q. Okay.

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1 But it's true, is it not, that Live365's
2 response was not to begin paying SoundExchange at
3 the rates set by the CRB, correct?
4 MR. MacDONALD: Objection, lacks foundation.
5 THE WITNESS: Live365 consulted with counsel
6 about what to do with this.
7 MR. DeSANCTIS: Right.
8 Q. And after receiving this letter, Live365 did
9 not begin paying at the rates set by the CRB for
10 webcasting, correct?
11 A. Counsel, I believe, responded, must have
12 responded to SoundExchange, okay?
13 Q. Uh-hmm.
14 I'm not -- I'm not asking about who
15 responded, I'm saying -- let me put it this way:
16 After receipt of this letter, Live365 did not begin
17 paying SoundExchange at the rate set by the CRB, did
18 it?
19 A. We continued to pay at the rate of .000762.
20 Q. Okay.
21 A. Okay.
22 Q. And this letter is dated May 28, 2008?
23 A. Uh-hmm.
24 Q. Numbered paragraph 1, it starts with the
25 bold sentence, "Failure to pay appropriate

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1 royalties." Numbered paragraph 2 starts with the
2 bold sentence, "Failure to pay mandatory true-up for
3 2006 and 2007."
4 At the time this letter was written, May
5 2008, had Live365 paid the true-up for 2006 and
6 2007?
7 A. Excuse me, could you read the question back
8 to me, I try to read this.
9 (The Reporter read back as follows:
10 "Question: Numbered paragraph 1,
11 it starts with bold sentence,
12 'Failure to pay appropriate
13 royalties.' Numbered paragraph
14 2 starts with the bold sentence
15 'Failure to pay mandatory true-up
16 for 2006 and 2007.")
17 At the time this letter was written, May
18 2008, had Live365 paid the true-up for 2006 and
19 2007?)
20 MR. MacDONALD: Object as lacking foundation
21 as to whether this witness is familiar with the --
22 with true-up.
23 BY MR. DeSANCTIS:
24 Q. Do you understand the true-up that's being
25 referenced in this paragraph?

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1 A. That's a true-up, does it refer to actually
2 true-up to what the CRB rate?
3 Q. Right. Paying the web II rates set by the
4 CRB for 2006 and 2007.
5 The letter complains that there's no record
6 of Live365 having paid that true-up as of the date
7 of the letter, which is May 28, 2008.
8 A. Uh-hmm.
9 Q. I'm asking you, as of May 28, 2008, had
10 Live365 paid the true-up referenced in this
11 paragraph or had they not?
12 A. As of May 28th?
13 Q. Yeah.
14 A. I really don't know for a fact, but I don't
15 believe so, okay?
16 Q. Okay.
17 And to this date Live365 has not, correct?
18 MR. MacDONALD: Objection, vague.
19 THE WITNESS: I believe that we have not.
20 MR. DeSANCTIS: Okay.
21 THE WITNESS: Excuse me, if possible could
22 we --
23 MR. DeSANCTIS: Let's take a short break.
24 (Recess.)
25 BY MR. DeSANCTIS:

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1 Q. Mr. Lam, back on the record.
2 Mr. Lam, I'd like to direct your attention
3 back to the letter of May 28th, it's been marked as
4 Exhibit 2. Do you have that in front of you still?
5 A. Uh-hmm.
6 Q. We talked about the first numbered paragraph
7 entitled, Failure to Pay Appropriate Royalties. And
8 this paragraph is alleging that Live365 had not been
9 laying royalties to SoundExchange under the rates
10 set by the CRB as of May 28, 2008 and I believe that
11 that is true, correct, Live -- Live365 was not so
12 paying?
13 A. What's --
14 Q. At that time?
15 A. Was not --
16 Q. Was not paying at the rate set by the CRB as
17 of May 28, 2008, correct?
18 A. Yeah, there was serious negotiations,
19 everybody's in negotiations.
20 Q. Paragraph 2, failure to pay the mandatory
21 true-up for 2006 and 2007, just before our break I
22 believe you said that is also true?
23 A. Yeah.
24 Q. Paragraph 3 is entitled, Failure to Provide
25 Required Reports of Use, and the second sentence

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1 reads, "According to our records, Live365 is only
2 submitted reports of use for 2007. Live365 should
3 immediately provide reports of use from at least the
4 second quarter of 2004 through 2006. Going forward,
5 reports of these should be submitted promptly."
6 Is this -- is this paragraph also true, to
7 the extent that Live365 had submitted reports of use
8 only for 2007?
9 A. I'm not sure.
10 Q. Okay.
11 A. Because this doesn't rise to my level, they
12 usually take care of this type of stuff.
13 Q. Who normally takes care of this?
14 A. I think Steve would submit -- you know,
15 Steve Chang will submit the -- the report of use on
16 a regular basis.
17 Q. Okay.
18 A. And I think during that time there was also
19 a change under the CRB of how the reporting would be
20 done.
21 Q. Uh-hmm.
22 A. Okay. I think there was this ongoing
23 negotiation.
24 Q. Well, I understand there was an ongoing
25 negotiation, but --

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1 A. Yeah.
2 Q. -- the question was whether the allegation
3 in this paragraph No. 3 of Exhibit 2 is true, and I
4 think your answer was that you do not know, correct?
5 A. I really don't know, yeah.
6 Q. Okay.
7 A. Because there were a lot of things
8 happening, there were discussions about different
9 reporting formats and that kind of stuff, so there
10 was generally confusion amongst the payers as well
11 as the payee and all that.
12 Q. There was confusion at Live365 as to how to
13 comply?
14 A. No, no, no. I think there was generally
15 during that period of time, I think amongst the
16 different -- different players, I think there was
17 generally in the marketplace, because there were
18 changes that was going on, if I could recall this.
19 Q. But I'm asking if Live365 -- if there was
20 confusion at Live365 as to how to comply with the
21 reporting requirements?
22 A. I don't know if we were confused but I think
23 we usually are pretty good with this type of stuff.
24 Q. Okay.
25 By that answer, then, do you mean that if

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1 the allegations in paragraph 3 were true it was
2 intentional and not an accident?
3 MR. MacDONALD: Objection, vague,
4 mischaracterizes the testimony.
5 THE WITNESS: I did not say that, I did not
6 say what you just told me. I said generally at that
7 point in time, I think under the CRB I remember
8 there were discussions in associations and different
9 associations and different members about using the
10 reporting, what was required, what wasn't required
11 and all that. But I'm -- should I say that I really
12 don't know, so I should just say, I don't know,
13 okay?
14 BY MR. DeSANCTIS:
15 Q. Okay.
16 Paragraph 4 --
17 A. Uh-hmm.
18 Q. -- is entitled, Failure to Pay the Minimum
19 Annual Fee.
20 A. Uh-hmm.
21 Q. Why don't you give that paragraph a read and
22 I'll ask you some questions about it.
23 (Witness reviews document.)
24 A. Okay.
25 Q. Is it true that as of May 28, 2008 Live365

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1 was not paying the required annual minimum fee under
2 the regulations determined by the copyright royalty
3 judges?
4 MR. MacDONALD: Objection, lacks foundation.
5 BY MR. DeSANCTIS:
6 Q. I'm asking if that's true. If it's not, you
7 can tell me it's not.
8 MR. MacDONALD: Again, it lacks foundation
9 to the extent he's aware of the minimum annual fee.
10 BY MR. DeSANCTIS:
11 Q. You know what an annual minimum fee is,
12 correct?
13 A. Yes.
14 Q. You've had many discussions with
15 SoundExchange about what that should be?
16 A. Yes. After -- after the CRB there was a
17 requirement of -- of \$500 per channel or per
18 station. And that there was an appeal on that that
19 was subsequently, I think -- I think the appellate
20 court reversed that part of it.
21 Q. Okay.
22 A. It was being appealed at that point in time
23 and there was a huge outcry in the industry, because
24 that would put basically almost everybody out of
25 business.

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1 Q. Do you recall whether in May 28 -- whether
2 as of May 28, 2008 Live365 was paying the annual
3 minimum fee set by the CRB?
4 A. I don't recall. We subsequently also
5 entered into agreement.
6 Q. Okay.
7 You entered an agreement with SoundExchange?
8 A. Yes.
9 Q. Do you recall the terms of that agreement?
10 A. I think it says we come under the \$50,000
11 per service minimum, okay.
12 Q. Do you recall when you entered into that?
13 A. I don't remember.
14 Q. Do you recall the -- the duration of that
15 agreement, for how long did it last?
16 MR. MacDONALD: Objection, vague.
17 BY MR. DeSANCTIS:
18 Q. Let me put it this way: Is the agreement
19 still in effect today?
20 A. I don't remember, but I believe so.
21 Q. Do you have an understanding of when, if
22 ever, it expires?
23 A. I don't remember when it expires.
24 Q. You mentioned that the issue of the minimum
25 fee was on appeal in the D.C. circuit --

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1 A. Yup.
2 Q. -- at the time this letter was written.
3 A. Uh-hmm.
4 Q. Other aspects of the CRB's decision was also
5 on appeal, correct?
6 A. I think the whole decision was appealed.
7 Q. Is that one of the reasons why Live365 was
8 not paying SoundExchange under the rate set by the
9 CRB because the decision was on appeal?
10 A. Yes, it was one of the reasons.
11 Q. You know, the -- with respect to everything
12 other than the minimum fee, the appeal has been --
13 well, the appeal is over, correct?
14 A. Correct.
15 Q. The D.C. circuit has decided?
16 A. Correct.
17 Q. And the CRB has affirmed with respect to
18 everything other than the minimum fee, correct?
19 MR. MacDONALD: I'm going to object to the
20 extent it calls for a legal analysis.
21 THE WITNESS: I believe so.
22 BY MR. DeSANCTIS:
23 Q. Did you think -- and I'm -- let's talk about
24 this period of, say, 2008, you've said that there
25 were ongoing discussions with SoundExchange.

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1 A. Uh-hmm.
2 Q. And that that is one of the reasons why
3 Live365 was not paying at the rates set by the CRB,
4 correct?
5 A. Yes.
6 Q. Were you under the impression at that time
7 that SoundExchange agreed that if you were under
8 ongoing -- if you were continuing negotiations, that
9 you did not need to pay at the rate set by the CRB
10 or was that only Live365's view?
11 MR. MacDONALD: Objection, compound, calls
12 for speculation.
13 THE WITNESS: As I told you before, we
14 discuss this with counsel, okay?
15 MR. DeSANCTIS: Right.
16 Q. I'm asking if you -- if -- if you ever
17 discussed it with SoundExchange.
18 A. Directly?
19 Q. Right.
20 A. Not personally I didn't.
21 Q. So no one -- did anyone at SoundExchange
22 ever tell you that it was okay not to pay at the
23 rates set by the CRB --
24 A. I don't know.
25 Q. -- as long as there were ongoing

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1 discussions? I'm asking if anyone at SoundExchange
2 told you personally.
3 A. Personally I seldomly talk to SoundExchange.
4 Q. What's that?
5 A. Personally, I mean, I actually have not
6 talked to -- I very seldomly talk to SoundExchange,
7 and these kinds of things are all done through
8 counsel and other people.
9 Q. And --
10 A. So the question is, you know, I don't know.
11 Q. Well, I'm not asking you to get inside of
12 SoundExchange's head, so to speak.
13 A. Uh-hmm.
14 Q. If you weren't ever -- wait.
15 I take it from your last answer, if I recall
16 it correctly, that you were never informed by anyone
17 at SoundExchange that they thought it was okay for
18 Live365 not to pay at the rates set by the CRB,
19 correct?
20 A. I believe so.
21 Q. Okay.
22 Were you told that by anyone else?
23 A. I believe counsel, during this period of
24 time, have been in continuous negotiation,
25 settlement negotiation with SoundExchange, you know.

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1 Q. But did anyone tell you that because of
2 that, SoundExchange was okay with Live365 not paying
3 at the rate set by the CRB?
4 A. Nobody told me whether it's okay or not
5 okay.
6 Q. Okay.
7 A. Or SoundExchange okay.
8 Q. Let me point you to the second to last
9 paragraph on page 2 of Exhibit 2.
10 A. Okay.
11 Q. The whole paragraph is in bold, do you see
12 it?
13 A. Okay.
14 Q. It says, "To avoid further liability for
15 noncompliance with the rates and terms set by the
16 CRB, Live365 must immediately submit any and all
17 past due amounts, revised statement of account forms
18 and all past due reports of use as well as all
19 applicable late fees. Please confirm by June 5th
20 that Live365 will promptly comply with these
21 obligations."
22 Did you ever see -- did Steve Chang, who
23 received this letter, ever show you that language?
24 A. No, I told you earlier --
25 Q. Yeah.

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1 A. -- when you show me this letter, that I --
2 I -- I don't recall ever seeing it.
3 Q. Did Mr. Chang ever convey to you the
4 substance of that paragraph?
5 A. I think Mr. Chang talked to counsel, okay,
6 and then I think counsel did talk to me.
7 Q. Well, were you informed of SoundExchange's
8 demand, that's my question?
9 MR. MacDONALD: Let me object to the extent
10 it calls for revealing any privileged
11 communications.
12 THE WITNESS: I mean, there's discussion
13 between me and counsel.
14 BY MR. DeSANCTIS:
15 Q. Yes, but it's not privileged if counsel is
16 simply passing on to you SoundExchange's demand for
17 payment. I'm not asking whether counsel advised to
18 pay or not, or how to respond, I'm asking whether
19 anyone conveyed this message of -- of
20 SoundExchange's demand for payment to you and you
21 said this would all be with regard -- this would all
22 be from discussions with counsel, correct?
23 A. Uh-hmm.
24 Q. Did counsel convey to you that SoundExchange
25 had demanded payment?

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1 A. I don't remember.
2 Q. Okay.
3 A. Yeah.
4 Q. Has SoundExchange ever conveyed to you that
5 it is no longer interested in negotiating?
6 A. To me?
7 Q. Yeah.
8 A. I don't think so.
9 Q. Do you know if they have to anyone else at
10 SoundExchange -- at Live365?
11 A. I don't know.
12 Q. Do you recall whether SoundExchange has ever
13 conveyed to you, Mr. Lam, that whether or not
14 settlement discussions continued, they want payment
15 now --
16 A. They --
17 Q. -- under the CRB rates?
18 A. I don't remember they have convey to me.
19 (Lam Exhibit No. 3 was marked for
20 identification.)
21 MR. DeSANCTIS: Let me show you what's been
22 marked as Exhibit 3.
23 THE WITNESS: Okay.
24 MR. DeSANCTIS: While the witness reviews
25 the document, I'll state for the record that this is

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1 a two-page letter dated August 20, 2009 on
2 SoundExchange letterhead from Colin Rushing to N.
3 Mark Lam, CEO Live365, Inc., and the re line is
4 third notice of -- of noncompliance: Live365's
5 webcasting service.
6 Q. Please take whatever time you need, Mr. Lam,
7 to familiarize yourself with the document.
8 A. Okay.
9 Q. Do you recall receiving the letter that has
10 been marked as Exhibit 3?
11 A. Yes, I do.
12 Q. Did you read it when you received it?
13 A. I think, yeah, I glance at it and gave it to
14 counsel.
15 Q. Okay.
16 You only glanced at it. Did you --
17 A. I look at it.
18 Q. Did you read it closely or you did -- you
19 read it or you didn't read it?
20 MR. MacDONALD: Objection, vague and
21 compound.
22 THE WITNESS: I read it.
23 BY MR. DeSANCTIS:
24 Q. After reading this letter, did Live365 begin
25 paying SoundExchange -- or let me put it this way

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1 because I've think we've already asked and answered
 2 the question.
 3 After receiving this letter, Live365 still
 4 did not begin paying SoundExchange at the webcasting
 5 rates set by the CRB, correct?
 6 A. I don't believe so.
 7 Q. Okay.
 8 Nor did it pay the true-up for '06, '07 and
 9 '08 to SoundExchange, correct?
 10 A. No. I don't believe so.
 11 Q. Okay.
 12 A. We still are trying to negotiate a
 13 settlement.
 14 Q. Okay, and because of that, you think Live365
 15 does not have to pay? Or let me put it this way:
 16 Is that why Live365 is not paying, because you
 17 continued to try to negotiate?
 18 A. As I told you before, there are different
 19 players in the industry --
 20 Q. Right.
 21 A. -- through this period that have, you know,
 22 one way or the other negotiate to settle and all
 23 that, right? And then -- so, you know, some of them
 24 have, some of them not, and that kind of stuff.
 25 And we have very earnestly tried to talk to

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1 SoundExchange, discuss with them, and say this is
 2 our rate. I think as late as June or even after
 3 that, we continue to say, look, can we in earnest
 4 sit down and discuss this, okay, and see if we could
 5 come to some sort of a resolution, okay?
 6 Q. And that's for the '06 to '10?
 7 A. Yup.
 8 Q. 2010 period as well as the 2011 to 2015
 9 period or are you just talking about one or the
 10 other?
 11 A. I think we have preferred to -- to be able
 12 to negotiate the whole thing.
 13 Q. Do you recall what the last -- do you recall
 14 what the last settlement offer was that Live365 made
 15 to SoundExchange? Let me rephrase it as, do you
 16 recall when it was?
 17 A. I think counsel may have told me, but I
 18 don't recall exactly when.
 19 Q. Okay.
 20 Do you recall approximately when?
 21 A. Not too long ago.
 22 Q. Like?
 23 A. Because we had discussions.
 24 Q. Was it in 2010, was it this month in January
 25 2010, was it --

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1 A. Yeah, I think I had this -- I have a couple
 2 discussion with counsel about -- about settlement
 3 this month.
 4 Q. Discussions with counsel at SoundExchange?
 5 A. No, no, no. I never discuss with counsel
 6 directly at SoundExchange.
 7 Q. Okay.
 8 A. Our counsel, yeah.
 9 Q. My question is: Do you know when the last
 10 time was that Live365 or its counsel made a
 11 settlement offer to SoundExchange?
 12 A. I don't, but it's -- I don't.
 13 Q. Do you know whether any such offer was made
 14 since this case was filed in September of '09?
 15 A. I don't know.
 16 Q. Do you know what the terms of the last
 17 settlement that -- that Live365 offered to
 18 SoundExchange were? And there may have been many
 19 terms, let me ask about the -- the rates that
 20 Live365 proposed paying.
 21 Do you recall what the proposed rates were
 22 in Live365's last offer to SoundExchange?
 23 A. Since I'm not sure what the last offer is,
 24 so I'm not sure about what the rate. But over time,
 25 you know, we have made different offers to

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1 SoundExchange.
 2 So I'm not sure I can remember all of them,
 3 but, you know, I don't -- as I told you, I don't --
 4 if I don't really know whether there have been, you
 5 know, an offer made recently, I don't remember,
 6 actually.
 7 Q. Do you remember the rates that -- do you
 8 remember any rates that Live365 has offered
 9 SoundExchange as part of a settlement?
 10 A. Yeah, I think we started with an aggregator
 11 rate.
 12 Q. What rate?
 13 A. I don't remember the particular, but I
 14 think, you know, that -- that counsel actually put
 15 together. I don't know, I don't remember the
 16 particulars.
 17 Q. Do you --
 18 A. Because there are different iterations and
 19 all that, over long period of time.
 20 Q. Do you remember there being a time when
 21 Live365 made a proposal to SoundExchange, I'm
 22 talking about the 2009 period, and SoundExchange
 23 responded to you via e-mail saying, what is the
 24 total that Live365 would pay SoundExchange per year
 25 under your proposal and you gave them an answer, do

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1 you remember that exchange?
2 A. Yes, that one I do remember.
3 Q. Do you remember what your answer was?
4 A. Not exactly.
5 Q. Does [REDACTED] a year sound right to you?
6 A. I really don't remember, if you could
7 refresh my recollection.
8 Q. Okay.
9 A. Yeah.
10 Q. Do you -- if you don't recall the specifics
11 of that exchange, do you recall ever making it -- a
12 proposal to SoundExchange that would require Live365
13 to pay more than [REDACTED] a year in royalties?
14 A. You know, I don't really remember the
15 particulars, there are a number -- a lot of numbers
16 I look at every day.
17 Q. Right.
18 A. I'm sorry if that's -- yeah.
19 Q. Do you have any idea whether that the
20 [REDACTED] is in the ballpark?
21 MR. MacDONALD: Objection, vague.
22 MR. DeSANCTIS: Well, it is.
23 Q. I'm asking if it sounds right to you or --
24 A. Like I said, over the period of, you know,
25 some years, there are different offers made back and

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1 forth and stuff like that, so I don't really
2 remember, you know. I don't want to run the risk of
3 giving you the wrong number or anybody the wrong
4 impression.
5 Q. Okay.
6 Let me ask you, and this is hypothetical, if
7 SoundExchange and Live365 never agree on a
8 settlement, will Live365 ever pay SoundExchange what
9 it owes under the web II rates?
10 MR. MacDONALD: Objection, this inherently
11 calls for speculation.
12 BY MR. DeSANCTIS:
13 Q. You can -- you can -- you can answer the
14 question.
15 A. But you are asking me to speculate. I mean,
16 as I saw -- as I told you earlier, right, counsel
17 and I have been in discussion for some time and then
18 try in good faith try to settle this case.
19 Q. Okay.
20 But I find it -- I find it surprising that
21 you can't answer the question. Because that
22 suggests to me that your position is that even if no
23 settlement is ever reached, Live365 might not ever
24 pay SoundExchange what it owes under the CRB web II
25 rates, is that true?

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1 MR. MacDONALD: Objection, calls for
2 speculation and getting somewhat argumentative.
3 MR. DeSANCTIS: No, it's not argumentative,
4 and it's a hypothetical. But doesn't call for a lot
5 of speculation.
6 THE WITNESS: Could you read the question
7 back to me?
8 (The Reporter read back as follows:
9 "Question: I find it surprising
10 that you can't answer the question.
11 Because that suggests to me that
12 your position is that even if no
13 settlement is ever reached,
14 Live365 might not ever pay
15 SoundExchange what it owes under
16 the CRB web II rates, is that true?)
17 MR. MacDONALD: Just for the record, I'm
18 going to renew my objections, including the one
19 about the question being somewhat argumentative.
20 THE WITNESS: I don't know. I mean, it
21 really -- with counsel, you know, we have discussed
22 a lot of issue involving this, about settlement, and
23 over long period of time, you know, so I think -- so
24 it would have to really depend on, you know, joining
25 what kind of position we -- you know, after the

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1 discussion that we -- we do or will not do.
2 BY MR. DeSANCTIS:
3 Q. Well, if there's no settlement --
4 A. Yeah.
5 Q. -- what possible ground would Live365 have
6 to not pay the rates set by the CRB in web II?
7 A. As I related to you earlier, okay, we had
8 actually been really trying to get a settlement.
9 Q. Right.
10 A. And we have tried very hard to get a
11 settlement.
12 Q. Right.
13 A. Okay? And so --
14 Q. And -- but my question is: If there is no
15 settlement, what ground would Live365 have not to
16 pay SoundExchange at the rate set by the CRB and web
17 II?
18 MR. MacDONALD: Objection, calls for
19 speculation.
20 BY MR. DeSANCTIS:
21 Q. You can answer.
22 A. I really don't know.
23 MR. MacDONALD: While there's a pause, I'm
24 just going to make a request that this transcript be
25 designated as restricted under the protective order,

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1 based on a lot of the discussions about settlement,
 2 the business decisions surrounding settlement and
 3 any settlement negotiations and any proposals made
 4 back and forth with SoundExchange.
 5 I don't know if you want to get the
 6 stipulation on the record now or at some other
 7 point.
 8 MR. DeSANCTIS: Sure.
 9 What I was actually picturing, although
 10 you're right, we didn't actually articulate it at
 11 the beginning, was doing the same thing that we've
 12 done in prior depositions, which is we'll consider
 13 the whole transcript restricted and the parties will
 14 aim to exchange dedesignations 14 days after
 15 receiving the final transcript. And I don't mean
 16 that as a deadline like if you miss that by one day,
 17 you've missed your chance. But that's when the
 18 parties will aim to exchange dedesignations.
 19 Is that our stipulation?
 20 MR. MacDONALD: That's my understanding of
 21 the stipulation, yes.
 22 MR. DeSANCTIS: Okay, great.
 23 MR. MacDONALD: Thank you.
 24 MR. DeSANCTIS: Since we're the only two
 25 here, I think it's so stipulated.

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1 Actually, you know what? We're not the only
 2 two counsel here, do you agree to that stipulation,
 3 Mr. Wright?
 4 MR. WRIGHT: I -- I agree, thank you.
 5 MR. DeSANCTIS: Okay. And I hope no offence
 6 was taken.
 7 Q. Are you familiar with your rate proposal,
 8 with Live365's rate proposal in this case?
 9 A. What rate proposal are you referring to?
 10 Q. I'm sorry, that's a fair question.
 11 Are you aware of the fact that Live365 has
 12 submitted a written rate proposal to the CRB in this
 13 action that is currently pending?
 14 A. Yes.
 15 Q. Are you familiar with that rate proposal?
 16 A. Somewhat, yeah.
 17 Q. Were you involved in its preparation?
 18 A. Somewhat.
 19 Q. Can you define what somewhat means? Can you
 20 define what your -- what your involvement was?
 21 A. I mean, the expert -- our expert witness
 22 prepare the -- the proposal.
 23 Q. Uh-hmm.
 24 A. So he asked for information, so I instructed
 25 my staff to give instruction. And, you know, he has

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1 some questions and so I answered some questions,
 2 give him an idea of what the business look like. He
 3 work mostly with counsel.
 4 Q. Okay.
 5 Was it -- did you personally decide what the
 6 requested rate would be?
 7 A. No.
 8 Q. Who did?
 9 A. Expert witness.
 10 Q. Okay.
 11 Are you aware of the fact that the basic
 12 structure of the Live365 rate proposal, and I'm not
 13 giving you the detail, but it proposes a particular
 14 rate per play --
 15 A. Yeah.
 16 Q. -- and then a percentage discount for
 17 aggregators.
 18 A. Yes.
 19 Q. Is that -- is that correct?
 20 A. What's correct?
 21 Q. Is that the basic structure of the Live365
 22 rate proposal, it provides a certain rate, penny
 23 rate per stream, and then a percentage discount for
 24 aggregators?
 25 A. Correct.

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1 Q. Okay.
 2 Do you recall what the percentage discount
 3 in the Live365 rate proposal is?
 4 A. I think we -- roughly 20 percent.
 5 Q. Do you know why 20 percent was chosen?
 6 A. I think we have dealings with ASCAP, BMI and
 7 SESAC, and I think they recognize our value as -- as
 8 an aggregator so they give us discounts, and I think
 9 that number -- I'm not sure, hundred percent sure,
 10 may have been derived from those other relationship.
 11 Q. Okay.
 12 Under your -- under the Live365 rate
 13 proposal, do you know what other aggregators, if
 14 any, besides Live365 would qualify for the 20
 15 percent discount?
 16 MR. MacDONALD: I'm going to object to the
 17 extent it calls for speculation.
 18 THE WITNESS: Okay.
 19 Let me try my best to answer the question.
 20 MR. DeSANCTIS: Yeah.
 21 THE WITNESS: First of all, you have to
 22 define what aggregators are. But let's assume --
 23 BY MR. DeSANCTIS:
 24 Q. Let's assume the definition in the rate
 25 proposal. Do you want to see the rate proposal?

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1 Would that help?

2 A. Okay. Could you reask the question, then,

3 maybe I'm not hearing it.

4 Q. It's fine, I don't want you to guess.

5 A. Yeah.

6 Q. It just dawned on me maybe it would help if

7 we actually looked at the rate proposal.

8 A. Okay.

9 MR. DeSANCTIS: So let me -- let me see if I

10 have that here.

11 (Lam Exhibit No. 4 was marked for

12 identification.)

13 MR. DeSANCTIS: While the witness reviews

14 what I've just handed him, I'll state for the record

15 that what's been marked as Lam Exhibit 4 is a

16 three-page document, double-sided, entitled Rate

17 Proposal for Live365, Inc.

18 (Witness reviews document.)

19 And why don't you take a moment to read it

20 closely, actually, so we can talk about it.

21 Q. Okay -- oh, sorry, don't mean to rush you,

22 take your time.

23 A. Okay.

24 Q. What's been marked as Exhibit 4 is Live365's

25 rate proposal submitted to the CRJs in this

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1 proceeding, correct?

2 A. I believe so.

3 Q. Okay.

4 And this is the proposal, is it not, that

5 seeks a 20 percent discount for what's referred to

6 as qualified webcast aggregation services, correct?

7 A. Correct.

8 Q. Under this definition, the term qualified

9 webcast aggregation services is defined in the

10 proposal, correct, at Paragraph B (1) C?

11 A. Yes.

12 Q. Okay.

13 Under that definition, would Live365 qualify

14 as a qualified webcast aggregation service?

15 A. Yes.

16 Q. Are you aware of any other services that

17 would qualify under that definition of -- as a

18 qualified webcast aggregation service?

19 A. Yes.

20 Q. Who?

21 A. I think LoudCity would qualify.

22 Q. I'm sorry, spell that.

23 A. LoudCity, H-o-l -- I mean, L-o-u-d-C-i-t-y,

24 SWCast.

25 Q. Anyone else?

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1 A. I said SWCast.

2 Q. Right.

3 A. Maybe.

4 And actually, many others, but who are not

5 paying royalties at all.

6 Q. What do you mean by that? I don't

7 understand.

8 A. There are other -- other web -- I mean,

9 aggregating service out there such as SHOUTcast,

10 that are not paying royalty, but they actually

11 aggregate many stations.

12 Q. Okay.

13 A. Or may consider SpatialAudio, SpatialAudio,

14 S-p-a-t-i-a-l, as another one.

15 Q. I'm sorry, which was the service, was it

16 SHOUTcast that you just said is not paying

17 royalties?

18 A. Yeah, I don't think they pay royalty on

19 behalf of their webcast.

20 Q. Do you know if their webcasters pay

21 royalties directly, or I should say, do you know if

22 their webcasters are supposed to pay royalties

23 directly?

24 MR. MacDONALD: I'm going to object to the

25 extent it calls for speculation.

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1 MR. DeSANCTIS: I'm asking if you know.

2 THE WITNESS: I don't know for fact but I

3 think out of the many stations on their so-called

4 aggregator service, probably many of them don't.

5 BY MR. DeSANCTIS:

6 Q. Well, why do you say that, that's a guess,

7 correct?

8 A. Yes, I just say I don't know for a fact.

9 Q. Okay.

10 A. But I believe.

11 Q. I'm asking more about the arrangements.

12 A. Yeah.

13 Q. Under Live365's arrangement with its

14 webcasters, Live365 pays the royalties to

15 SoundExchange, right, as opposed to the individual

16 webcasters?

17 A. There's some webcasters who pay royalties

18 themselves as well.

19 Q. Okay.

20 A. But in our case, we try to make sure there's

21 royalty compliance, in many of these other services

22 that may under definition qualify for this, they may

23 not require them to pay anything.

24 Q. Okay.

25 When you -- you mentioned SHOUTcast and you

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1 said you don't believe that SHOUTcast is paying
2 royalties to SoundExchange, do you know whether
3 under SHOUTcast's agreement with its webcasters,
4 SHOUTcast is supposed to be paying royalties to
5 SoundExchange on behalf of its webcasters? And I'm
6 only asking if you know, I'm not asking you to
7 speculate.
8 A. I don't know.
9 MR. MacDONALD: I'm just going to object to
10 the extent it calls for speculation.
11 MR. DeSANCTIS: Right.
12 Q. I'm just asking if you know and your answer
13 is you don't know?
14 A. My understanding, my understanding is that
15 the Shout- -- the webcasters are supposed to be
16 paying their own royalty.
17 Q. You can put that aside for a minute. And
18 let me direct your attention to -- back to Exhibit
19 1, which is your written direct testimony, do you
20 still have that?
21 A. Yup.
22 Q. Page 8, paragraph 24.
23 Why don't you read that paragraph and then
24 I'll ask you some questions about it, it continues
25 over to the next page as well.

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1 A. Okay.
2 Q. Here you explain that BMI -- BMI is a
3 performing rights organization, correct?
4 A. Yes.
5 Q. They license music publishing rights; is
6 that correct?
7 A. Yes, for composition rights, yeah.
8 Q. And you state in this paragraph that BMI
9 provides Live365 a 20 percent discount, correct?
10 A. Yeah, approximately 20 percent.
11 Q. Okay.
12 And that's by -- by contract or statute?
13 A. As far as I know it's not by statute.
14 Q. It's by contract?
15 A. Yes.
16 Q. So agreed upon between Live365 and BMI?
17 A. I believe so.
18 Q. And you actually attach that contract as an
19 exhibit to your testimony, correct?
20 A. I believe so, yeah.
21 Q. Okay.
22 The next paragraph, 25, it says, "The other
23 PROs (i.e., ASCAP and SESAC) provide even greater
24 discounts to Live365 webcasters for the same
25 reasons."

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1 Do you know what -- but you did not attach
2 contracts between Live365 and ASCAP or SESAC to your
3 testimony.
4 Do you know if such contracts exist?
5 A. I don't know for a fact, but there must be
6 agreement one way or the other, yeah.
7 Q. You think it might be an oral agreement?
8 A. It could have been, for example, in a case
9 of SESAC, that there have been discussion in the
10 past through the years and then we have just follow
11 a convention.
12 Q. Who were the -- who at SESAC were those
13 conversations with?
14 A. Various people.
15 Q. Do you remember any of them?
16 A. I mean, I even remember one time it was with
17 I think president or CEO and SESAC and myself, there
18 are various people involved.
19 Q. Okay.
20 Do you know what discounts ASCAP and SESAC
21 provide to Live365?
22 A. I don't remember, but I think -- exactly,
23 but I think it's -- I don't have the exact answer, I
24 don't remember the numbers.
25 Q. Okay.

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1 A. But if I said greater, I mean, chance is
2 they're a high percentage, yeah.
3 Q. Okay.
4 If you wanted to find out, if you wanted to
5 go to the contracts themselves, where -- where -- do
6 you know where those are?
7 A. Yeah, I should be able to locate them.
8 Q. In Live365's files?
9 A. I should be able to locate them.
10 Q. Okay.
11 A. I mean, unless of course if -- if somehow
12 it's just, as I told you earlier, that we've done it
13 that way, and then there's no specific contract.
14 But, you know, that would be off, you know, what the
15 standard rate.
16 MR. DeSANCTIS: Okay.
17 Now, the relationship between Live365 --
18 well, let me take that back.
19 Let's go off the record for just a minute.
20 (Recess.)
21 (Whereupon, a lunch recess was taken from
22 12:33 p.m. to 1:30 p.m.)
23
24
25

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1 AFTERNOON SESSION; 1:33 P.M.
2
3 EXAMINATION RESUMED
4 BY MR. DeSANCTIS:
5 Q. Back on the record.
6 Mr. Lam, this morning you described a
7 Live365 bank account containing [REDACTED]
8 [REDACTED] do you remember that?
9 A. Yup.
10 Q. And that account, that [REDACTED]
11 [REDACTED] dollars is the difference between what --
12 let me put it this way: That [REDACTED]
13 [REDACTED] is the difference between the --
14 what Live365 would owe SoundExchange under the CRB
15 web II rates, and what Live365 has actually been
16 paying SoundExchange? Is that basically correct?
17 A. That should be.
18 Q. Do you know who, if anyone, is authorized
19 to -- do you know who, if anyone, has the authority
20 to authorize withdrawals out of that account?
21 MR. MacDONALD: Objection, vague.
22 THE WITNESS: I would be.
23 BY MR. DeSANCTIS:
24 Q. I'm sorry?
25 A. I would be.

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1 Q. Okay, anybody else?
2 A. I think that's it.
3 Q. I'd like to return your attention to
4 Exhibit 1, which is your written direct testimony.
5 A. Okay.
6 Q. Prior to the lunch recess I believe we were
7 looking at paragraph 24, which begins on page 8.
8 How is the royalty that Live365 pays to SESAC set
9 for the use of the SESAC compositions?
10 MR. MacDONALD: Objection, lacks foundation.
11 BY MR. DeSANCTIS:
12 Q. Well, let me put it this way: Live365 pays
13 a royalty to SESAC, correct?
14 A. Correct.
15 Q. For musical compositions?
16 A. Correct.
17 Q. How is that royalty set? Is it statutory,
18 is it set by the CRB, is it by contract?
19 MR. MacDONALD: I'm going to object, lacks
20 foundation.
21 THE WITNESS: I think there's a rate code
22 involved for ASCAP, BMI, and so SESAC, I'm not quite
23 sure.
24 MR. DeSANCTIS: Okay.
25 THE WITNESS: But even -- so let me stop it

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1 there.
2 BY MR. DeSANCTIS:
3 Q. Okay, so as far as you're aware, the rate
4 court sets the rate code to ASCAP and BMI but you're
5 not sure how the rate owed to SESAC is set; is that
6 right?
7 A. Yeah, as far as there may be some
8 negotiation involved as well.
9 Q. Has BMI ever complained to Live365 that
10 Live365 is not paying BMI the royalty rate that it
11 should be paying?
12 A. To my knowledge, no.
13 Q. Has ASCAP?
14 A. To my knowledge, no.
15 Q. Has SESAC?
16 A. To my knowledge, no.
17 Q. Let me direct your attention to paragraph 27
18 of your statement, which is Exhibit 1. Why don't
19 you read that and then I'll ask you some questions
20 about it.
21 (Witness reviews document.)
22 A. Go ahead.
23 Q. The last sentence of that paragraph reads:
24 "Significant risks and uncertainties abound for our
25 nascent industry."

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1 What nascent industry are you referring to
2 there?
3 A. I think if you look at webcasting or -- as
4 an industry, I mean, there are all kind of players,
5 you know, players coming and going in different
6 forms and so it could be very broadly defined or
7 very narrowly defined.
8 Q. Let me put it this way: Were you referring
9 there to the entire webcasting industry or to
10 aggregators in particular or to something else?
11 A. No, I think I was referring to something,
12 you know, people do webcastings or having to do with
13 providing listening in terms of music.
14 Q. Okay.
15 So the sentence reads --
16 A. And contents.
17 Q. I'm sorry?
18 A. And contents.
19 Q. And --
20 A. Music and relate -- and other contents.
21 Q. I see, I'm sorry to have cut you off, I
22 thought you were finished.
23 So the sentence reads: "Significant risks
24 and uncertainties abound for our nascent industry,
25 such as fluctuating statutory royalty fees."

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1 What are the statutory royalty fees that
2 you're referring to there?
3 A. In this particular instance, we particularly
4 referred to the status change, the royalty rates.
5 Q. The fees for sound recordings?
6 A. Sound recordings, correct.
7 Q. Not the composition fees?
8 A. Yeah.
9 Q. And how is it that they're fluctuating?
10 A. Well, between the first -- between --
11 between cop- -- copyright arbitration, royalty
12 panel, and CRB rate went up dramatically, as I
13 mentioned earlier, it went up two and a half times.
14 To my knowledge, I've not seen that in -- in other
15 industries.
16 Q. Okay.
17 Then how does -- how does a fluctuating
18 statutory rate affect your business, as your -- as
19 you define those -- those terms in paragraph 27?
20 A. In this list, like in anything else, you
21 want to have certain amount of predictability as to
22 your cost. When you don't know what your cost will
23 be, it makes it virtually -- virtually impossible to
24 plan for the future. It's extremely difficult to
25 run a business that way.

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1 Q. Another risk and uncertainty that you refer
2 to in that sentence is "increasing diversity of
3 media outlets."
4 What does that mean?
5 A. I think there are, as told you earlier, you
6 know, first of all, for example, the latest -- the
7 last five years or so, you see new players coming in
8 that basically wouldn't have existed five years
9 before.
10 Q. New --
11 A. And different -- different players offering
12 different features, and some of them are crossovers
13 and some of them are things that nobody have ever
14 thought about five years ago and so on and so forth.
15 Q. When you said new players, do you mean in
16 the webcasting industry?
17 A. In -- in that industry, so something having
18 to do with providing, you know, music listening, or
19 content listening.
20 Q. What new players are -- what specific new
21 players in the webcasting industry in the last five
22 years are you referring to?
23 A. I say players that are related to this
24 industry.
25 Q. Okay.

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1 A. A lot of social networking, for example --
2 for example, have become, you know, in -- players
3 with the social networking features and other
4 features that I'm not even aware of, have entered
5 this industry or exit this industry. I mean, there
6 are probably many of us -- many of which that none
7 of us even know about.
8 Q. Many webcasters that have entered the
9 industry that you don't know about?
10 A. Or, with related features, you know, with
11 related social, you know, networking type of
12 features.
13 Q. You mean social networking sites that --
14 that stream music over the Internet?
15 A. Yeah, yeah.
16 Q. Okay.
17 A. Or allow that to happen or somehow.
18 Q. And do you compete with all those different
19 services?
20 A. Yeah, I think there's only so much my share.
21 Q. So much?
22 A. My share. I mean, as long as they're
23 continually different types of players and new
24 players entering, there's only so many hours for
25 consumption in anybody, right? So I think those

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1 necessarily -- you know, in the broadest sense I
2 consider, you know, alternatives.
3 Q. Okay.
4 So does Live365 -- Live365 obviously
5 competes with other aggregators, correct?
6 A. Yes.
7 Q. Does Live365 compete with other webcasters
8 who are not aggregators?
9 A. Yeah, I think so, yeah. I think -- inasmuch
10 as, you know, there are people listening to content,
11 you know, I think each one of these are -- would be
12 considered, you know, competitor alternative.
13 Q. Okay.
14 And people listen to content over
15 terrestrial radio, correct?
16 A. Correct.
17 Q. And in that sense, does Live365 compete for
18 listeners with terrestrial radio?
19 MR. MacDONALD: I'm going to object as vague
20 with respect to compete.
21 THE WITNESS: I think in a broader sense --
22 let me take it back, sorry, strike that.
23 Yeah, terrestrial radio is competition.
24 MR. DeSANCTIS: Okay.
25 THE WITNESS: In fact, very formidable

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1 competition.
2 BY MR. DeSANCTIS:
3 Q. Very formidable competition?
4 A. Yeah.
5 Q. Let me turn your attention to paragraph 34,
6 which is on page 11.
7 A. 34?
8 Q. Yes, paragraph 34 on page 11.
9 A. Uh-hmm.
10 Q. Why don't you read that and I'll ask you
11 some questions about it.
12 A. Okay.
13 Q. Okay.
14 The first sentence is since webcaster II,
15 and by that do you mean the webcasting II rates
16 issued by the --
17 A. Yup.
18 Q. -- CRJs in May 2007?
19 A. Yes.
20 Q. As I sit here today, I can't actually
21 remember if -- it was May but it was 2007?
22 A. I think it's March.
23 Q. Okay, March.
24 It says, "Since webcaster II, Live365 has
25 witnessed decreased new VIP member acquisition."

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1 What does -- what does that mean, decreased
2 new member VIP acquisitions?
3 A. Fewer members of paid subscriber listeners.
4 Q. Does -- do you mean in this sentence to
5 attribute that decrease to the webcaster II rates?
6 A. Yes.
7 Q. Why would the -- why would the decrease in
8 new VIP members be attributable to the webcaster II
9 rates?
10 A. Because overall listening decreased.
11 Q. Overall listening has decreased since the
12 webcaster II rates?
13 A. Roughly, yeah, around that time.
14 Q. Are you referring to listening on Live365 --
15 A. Correct.
16 Q. -- or in the industry generally?
17 A. On Live365.
18 Q. Do you know if it has decreased in the
19 industry generally?
20 A. I'm not sure. I mean, over the period of
21 time.
22 Q. Okay.
23 So I'm still having difficulty figuring out
24 or understanding why it is that you're attributing
25 the decrease in new VIP member acquisitions to the

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1 increased web II rates.
2 A. Okay, in order for us -- you know, we
3 basically have -- offer listening, free listening,
4 you know, anybody could come to our site and listen
5 to -- to the content.
6 Q. To the free ad-supported content?
7 A. Yes.
8 And, you know, just like many other sites,
9 you know, you need enough people to come to the site
10 in order to drive the subscribers.
11 So as -- you know, we took actions to limit
12 the hours because of the cost of -- because of
13 the -- you know, SoundExchange rate, you know, we
14 also get less VIPs.
15 Q. Do you know why you get less VIPs?
16 A. Yes. I mean, it's like a funnel concept,
17 right? On the top you need -- on top of these new
18 listeners or listeners that come to your site and
19 then, you know, you only net a certain small
20 percentage of that. In fact, a very low percentage.
21 Q. I'm sorry, net a low percentage, you mean --
22 A. Convert the free listeners to paid
23 listeners.
24 Q. Okay.
25 And has that conversion rate decreased since

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1 the web II rates were issued?
2 A. No, I think the rate as -- to my knowledge,
3 I'm not sure because I haven't looked at the stats,
4 the conversion rate has basically stayed about the
5 same or may be due to our effort to optimize, it's
6 gotten slightly better. But I'm not sure about
7 that.
8 Q. The conversion rate from free to paid
9 subscriber --
10 A. Yup.
11 Q. -- has increased?
12 A. No, I'm saying it -- it probably stay about
13 the same. I don't have the stats in front of me
14 but -- you know, because we take action to try to
15 improve that all the time.
16 Q. Okay.
17 A. So it might have done better.
18 But I don't know. But I think it's very
19 difficult to -- to -- it's very difficult to get
20 people to pay what they're offering free
21 alternatives out there.
22 Q. Sure.
23 If there were fewer free alternatives, would
24 more people pay?
25 MR. MacDONALD: Objection, calls for

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1 speculation.
2 THE WITNESS: I can't say for sure, but I
3 imagine.
4 BY MR. DeSANCTIS:
5 Q. You imagine yes?
6 A. Yeah.
7 Q. So if the -- if the rate of conversion from
8 free listener to VIP subscriber has stayed the same
9 or roughly the same, does that mean that the rate of
10 new free users has decreased, thus a decrease in VIP
11 subscribers? How can you have a decrease in VIP
12 subscribers if the conversion rate has stayed the
13 same?
14 MR. MacDONALD: I'm going to object to the
15 extent it calls for speculation, and the question as
16 posed was compound.
17 BY MR. DeSANCTIS:
18 Q. Do you understand the question?
19 A. Could you reask the question again, just so
20 I --
21 Q. What I'm trying to get at, is you suggested
22 that the conversion rate from free to paid
23 subscriber --
24 A. Yeah.
25 Q. -- may have stayed the same.

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1 A. Uh-hmm.
2 Q. Since the web II rates came out.
3 A. Uh-hmm.
4 Q. I'm asking, if the conversion rate has
5 stayed the same, how can it be that there has been a
6 decrease in new VIP member acquisitions?
7 MR. MacDONALD: Same objections.
8 THE WITNESS: As -- as people listen to us
9 less, we are less likely to convert them.
10 MR. DeSANCTIS: Okay.
11 Q. So people -- so your testimony is that
12 there's been less listening to Live365. Is it
13 that -- since the web II rates came out; is that
14 correct?
15 MR. MacDONALD: I'm going to object to the
16 extent it mischaracterizes the prior testimony.
17 MR. DeSANCTIS: I'm actually -- I'd love the
18 witness to clarify, I'm not trying to characterize
19 it.
20 THE WITNESS: I think we took actions as we
21 told you earlier, because of the expensive nature --
22 I mean, the fact that costs went up dramatically, to
23 make sure we could control the cost. So as a
24 result, listening, you know -- you know, we have
25 restricted our listening to a certain extent, and

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1 that caused the VIP to decrease.
2 BY MR. DeSANCTIS:
3 Q. Okay. If you have -- if you have limited or
4 contained ATH, which means you limited or contained
5 hours listened, does that necessarily mean that you
6 have limited or contained the number of unique
7 listeners to the Live365 service?
8 MR. MacDONALD: Objection, calls for
9 speculation.
10 MR. DeSANCTIS: Well, I don't want you to
11 speculate.
12 Q. I'm asking if that is part of your
13 assumption here, that there have been fewer unique
14 listeners to the Live365 service since the web II
15 rates came out?
16 A. Okay, could you reask the question?
17 Q. Sure.
18 Do you know whether there have been fewer
19 unique listeners to the Live365 service since the
20 web II rates came out?
21 A. I'm not sure. I'm not sure whether we have
22 actually fewer unique listeners.
23 Q. Then if you're not sure whether there have
24 been fewer unique listeners, and if the conversion
25 rate from listeners to subscribers has remained

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1 constant, how is it that the new VIP acquisitions
2 could have decreased?
3 MR. MacDONALD: Objection, compound, calls
4 for speculation.
5 THE WITNESS: As people listen less, because
6 we try every way possible to convert them. So when
7 people listen to us, there will be messages that are
8 produced by us, audio and visual to say, you know,
9 become a VIP. So, you know, as they listen, for
10 example, if a person listened for an hour, he may
11 get it a few times, a person listen to it two hours,
12 he will get twice as many messages.
13 So the more fees, the more the person
14 listen, the more likely they will be converted.
15 BY MR. DeSANCTIS:
16 Q. Do you know that somehow or are you assuming
17 that?
18 A. I'm -- it makes sense, because we -- like I
19 said, that there's a correlation -- correlation
20 between how -- how much they listen and how much
21 we're able to get them to convert.
22 Q. And -- well, but my question is: Do you
23 have any data supporting that correlation or is that
24 just your assumption?
25 A. My assumption is that, because we actually,

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1 you know, try to do any way that we could, to
2 monetize our listeners.
3 Q. But the decrease in ATH, the decrease in
4 listening was the result of intentional measures
5 taken by Live365, right, to --
6 A. Yes, to a certain extent.
7 Q. The parking meter and this kind of thing?
8 A. Yeah.
9 Q. And those -- those decisions to -- the
10 decision to implement things like the parking meter
11 and other things that decreased ATH were done in
12 order to contain costs while decreasing revenue as
13 little as possible, correct?
14 A. Correct.
15 Q. And the same measures could have been taken
16 under the old rates, the .762 rates, before the
17 CRB's web II rates came out, correct?
18 MR. MacDONALD: Objection, calls for
19 speculation.
20 BY MR. DeSANCTIS:
21 Q. Well, it's not speculation, I'm saying
22 Live365 could have implemented the same measures,
23 parking and delisting from the iTunes Radio in order
24 to contain royalty costs while having a minimal
25 impact on revenue, it could -- Live365 could have

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1 implemented those same measures before the web II
2 rates came out, right?
3 MR. MacDONALD: Objection, compound, calls
4 for speculation.
5 THE WITNESS: Yeah, I think you're asking me
6 questions on a hypothetical basis, that's really
7 hard to answer. I mean, we could do any number of
8 things, but unless something triggered, we just
9 don't do things randomly.
10 MR. DeSANCTIS: Right.
11 Q. But that's not -- that doesn't mean I'm
12 asking you a hypothetical.
13 Live365 did not implement those measures
14 under the old rates, correct? That's just -- that's
15 not hypothetical, I'm just asking, did they or
16 didn't they?
17 A. We had -- various times have experiment with
18 different things. But, you know, I think for us,
19 because royalty went up so much, we implemented that
20 to avoid running up costs that would drive us to
21 bankruptcy.
22 Because those are staggering number, it's
23 not small numbers.
24 Q. Right.
25 And my question is that -- isn't it true

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1 that Live365 did not implement the measures we've
2 been discussing to limit listening prior to the web
3 II rates coming out, that's something Live365 did
4 after the web II rates came out, right?
5 A. We may have done different things, like I
6 told you, that over time to experiment with
7 different things, but in terms of consciously try to
8 limit listenership due to the cost of royalty, yes,
9 that was after -- after, you know, the web II came
10 out.
11 Q. Okay.
12 And there was -- Live365 could have
13 implemented them, the same measures before web II
14 came out, right?
15 MR. MacDONALD: Objection, calls for
16 speculation.
17 MR. DeSANCTIS: No. I don't want you to
18 speculate.
19 Q. Was -- is there any reason why Live365 could
20 not have implemented the same measures prior to the
21 web II rates coming out?
22 MR. MacDONALD: Objection, same objection.
23 THE WITNESS: But there's no reason to
24 trigger -- for us to do that.
25 MR. DeSANCTIS: Okay.

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1 THE WITNESS: There was no reason for us to
2 do that, we calculated that in our revenue we'll be
3 able to cover the cost.
4 But after web II came out, it became so
5 patently obvious to us that, you know, to continue
6 to grow our listenership at such rate we would
7 really be in the poorhouse.
8 BY MR. DeSANCTIS:
9 Q. Why wouldn't it have made you more efficient
10 before the web II rates came out, if you could have
11 contained royalty costs by decreasing listenership
12 without having -- let me rephrase that.
13 If before the web II rates came out, you
14 could have implemented, say, a parking meter to
15 contain royalty costs and decrease listenership,
16 wouldn't that have made your business more efficient
17 then?
18 MR. MacDONALD: Objection, calls for
19 speculation and compound.
20 THE WITNESS: Let's ask the question one
21 more time.
22 MR. DeSANCTIS: Okay.
23 Q. I'll try to ask it as crisply as possible.
24 Let me ask this first: Was there anything
25 preventing Live365 from implementing the parking

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1 meter before the web II rates came out? I realize
2 you thought you didn't need to, but I'm asking
3 whether there was anything preventing you from doing
4 it.
5 A. You're asking me to really speculate on
6 hypothetical situations.
7 Q. No, no, no, no, I'm not.
8 A. Okay.
9 MR. MacDONALD: I'm going to ask that -- let
10 the witness finish his response, I'm not sure he was
11 done before --
12 THE WITNESS: Okay.
13 MR. MacDONALD: -- there was an
14 interjection.
15 THE WITNESS: We just don't do things
16 randomly, we calculate. You know, I mean, if we
17 could grow our business at a profitable rate, we
18 would be all for it, okay? But the fact that the
19 rate came out and then we did some serious analysis
20 and realized that, you know, we cannot -- I mean,
21 the -- if we try to grow and increase our
22 listenership and all that, we would go to poorhouse,
23 okay?
24 So to answer your question, under the old
25 rate, at some point, I mean, there are -- this is --

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1 you know, this is -- there are a lot of moving
2 parts, okay?
3 So, you know, but this is a major cause, so,
4 you know, we had to pay, you know, serious attention
5 to it. And I can't tell you exactly at which point
6 where we continued to grow, at which point we -- we
7 put, you know -- put our limit on it, okay? So
8 it's -- it's really a marginal cost issue, okay?
9 BY MR. DeSANCTIS:
10 Q. What do you mean by it's a marginal cost
11 issue?
12 A. You know, I think to optimize in any
13 business, marginal revenue crosses over with
14 marginal cost, right, revenue.
15 Your margin of cost goes up so much higher
16 than marginal revenue.
17 Q. Prior to the web II rates coming out, are
18 you aware of Live365 having conducted any analysis
19 regarding whether implementing measures to decrease
20 ATH might actually have a positive effect on
21 marginal revenues?
22 A. We -- you know, we look at our business, you
23 know, we try for the last ten, 11 years, I try
24 really a lot of methods to optimize. I don't
25 remember exactly what we did, what we didn't do.

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1 But, you know, I'm sure we must have considered
2 that. But whether we have tried it, I mean, we
3 oftentimes, you know, with -- you know, create
4 different things such as landing pages to try to see
5 if we could, you know, increase conversion. You
6 know, we tried all kind of methods. And so to -- to
7 see how that would optimize our business.
8 So, you know, I -- it's, you know -- you
9 know, whether we actually did limit any listenership
10 or not, I'm not sure before that. But, you know...
11 Q. Okay.
12 I'm not asking you to speculate here.
13 A. Yes.
14 Q. I'm asking you, as you sit here today, do
15 you know whether implementing the parking meter or
16 otherwise -- let me just ask: Do you know whether
17 limiting ATH prior to the web II rates coming out
18 would have contained costs more than it might have
19 decreased your revenue? I'm asking you whether you
20 know that as you sit here today.
21 MR. MacDONALD: I'm still going to object to
22 the extent it calls for speculation.
23 THE WITNESS: No, I don't know.
24 MR. DeSANCTIS: Okay.
25 Q. Do you know whether that was ever analyzed,

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1 that specific question, analyzed by Live365?
2 A. I don't remember whether we analyzed it or
3 not, okay?
4 Q. Yup.
5 Before the break we were talking about some
6 of the settlement discussions between Live365 and
7 SoundExchange.
8 A. Uh-hmm.
9 Q. And at one point you said that the
10 settlement offers that SoundExchange was making
11 penalized small broadcasters, do you remember that?
12 A. The what?
13 Q. You said that the proposals that
14 SoundExchange was making penalized small
15 broadcasters, do you remember stating that?
16 A. I don't remember I stated specifically that
17 way. But what I -- I believe what I said was that
18 we are being penalized, because before we have
19 thousands of small broadcasters who block us on a
20 platform who are paying basically the highest rate
21 when they rightfully should be -- you know, be, you
22 know, enjoying the small webcaster rate.
23 Q. But the webcasters aren't paying the rate at
24 all, right? I thought Live365 pays the rate?
25 A. Some of them do. Some of them decided to

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1 use us just as technology platform and all that, use
2 our tools, use our streaming facilities, use, you
3 know -- so on and so forth.
4 Q. But then in that event, those webcasters
5 that you just described aren't subject to Live365's
6 rate, are they? They'd be subject to whatever other
7 rate they would be subject to?
8 MR. MacDONALD: Objection, vague.
9 BY MR. DeSANCTIS:
10 Q. I mean, isn't that right?
11 MR. MacDONALD: Same objection.
12 THE WITNESS: If I'm understanding
13 correctly, they should be.
14 BY MR. DeSANCTIS:
15 Q. They should be what?
16 A. They should be paying whatever rate that
17 which category they -- they fit under.
18 Q. Okay.
19 Not necessarily what Live365 pays?
20 A. Correct.
21 Q. So those webcasters aren't penalized or even
22 affected by the rates that Live365 pays to
23 SoundExchange, correct?
24 MR. MacDONALD: Objection, vague, also calls
25 for speculation.

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1 BY MR. DeSANCTIS:
2 Q. I mean, those webcasters pay royalties to
3 SoundExchange independently of whatever Live365 pays
4 to SoundExchange, correct?
5 A. Yes.
6 Q. Okay.
7 For other webcasters, Live365 actually pays
8 the royalties to SoundExchange, right?
9 A. On their behalf, yes.
10 Q. On their behalf?
11 A. Yeah.
12 Q. They do not pay themselves directly,
13 correct?
14 A. Yes.
15 Q. Do those webcasters make more or less money,
16 depending on the rate that Live365 pays to
17 SoundExchange?
18 MR. MacDONALD: Objection, calls for
19 speculation.
20 THE WITNESS: Yeah, I really don't know if
21 they make -- I never look at their financial
22 statements, so...
23 BY MR. DeSANCTIS:
24 Q. I'm asking is there even a relationship
25 there? Is there a relationship between what the

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1 rate that Live365 pays to SoundExchange and the
2 amount of money that your webcasters make?
3 MR. MacDONALD: Objection, this calls for
4 speculation.
5 MR. DeSANCTIS: No, I'm not asking for
6 speculation.
7 Q. I'm asking whether there's a relationship?
8 A. I really don't know. But many of our
9 webcasters, they are tastemakers.
10 Q. What does that mean?
11 A. Tastemakers, they really love music, or love
12 certain content.
13 Q. Tastemakers?
14 A. Yeah. And they really want to share
15 whatever they have with the world, and some of them
16 are former DJs of clear channels, even very -- you
17 know, they are not necessarily into make money, per
18 se, okay?
19 Q. Right.
20 A. So I really don't know whether they make
21 more or less money. Some of them don't care about
22 making money, that's their hobby.
23 Q. Right.
24 A. Okay. So really, that question -- you know,
25 the answer to that question is really difficult.

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1 Q. Well, no.
2 A. And we don't really have access -- I mean,
3 many of them are individuals or individual entities,
4 they're not necessarily, you know, big companies, so
5 we don't have access to their financials and we
6 don't know, we don't talk to them about those.
7 Q. Okay.
8 A. Yeah. Thousands of them, you know.
9 Q. Sure.
10 So how, if at all, are those webcasters
11 negatively affected if the rate for Live365 goes up?
12 A. Well, in a very big --
13 MR. MacDONALD: Objection, calls for
14 speculation.
15 THE WITNESS: Okay.
16 BY MR. DeSANCTIS:
17 Q. Seems like you wanted to answer.
18 A. Well, let me suggest this, when a cost goes
19 up, somehow to stay in business we necessarily have
20 to ask whoever is use us as a broadcasting platform
21 or whatever, to pay more, okay? It's just -- or
22 charge our VIP more.
23 Q. Well, the VIPs are users, right, not
24 webcasters?
25 A. Yeah, yeah.

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1 Q. So has Live365 raised the fees that it
2 charges its webcasters?
3 A. Yes.
4 Q. Because of the web II rates?
5 A. Yes.
6 Q. When did it do that?
7 A. I don't remember exactly when, but after
8 the -- the web II rate.
9 Q. Has Live365 ever communicated to its
10 webcasters that it is not paying SoundExchange at
11 the web II rates?
12 A. I don't know.
13 Q. Has Live365 ever communicated to its
14 webcasters that one of the reasons that it increased
15 fees to the webcasters is because of the CRB's web
16 II rates?
17 A. I don't really know whether we have
18 communicated that either.
19 Q. As far as you know, was there any reason
20 given to the webcasters when Live365 raised its
21 fees?
22 A. I don't really know whether we did or we
23 didn't.
24 Q. You don't know whether any explanation was
25 given?

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1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

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1 A. Yeah, yeah.
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
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19 [REDACTED]
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21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

153

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
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25 [REDACTED]

154

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 BY MR. DeSANCTIS:
17 Q. Are you aware of a different deal that was
18 executed with Sirius XM and SoundExchange?
19 A. Yes.
20 Q. Live365 could have opted into that deal,
21 correct?
22 A. I don't believe so.
23 Q. Did you ever -- did Live365 ever consider
24 whether to opt into it?
25 A. I think what had happened was when the deals

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1 come down, we consult with counsel, and then whether
2 see we fit or not. If my recollection is correct,
3 the XM Sirius deal is actually a very favorable
4 deal. If it is, indeed is, I may be mistaken,
5 there's no reason for us to opt into it.
6 Q. But you have not opted into it, correct?
7 A. I don't believe so, yeah.
8 MR. DeSANCTIS: Let me change gears here and
9 show you another document.
10 (Lam Exhibit No. 5 was marked for
11 identification.)
12 BY MR. DeSANCTIS:
13 Q. You said this morning in preparation for
14 today's deposition you reviewed the written
15 testimony of Mr. Fratrik; is that right?
16 A. Yes.
17 MR. MacDONALD: We like to call him
18 Dr. Fratrik.
19 MR. DeSANCTIS: Okay, Dr. Fratrik.
20 Q. Is that correct?
21 A. Yeah.
22 Q. Let me show you what's been marked as Lam
23 Exhibit 5.
24 I'll state for the record that what's been
25 marked as Lam Exhibit 5 is a one-page document,

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1 bearing a table entitled, Table I-Allocated Costs of
2 Live365 for Webcasting to US Listeners (FY 2008).
3 Mr. Lam, do you recognize this as a table
4 listed in Dr. Fratrik's testimony?
5 A. Yes, it should be, if I'm not mistaken.
6 Q. Okay.
7 And in this table, as the title suggests,
8 Dr. Fratrik allocates a certain percentage of the
9 various costs to the Live365 Internet radio service,
10 correct?
11 MR. MacDONALD: Objection, lacks foundation,
12 and I'm going to object to the extent it calls for
13 him to speculate.
14 THE WITNESS: Reask the question.
15 BY MR. DeSANCTIS:
16 Q. Well, is it correct that -- that in this
17 table Dr. Fratrik has allocated a certain percentage
18 of various costs and revenue to the Live365 Internet
19 radio service as opposed to the broadcast service?
20 MR. MacDONALD: Objection, calls for
21 speculation, also lacks foundation.
22 THE WITNESS: You talk about --
23 BY MR. DeSANCTIS:
24 Q. Isn't that --
25 A. -- cost and revenue, I don't see any revenue

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1 in here.
2 Q. You see the top several lines?
3 A. Oh, okay.
4 Q. Okay.
5 So -- so is that -- is that what's going on
6 here, in this chart, Dr. Fratrik has allocated a
7 certain percentage of the revenues and the costs to
8 Live365's Internet radio service as opposed to the
9 broadcast service?
10 MR. MacDONALD: Objection, lacks foundation
11 and it calls for speculation as to what Dr. Fratrik
12 did or did not do.
13 THE WITNESS: I don't really know the
14 methodology he used to -- to do this.
15 MR. DeSANCTIS: Okay, but --
16 THE WITNESS: He's our expert, right?
17 BY MR. DeSANCTIS:
18 Q. Yes, but separate and apart from the
19 methodology, you said you reviewed the testimony
20 this morning.
21 A. Yup.
22 Q. And I'm just asking, did I accurately
23 describe what's going on in this chart? If you
24 don't know, you don't know, I'm just asking.
25 MR. MacDONALD: Same objections.

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1 THE WITNESS: Okay, ask the question one
 2 more time, let's make sure, I want to answer the
 3 question.
 4 BY MR. DeSANCTIS:
 5 Q. Is it right that what's going on in this
 6 chart is that Dr. Fratrick is allocating various
 7 percentages of the revenues and costs to the Live365
 8 Internet radio service as opposed to the broadcast
 9 service?
 10 MR. MacDONALD: Objection, calls for
 11 speculation as to what Dr. Fratrick did, and there's
 12 a lack of foundation.
 13 THE WITNESS: Yeah, I think that's his --
 14 you know, his attempt to do that.
 15 MR. DeSANCTIS: Okay.
 16 Q. Were you involved at all in the preparation
 17 of this table?
 18 A. Yeah. A little bit.
 19 Q. How so? What was your involvement?
 20 A. My involvement was there were certain
 21 questions that were asked me, you know, so whatever
 22 question that he -- we gave him an overview of what
 23 the business is, just a really brief overview, and
 24 then -- and then, you know, he asked for -- so --
 25 and then he asked certain questions and I answered

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1 certain things and then he went ahead and did this,
 2 yeah.
 3 Q. Okay.
 4 Do you see how each item of revenue or cost
 5 has its own percentage allocation, correct?
 6 A. Correct.
 7 Q. Some are -- some are in the 90 percent, some
 8 are in the 80 percent, some are 100 percent, some
 9 are 49 percent.
 10 A. Uh-hmm.
 11 Q. Do you know whether those percentages were
 12 provided to Dr. Fratrick from someone at Live365 or
 13 whether he derived those himself?
 14 A. I really don't know.
 15 Q. Did you help derive any of them?
 16 A. I don't think I help him derive it in the
 17 percentages, in this document.
 18 Q. You see about two-thirds of the way down
 19 under cost of sales?
 20 A. Uh-hmm.
 21 Q. Is others?
 22 A. Uh-hmm.
 23 Q. There's 773,858?
 24 A. Uh-hmm.
 25 Q. Do you know what's included in others?

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1 A. I think the --
 2 MR. MacDONALD: Hold on, objection to the
 3 extent it calls for speculation.
 4 THE WITNESS: I'm not sure -- surely of all
 5 the details, what it includes, but I would imagine
 6 it would include -- let me remember what the detail.
 7 I don't remember exactly what they are,
 8 actually.
 9 MR. DeSANCTIS: Okay.
 10 THE WITNESS: I'm sure it must have, you
 11 know, cost of, you know -- cost of sale, you know,
 12 whatever it costs to help, you know, contribute
 13 toward the sale. I don't know the detail, I'm
 14 sorry, I don't remember what exactly they are.
 15 MR. DeSANCTIS: Okay.
 16 THE WITNESS: Yeah.
 17 BY MR. DeSANCTIS:
 18 Q. Do you know why they are attributed 100
 19 percent to the Internet radio service as opposed to
 20 the broadcast service? I'm just asking if you know
 21 why.
 22 MR. MacDONALD: And I'm going to object to
 23 the extent that this calls for speculation, and
 24 also, this lacks foundation.
 25 BY MR. DeSANCTIS:

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1 Q. You can answer, if you know.
 2 A. No, I don't know exactly why he take that
 3 percentage.
 4 Q. Okay.
 5 Is that true for all of the percentages in
 6 the table, you don't know why the particular
 7 percentages were picked? Or as you review it now,
 8 are there any that you do know why the particular
 9 percentage was picked?
 10 A. I think he -- I think he tried to the best
 11 of his ability to given the information that he
 12 gleaned and understood about this business, and work
 13 on the percentages. I mean, that's my guess, I
 14 didn't work on this, so I don't know.
 15 Q. Okay.
 16 A. To the best of his ability, I'm sure.
 17 Q. Okay.
 18 Would you describe Live365's webcasting
 19 service as noninteractive?
 20 MR. MacDONALD: Objection, vague, vague and
 21 ambiguous.
 22 THE WITNESS: What do you mean by
 23 noninteractive?
 24 MR. DeSANCTIS: I know it can mean different
 25 things in different context. I didn't mean it to be

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1 a trick question at all.
 2 Q. Some webcasting services are on demand, and
 3 the user can request a particular track to be played
 4 to that user's computers. Other services, the
 5 listener can pick a particular station but has no
 6 input and no effect of what's played on that
 7 station, it's just whatever is programmed by the
 8 programmer.
 9 A. Uh-hmm.
 10 Q. Okay, that's what I call noninteractive. Is
 11 Live365's Internet radio service not interactive?
 12 A. According to your definition, it's not
 13 interactive.
 14 Q. Okay.
 15 Is there any definition under which it would
 16 be interactive? I'm just -- just based on how you
 17 answered the question, I wondered if you were
 18 suggesting that if defined differently it might be
 19 interactive?
 20 MR. MacDONALD: Objection, vague and
 21 ambiguous as to interactive.
 22 THE WITNESS: I don't think our services
 23 could be defined as interactive.
 24 MR. DeSANCTIS: Okay.
 25 Q. So your -- the listener --

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1 A. Yup.
 2 Q. -- cannot request that a particular stream
 3 be played to him or her, correct?
 4 A. A particular song, yes.
 5 Q. Yeah.
 6 A. It cannot.
 7 Q. Are you familiar with what many refer to as
 8 custom radio?
 9 A. A little bit.
 10 Q. Pandora, you're familiar with a service
 11 called Pandora?
 12 A. Yes.
 13 Q. Is Pandora a service that you would consider
 14 to be custom radio?
 15 MR. MacDONALD: Objection, to the term
 16 "custom radio," it's vague.
 17 THE WITNESS: That term, I think over time
 18 it's taken -- I don't know. I understand there's a
 19 case about -- I haven't read the case, so how that
 20 term is -- you know, is used to define, what is and
 21 what isn't, I'm not quite sure, yeah.
 22 BY MR. DeSANCTIS:
 23 Q. Well, separate and apart from the case.
 24 A. Yeah.
 25 Q. I think you're referring to the LAUNCHcast

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1 decision by the Second Circuit?
 2 A. Yup.
 3 Q. Second and apart from that --
 4 A. Yup.
 5 Q. -- I'm just asking under Pandora's service.
 6 A. Yup.
 7 Q. And I'm not asking what's interactive or
 8 noninteractive under -- as terms of art or anything
 9 like that. I'm just saying, isn't it right that
 10 the -- the user of Pandora can influence what songs
 11 are streamed to him or her more so than they can
 12 using Live365?
 13 MR. MacDONALD: Objection, lacks foundation
 14 and calls for speculation.
 15 BY MR. DeSANCTIS:
 16 Q. Well, do you -- are you familiar with the
 17 Pandora service?
 18 A. Yes, I haven't used it for a while.
 19 Q. But you know how it works?
 20 A. Yeah, in general, yeah. I haven't used it
 21 for -- for a long time, I mean, I've gone and used
 22 it.
 23 Q. Right.
 24 But do you understand that to be a custom
 25 radio service?

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1 MR. MacDONALD: Objection, vague as to the
 2 term "custom radio."
 3 THE WITNESS: I don't know whether it would
 4 fit under custom radio or not, but I think to a
 5 certain extent if you were to say -- you know, I
 6 think it is slightly more in- -- I mean, it's more
 7 interactive than ours, but that's just, you know, I
 8 think --
 9 BY MR. DeSANCTIS:
 10 Q. How is it more interactive than yours? I'm
 11 not using any terms of art here, I'm just asking you
 12 to describe the service.
 13 A. I think ours is just passive listening.
 14 Q. Okay.
 15 A. Very much like radio, okay? So the user --
 16 while the user can try to figure out which station
 17 have certain songs, but they have no way of
 18 predicting when the song will come on, okay?
 19 So they may have to wait three hours until
 20 the last song on the list, or somewhere in the
 21 middle or three-quarters towards the end.
 22 Q. Okay.
 23 A. Okay.
 24 Q. That's the Live365 service?
 25 A. Yeah, it's very much like radio.

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1 Q. Okay.
2 How does the Pandora -- you said Pandora is
3 more interactive, how is it more interactive?
4 A. I think what happened is the user says I
5 like this -- unless they have changed the services
6 recently.
7 Q. Sure.
8 A. And then supposedly they have a computer
9 algorithm that says, if you like this song, you
10 know, there are these other songs that you may also
11 like, okay?
12 And so in that sense it's more interactive.
13 Q. So is it fair to say that what Pandora is
14 offering is a stream that is -- is more tailored to
15 the specific user's preferences?
16 MR. MacDONALD: I'm going to object to the
17 extent it's vague.
18 THE WITNESS: Yeah.
19 I think you sort of asked me to speculate
20 but I say to a certain extent, yes.
21 MR. DeSANCTIS: Okay.
22 THE WITNESS: Because, you know, I heard
23 people complain also that it isn't exactly what they
24 want, you know.
25 BY MR. DeSANCTIS:

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1 Q. Right, I'm not saying it's on demand.
2 A. Yeah.
3 Q. But you said it's more interactive than
4 Live365.
5 A. Yeah.
6 Q. And I'm just trying to figure out how.
7 A. Yeah.
8 Q. And so can you explain how it's more
9 interactive? What -- and I -- I -- I'm -- I don't
10 mean to be argumentative here at all, just --
11 A. Yeah.
12 Q. -- you said the user can indicate
13 preferences and that what it streams to the user is
14 tailored to those preferences, right?
15 A. Supposedly, according -- I mean, they have
16 an algorithm that's supposed to do that, right?
17 That's my understanding.
18 Q. Does Live365 offer a service like that,
19 where streams are somehow tailored to the particular
20 user's preferences?
21 A. No. Live365 relies on the broadcasters,
22 basically, you know, to -- behind every Live365
23 broadcasting station is a live human being who put
24 together the play list, okay, to -- to -- so -- so
25 it's different.

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1 Q. Does Live365 have any plans to introduce a
2 service where the streams to the individual users
3 are tailored to the individual users' preferences?
4 A. I'm not a liberty to discuss this right now
5 because we -- we have talked about all the kind of
6 possibilities, okay, and really it's trade secrets.
7 We -- we -- we are constantly looking at different
8 possibilities, what we need to do and all that.
9 Q. Right.
10 A. Okay. And so, you know, we -- [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 Q. [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 A. [REDACTED] And then it involves a lot too, it's
17 not just whether we decide, because it has something
18 to do with the system. You know, in order to make a
19 system compliant with sound change rules and to
20 track the songs and track play, it's a huge back-end
21 system there, you know, we need to look at and then
22 there's the billing aspect of it and there's a
23 registration aspect of it. You know, there are
24 many, many different pieces.
25 So we can't just say, well, we're going to

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1 turn on a dime.
2 Q. Sure, I understand.
3 A. Yeah. So we have to, you know, consider the
4 cost and the likelihood of success and all the other
5 things.
6 Q. And is that something that Live365 is
7 currently considering and analyzing?
8 A. Like I said before, you know, we try to be
9 very cognizant what's happening around us, okay?
10 But because we're relatively shorthanded, you know,
11 we can't analyze everything or do everything, okay?
12 And so, you know, there are lots of things
13 that, you know, we -- we try to say, hey, should we
14 look at this, should we look at that, okay? So even
15 some of my guys, they may be doing something that I
16 don't know about, so, you know, it's really
17 difficult for me to answer that question.
18 Q. Well, is a more customized stream like we've
19 been talking about, something that you are aware of,
20 that Live365 has been analyzing whether it should
21 do?
22 MR. MacDONALD: Objection, vague.
23 THE WITNESS: I think we are looking at the
24 market, to remain relevant about what we need to do.
25 Okay?

1 [REDACTED]
 2 [REDACTED]
 3 MR. DeSANCTIS: Okay.
 4 Q. Are you -- is -- is Live365 still
 5 considering the possibility of offering a more
 6 customized service, where streams are tailored to
 7 individual users' preferences, or is it something --
 8 is that something that Live365 has ruled out?
 9 MR. MacDONALD: Objection, compound.
 10 THE WITNESS: You know -- you know, we look
 11 at it competitive landscape. And so we try to pay
 12 attention to what's around us, okay?
 13 To answer your question, as long as, you
 14 know, we have not, you know -- I think we are not
 15 actively saying we are not going to do this or that,
 16 you know. There's certain things that -- that, you
 17 know, we by necessity of being in this industry, you
 18 know, we have to really, you know, entertain
 19 different possibilities and all that, okay?
 20 [REDACTED]
 21 [REDACTED]
 22 BY MR. DeSANCTIS:
 23 Q. Is it something you would like to offer as a
 24 business matter, if possible?
 25 MR. MacDONALD: Objection, calls for

1 speculation.
 2 MR. DeSANCTIS: No, it's not speculation.
 3 Q. It's --
 4 A. It's fairly speculative in a sense, because
 5 as I explained to you, it's not just something that
 6 we -- we like to do something, it happens. Because
 7 it takes a lot of engineering to change certain
 8 things.
 9 Q. Right.
 10 A. Okay.
 11 Q. Right.
 12 A. And so it's also depending on what project
 13 is competing with, the likelihood of success, and
 14 you know, other benefits that we may be able to get
 15 from doing certain things.
 16 Q. And all of those remain under consideration?
 17 A. Yeah, I think we consider a lot of things,
 18 okay? And then there's only so much resources we
 19 have.
 20 Q. Is there a person in charge of analyzing
 21 whether Live365 should or should not implement a
 22 customized service like we've been discussing?
 23 A. No, there's not just one person. I think we
 24 talk amongst management, different people about --
 25 you know, about which project we should undertake or

1 not. And -- and so that's how decisions usually
 2 made.
 3 Q. Are you aware of any documents describing
 4 the analysis of whether Live365 should or could
 5 offer a customized service like we've been
 6 discussing?
 7 A. I'm not aware of any documents.
 8 Q. Okay.
 9 You're not aware of any presentations about
 10 this subject, written presentations, PowerPoint
 11 slides, anything like that?
 12 A. Not to my recollection.
 13 Q. You said there are many -- there would be
 14 many people involved in analyzing this, who else
 15 would it be?
 16 A. I mean, people in the engineering, because,
 17 you know, they would be different directors in
 18 engineering, the two of them have to say what does
 19 it take, and probably, you know, people in the
 20 broadcasting platform side, say what does this mean
 21 for the broadcasting business, and people who are in
 22 the listening side, the Internet radio side, say
 23 what does this mean. I mean, would it do anything
 24 for us.
 25 Q. Right.

1 A. Yeah.
 2 Q. So currently do I understand correctly that
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 Q. Okay.
 7 A. You know, as you know in any company that --
 8 that's heavily into engineering, there's always
 9 people that's done work, right?
 10 Q. Yeah. I wasn't asking whether someone might
 11 have thought of it somewhere.
 12 I was asking whether there's actually
 13 concrete plans to -- to offer such a service?
 14 A. [REDACTED]
 15 [REDACTED] you know, planning committee, product
 16 planning meetings and all that either, okay?
 17 Q. Well, if there were concrete plans to
 18 actually offer the service --
 19 A. Yeah.
 20 Q. -- at Live365, wouldn't you know about it?
 21 MR. MacDONALD: Objection, to the extent it
 22 calls for speculation.
 23 THE WITNESS: Generally guys will work
 24 something up and then, you know, they will bring it
 25 up, you know, when it goes through certain

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1 process -- I mean, when it -- when it go to certain
2 maturity and they think it's reasonable, then they
3 would present it.
4 BY MR. DeSANCTIS:
5 Q. Okay.
6 Has anyone presented that to you yet?
7 A. Not that I can recall.
8 Q. Okay.
9 A. Could we take a bathroom break?
10 MR. DeSANCTIS: Sure. Let's take a short
11 break.
12 (Recess.)
13 BY MR. DeSANCTIS:
14 Q. Mr. Lam, are you aware of the fact that
15 Live365 has filed a complaint in Federal court in
16 Washington, D.C. alleging that the copyright royalty
17 judges were unconstitutionally constituted?
18 A. Yes, sir.
19 Q. That litigation is still pending; is that
20 right?
21 A. To my knowledge.
22 Q. And it is -- is it still Live365's position
23 in that litigation that the CRJs were
24 unconstitutionally constituted?
25 MR. MacDONALD: I'm just going to object,

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1 this is very, very, very far off the scope of his
2 written direct testimony.
3 But you may answer.
4 THE WITNESS: You know, we were advised by
5 counsel, because there was a pretty big issue raised
6 previously, therefore, it's a very important issue.
7 BY MR. DeSANCTIS:
8 Q. But it's still Live365's position in that
9 litigation that the CRJs are unconstitutionally
10 constituted, correct, Live hasn't changed its
11 position since it filed its complaint?
12 A. We are asking for clarification from the
13 court.
14 Q. I'm sorry?
15 A. We are asking for clarification from the
16 court.
17 Q. What clarification?
18 A. Whether CRJ is constitutional -- I mean, the
19 CRB is constitutional or not, because it's a really
20 serious constitution issues.
21 Q. Right. It's a more than Live's asking for
22 clarification, Live is actually -- you were at
23 counsel table at the argument at the Federal court
24 in D.C., right?
25 A. Yes, I was at counsel table.

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1 Q. So Live is actually -- more than seeking
2 clarification, Live is alleging that the CRJs were
3 constituted unconstitutionally, correct?
4 A. That's our position.
5 Q. Okay.
6 Is the pendency of that -- and that case has
7 not been resolved yet, right?
8 A. To the best of my knowledge.
9 Q. It remains pending?
10 A. Yup.
11 Q. Is the pendency of that litigation one of
12 the reasons why Live365 has not been paying
13 SoundExchange at the webcasting rates set by the
14 CRJs in web II?
15 MR. MacDONALD: Objection, vague, lacks
16 foundation.
17 THE WITNESS: As I conveyed to you earlier,
18 there are reasons why. I mean, you know, why we
19 have not paid a CRB rates, okay?
20 I think the principal reason is that, you
21 know, we had really trying to -- really trying to
22 see if we come to a settlement, so we can -- yeah.
23 MR. DeSANCTIS: Right.
24 Q. So the pendency of the constitutional
25 litigation is not one of the reasons? I'm -- it

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1 wasn't a reason that had been mentioned before and
2 I'm wondering whether you just forgot about that or
3 whether that's actually not one of the reasons or
4 whether it is?
5 MR. MacDONALD: Objection, lacks foundation,
6 vague, compound.
7 BY MR. DeSANCTIS:
8 Q. The foundation was set all this morning by
9 your testimony that Live365 has not been paying
10 SoundExchange at the rates set by the CRJs in web
11 II, my question is: Is the pendency of the
12 constitutional litigation one of the reasons why
13 Live365 -- why Live365 has not been paying under the
14 web II rates?
15 MR. MacDONALD: Same objections.
16 BY MR. DeSANCTIS:
17 Q. Or maybe it's not one of the reasons, I'm
18 just asking.
19 A. I think the main reason, right, is the one I
20 told you this morning, okay?
21 Q. That you want to reach a settlement with
22 SoundExchange?
23 A. Yeah.
24 Q. You also mentioned this morning that you
25 felt that -- I don't want to put words in your

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1 mouth, I'm not trying to characterize your
2 testimony.
3 A. Sure.
4 Q. You said, I think, that SoundExchange -- you
5 felt you weren't a priority for SoundExchange, that
6 they were negotiating with others and -- and weren't
7 negotiating enough with you; is that right? And
8 again, I don't want to put words in your mouth. If
9 you could just explain.
10 A. We have tried since March '07, first I think
11 we had -- you know, outside counsel who supposedly
12 know SoundExchange people might have know people
13 quite well and say, let's talk about this.
14 And then nothing came to fruition. And then
15 we ourself, through one of the consultants that we
16 hire, who work at Capital Hill quite a bit, to try
17 advance our position.
18 And basically, you know, in fact, we've gone
19 to the East Coast, not me personally, but I think
20 Johnie or this person had gone and try to talk to
21 SoundExchange and all of that.
22 Yeah, I think I would say that, you know,
23 each time we say could we come to some -- you know,
24 could we really talk about this. It's been, oh, you
25 know, we're busy doing this, let us finish this

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1 first before we turn to you.
2 Q. But the SoundExchange has -- has listened to
3 your various proposals, right?
4 MR. MacDONALD: Objection, calls for
5 speculation.
6 BY MR. DeSANCTIS:
7 Q. Well, has SoundExchange ever told you that
8 they're -- don't bother talking to us, we're not
9 interested?
10 A. I don't recall that ever happening.
11 Q. Okay.
12 And -- and --
13 A. It's always --
14 Q. I'm sorry.
15 A. In the past, my impression is always, we'll
16 get to you when we have time.
17 Q. But various proposals have been exchanged
18 between -- or Live365 has presented various
19 proposals to SoundExchange, correct?
20 A. I don't know how many, but, you know, we
21 have in good faith tried to do that.
22 Q. Right.
23 And each has been rejected by SoundExchange,
24 right?
25 A. I'm not sure that each has been rejected.

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1 Q. Has any been accepted? There's -- there is
2 no settlement, right?
3 A. Yeah, but -- okay. I mean --
4 Q. So --
5 A. But the thing is that my impression, at
6 least my impression is that, you know, always we'll
7 get to you, we'll get to you.
8 Q. What's that impression based on?
9 A. Because actually, you know, I have the
10 e-mail that you were referring to earlier with me,
11 basically, look, my impression is always, we'll get
12 back to you, we're busy with this other bigger fish
13 to fry now, and so...
14 Q. Isn't it also possible that SoundExchange
15 wasn't impressed with any of your proposals?
16 MR. MacDONALD: Objection, calls for
17 speculation.
18 THE WITNESS: I don't know what they're
19 thinking about, but...
20 BY MR. MacDONALD:
21 Q. Have you or anyone at Live365 that you're
22 aware of ever told SoundExchange that Live365 will
23 not pay at the web II rates as long as discussions
24 are ongoing?
25 MR. MacDONALD: I'm going to object to the

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1 extent it calls for speculation.
2 BY MR. DeSANCTIS:
3 Q. I'm asking if you have ever told that to
4 SoundExchange.
5 A. I don't believe so.
6 Q. Are you aware of anyone else at Live365 ever
7 telling that to SoundExchange?
8 A. I'm not aware of that.
9 Q. But it is true, correct?
10 MR. MacDONALD: Objection, vague.
11 THE WITNESS: I don't believe that's true,
12 okay?
13 BY MR. DeSANCTIS:
14 Q. You don't -- how is it not true? Isn't it
15 true that Live365 has not been paying SoundExchange
16 at the web II rates because in its view settlement
17 discussions have been ongoing? I thought that's
18 what you said the reason was.
19 A. Yeah. I mean -- and various, during this
20 last few years, it's not just them, but this -- you
21 know, various settlement proceeding in which we're
22 part of DiMa, right, and then other things that
23 continue to happen.
24 Q. So that -- so it is -- it is true that that
25 is why Live365 has not been paying, but you've

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1 never -- you've never conveyed that to
2 SoundExchange; is that right?
3 MR. MacDONALD: Objection, vague.
4 THE WITNESS: What have I not conveyed to
5 SoundExchange?
6 BY MR. DeSANCTIS:
7 Q. I'm sorry?
8 A. That --
9 Q. Well, okay.
10 We saw a couple of letters this morning --
11 A. Yup.
12 Q. -- where SoundExchange demanded payment from
13 Live365 at the web III rates, right?
14 A. Uh-hmm.
15 MR. MacDONALD: I think that
16 mischaracterizes --
17 MR. DeSANCTIS: I'm sorry, at the web II
18 rates, did I just say web III, I apologize.
19 Q. So the question is whether you ever
20 responded to SoundExchange by telling them that you
21 will not pay at the web II rates as long as
22 settlement discussions are ongoing?
23 MR. MacDONALD: Objection, vague as to who
24 "you" is referring to.
25 BY MR. DeSANCTIS:

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1 Q. I'll start --
2 A. I believe counsel, our counsel had responded
3 to SoundExchange. I don't remember exactly what the
4 content is, but, you know, something to that effect.
5 Q. Something to what effect?
6 A. To maybe, we are -- we are looking forward
7 to -- you know, to try to see if we could settle and
8 negotiate a settlement, yeah.
9 Q. And that that's why Live365 has not been
10 paying at the web II rates?
11 MR. MacDONALD: Objection, vague.
12 BY MR. DeSANCTIS:
13 Q. Well, no, that's -- it's actually an
14 important point.
15 There's a difference between your counsel
16 saying to SoundExchange that we want to continue
17 discussions versus we will not pay the web II rates
18 as long as discussions are continuing. I'm
19 wondering if you're aware of the latter ever having
20 been conveyed to SoundExchange?
21 A. I'm not aware of the fact that it was ever
22 conveyed.
23 It was conveyed, okay.
24 MR. DeSANCTIS: Okay.
25 Let me show you another document.

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1 (Lam Exhibit No. 6 was marked for
2 identification.)
3 MR. DeSANCTIS: It's marked as Lam
4 Exhibit 6. Why don't you take a moment to review
5 it.
6 For the record, I will state that this is a
7 one, two, three, four, five-page document, dated
8 March 15, 2007, it's on 11-by-17 paper, it's on
9 Live365 stationery, and it is -- the title is
10 Live365 DSRP Royalty Statements Scenarios.
11 Q. Have you had a chance to look it over,
12 Mr. Lam?
13 A. I'm not finished.
14 This one has a lot of detail.
15 Q. It does, and I won't ask you specific
16 questions without pointing you to something
17 specific, but let me just ask you this first, have
18 you ever seen this before? Perhaps not this size,
19 it's blown up so that it's more easily read, but
20 have you ever seen this before?
21 A. Yeah, I believe I've seen this before.
22 Q. What is it?
23 A. I think at one point in time there was some
24 analysis that was done to try to see what the new
25 rate, how it would impact our business.

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1 Q. That was analysis done by someone within
2 Live365?
3 A. Yes.
4 Q. Were you involved in that analysis?
5 A. Doing this?
6 Q. Doing any --
7 A. The spreadsheet?
8 Q. Analysis, yeah.
9 A. No, I wasn't involved in doing the
10 spreadsheet.
11 Q. Did you -- were you responsible for
12 commissioning someone to prepare this spreadsheet?
13 A. Not exactly. What happened was after this
14 came down, I think management team had a meeting and
15 then I think -- and then I believe it might have
16 been Johnnie, Johnnie Floater, because that's who --
17 who undertook this task to do that.
18 Q. Okay.
19 In the -- the vertical columns have years at
20 the top --
21 A. Uh-hmm.
22 Q. -- going from 2004 to 2010 projected, do you
23 know how the projections were calculated, what the
24 assumptions were going into that?
25 MR. MacDONALD: Objection, compound.

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1 THE WITNESS: No, I don't really know what
2 the assumptions were.
3 MR. DeSANCTIS: Okay.
4 MR. MacDONALD: I just want to state
5 something on the record, I can't quite tell if this
6 is a document that's been produced or not, to
7 SoundExchange. It doesn't have -- it doesn't bear a
8 Bates number, as far as I can tell. It may have
9 been produced as a native format, and I was under
10 the assumption that documents produced in a native
11 format would bear the restricted designation. And I
12 don't see any restricted designations here, so I
13 would like this document to be treated as restricted
14 under the protective order.
15 MR. DeSANCTIS: I have no objection to that
16 whatsoever.
17 MR. MacDONALD: Okay.
18 MR. DeSANCTIS: I affirmatively concur in
19 that unless and until such time as you dedesignate,
20 that's fine.
21 MR. MacDONALD: Thank you.
22 BY MR. DeSANCTIS:
23 Q. Mr. Lam, on page 1 is -- well, no, strike
24 that.
25 I don't have anymore questions on this

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1 document. Why don't we all write restricted on the
2 bottom right now, if we haven't already.
3 I'm going to take a Post-it and put the
4 Post-it on the original.
5 (Lam Exhibit No. 7 was marked for
6 identification.)
7 BY MR. DeSANCTIS:
8 Q. I'm showing you now, Mr. Lam, what has been
9 marked as Exhibit 7. If you could take a look at
10 this and I'll state for the record that this is a
11 one-page document, bearing the Bates label LIVE 971
12 and the title -- this does bear the restricted
13 designation, by the way, and the title is Live365
14 Five-Year Financial Historical Trend and Comparison.
15 Do you recognize this as an accurate
16 representation of Live365's financials?
17 MR. MacDONALD: Objection, vague as to which
18 financials.
19 MR. DeSANCTIS: Well, let me ask this way:
20 Q. Do you know what Exhibit 7 is, Mr. Lam?
21 A. Yes.
22 Q. What is it?
23 A. I believe this is a financial -- a financial
24 statement that shows from October '4 to June '09.
25 Q. Do you review financial -- financials such

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1 as this in the regular course of your business?
2 A. Yes.
3 Q. At the very top -- well, first of all, the
4 first column of numbers is fiscal year 2005, do you
5 see that?
6 A. First column?
7 Q. First column of numbers.
8 A. Yes.
9 Q. That's October '04 through September '05?
10 A. Yup.
11 Q. That's Live's fiscal year?
12 A. Uh-hmm.
13 Q. The last column is October '08 through only
14 June '09. So that means this is not the full fiscal
15 year of '09 on this document, correct?
16 A. Correct.
17 Q. Okay.
18 But those -- and this as you can see, this
19 document was prepared September 15, 2009. I
20 understand that the numbers for the full fiscal year
21 '09 are now available; is that correct?
22 A. Correct.
23 Q. Have you looked at the numbers for the full
24 fiscal year 2009?
25 A. Yes, I have looked at some numbers for

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1 fiscal year '09.
2 Q. At the -- the top line is ATH total, do you
3 see that?
4 A. Uh-hmm.
5 Q. Then it has a line for growth percentage.
6 A. Uh-hmm.
7 Q. And the next line says ATH royalty bearing,
8 and the next says performances royalty bearing.
9 A. Uh-hmm.
10 Q. What does ATH royalty bearing mean?
11 A. ATH is advocate tuning hours, as we
12 discussed this morning. Royalty bearing is, you
13 know, the ATH, that should bear the SoundExchange
14 warranty.
15 Q. So some -- some ATH doesn't bear royalty?
16 A. No.
17 Q. And some does?
18 A. Uh-hmm.
19 Q. How do you account for situations where part
20 of an hour might bear royalties and part of an hour
21 might bear royalties?
22 MR. MacDONALD: Objection, vague, ambiguous,
23 lacks foundation.
24 BY MR. DeSANCTIS:
25 Q. In other words -- well, really my question

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1 is: Do you know how this figure is calculated, the
2 royalty bearing ATH as opposed to nonroyalty bearing
3 ATH?
4 A. Yeah, I have a rough idea.
5 Q. How?
6 A. Remember, I told you we also act as the
7 platform for people who use us as broadcasting
8 platform.
9 Q. Uh-hmm.
10 A. And people who will pay royalty themselves.
11 So even though we record the ATH, but those are used
12 by those people who -- who, you know, that have
13 their own -- I mean, who pay their own royalties,
14 aside from us.
15 Q. So the ATH royalty bearing is only the ATH
16 of those webcasters for whom Live365 pays the
17 royalties?
18 A. Correct.
19 Q. Okay, I understand. Thank you.
20 What is performances (royalty bearing)?
21 A. Within each advocate tuning hour there are
22 14, 15 songs, so the amount multiplied by factor, I
23 don't know exactly what the factor use here, but I
24 think it's between 14 and 15.
25 Q. I see.

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1 So that -- that's individual --
2 A. Song.
3 Q. Performances and individual tracks streamed
4 to an individual listener, one stream?
5 A. Supposedly, there's -- okay.
6 Q. Okay.
7 So is this -- is this a physical count of
8 the streams contained in the ATH royalty bearing
9 line or is it sort of rough calculation, to take the
10 ATH and multiply it by a certain number?
11 A. Could you repeat the question?
12 Q. Do you --
13 A. No, I don't -- one more time, I mean --
14 Q. Let me ask it this way: How is the
15 performances (royalty bearing) line calculated?
16 A. I think we actually had the database, a data
17 warehouse that tracks all the songs.
18 Q. So it's an actual count of actual
19 performances?
20 A. I believe so.
21 Q. Okay.
22 And again, is that only -- does this only
23 include performances of webcasters for whom Live365
24 pays the royalties?
25 A. Yes.

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1 Q. Do you know whether this is the numbers
2 we're looking at here, are US only or global or
3 something else?
4 A. I think we're talking about US only.
5 Q. This is US only?
6 A. Yeah. I could be wrong, but I think it's US
7 only.
8 Q. Okay.
9 I don't have any more questions on this
10 document right now, I may get back to it later.
11 A. Okay.
12 MR. DeSANCTIS: You can put that aside.
13 Show you what's being marked as Lam
14 Exhibit 8.
15 (Lam Exhibit No. 8 was marked for
16 identification.)
17 BY MR. DeSANCTIS:
18 Q. I'll ask you to look it over, Mr. Lam, and
19 in the meantime I'll state for the record that this
20 is a multipage, double-sided document, bearing the
21 Bates range LIVE 4355 through 4359. It is marked
22 restricted. The cover page is an e-mail dated
23 July 30, 2007 from Jason Dedrick to M. Lam at
24 Live365.com.
25 A. Give me a second.

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1 Q. Sure.
2 (Pause in proceedings.)
3 MR. DeSANCTIS: Okay.
4 Q. Do you recognize this e-mail?
5 A. Yes, I recognize this.
6 Q. This is an e-mail from Jason Dedrick to you,
7 correct?
8 A. Yes.
9 Q. Who is Jason Dedrick?
10 A. He's outside advisor who is a professor at
11 Syracuse University.
12 Q. He's an outside adviser to Live365?
13 A. Correct.
14 Q. Is he still?
15 A. Yes.
16 Q. What is he hired to advise Live365 on?
17 A. He -- ever since I was involved with
18 Live365, he had put on as advisor to the company on
19 various aspect of the company, business -- business
20 advisor.
21 Q. A business advisor?
22 A. Yeah.
23 Q. He's not a technologist or a music advisor?
24 A. No.
25 Q. Do you recall the PowerPoint presentation

1 that's attached to this e-mail?
 2 A. Actually, I don't. In fact, on this e-mail,
 3 I may recognize it, but I don't really remember the
 4 content. First of all, because of time, second of
 5 all, Jason -- I'm sure I probably have seen this
 6 before, but Jason would shoot us an e-mail from time
 7 to time about his views of, you know, what we need
 8 to do and all that. And because he's not inside the
 9 company, sometimes, you know, he's pretty far
 10 removed about what we can and cannot do or the
 11 constraints we have. You heard about consultants?

12 Q. Yes.
 13 Is this something, do you recall, and I'm
 14 talking about the e-mail and the PowerPoint
 15 presentation, is this something that Mr. Dedrick
 16 compiled on his own initiative or was he asked to do
 17 so by someone at Live365, if you know?

18 MR. MacDONALD: Objection to the extent it
 19 calls for speculation.

20 THE WITNESS: I -- I don't remember exactly
 21 what it was. But this could have been after
 22 strategic meeting that we had.

23 BY MR. DeSANCTIS:

24 Q. Do you recall the strategic meeting where
 25 [REDACTED] was

1 discussed?

2 A. You know, I think in various strategic
 3 meeting various things were discussed. And advisors
 4 such as Jason sometimes would raise things that, oh,
 5 we need to do this, we ought to do this, we ought to
 6 do that, and present their view.

7 You know, they come to the meeting with
 8 their view of what the world should be, not exactly
 9 what our reality is.

10 Q. Right.

11 A. Okay.

12 Q. Right.

13 A. I mean, if I could do all these, I'd be
 14 happily do it, okay?

15 Q. Are you aware of Live365 having any meetings

16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]

19 MR. DeSANCTIS: I don't have anything more
 20 on that document.

21 (Lam Exhibit No. 9 was marked for
 22 identification.)

23 MR. DeSANCTIS: I'll show you what's been
 24 marked as Exhibit 9. You'll probably want to write
 25 restricted on that, Mr. MacDonald.

1 Q. And there's lots of numbers here, Mr. Lam,
 2 I'm not asking you to actually read them all or know
 3 them all.

4 A. Uh-hmm.

5 Q. Let me just state for the record that this
 6 is a multi-page document that's been marked as
 7 Exhibit 9, it's actually a 24-page document. It's
 8 titled Live365.com Balance Sheet as of September 30,
 9 2009. And it is not marked restricted, but I have
 10 marked that -- the original -- I've written
 11 restricted on it before handing it out.

12 I don't know for sure, but I assume this was
 13 also a native file produced by Live365.

14 MR. MacDONALD: And if we can consider it
 15 restricted, I would appreciate it.

16 MR. DeSANCTIS: Yes, thank you.

17 Q. Mr. Lam, as promised I'm not going to ask
 18 specific questions about specific numbers. But do
 19 you know what Exhibit 9 is?

20 A. Yeah.

21 Q. What is it?

22 A. It's a balance sheet that we prepare every
 23 month.

24 Q. Do you review it every month?

25 A. Not necessarily. You know, I --

1 Q. Are you given it every month, you may or may
 2 not look at it, is that how it works?

3 A. Yeah, I think every month we generate the
 4 updated balance sheet.

5 Q. Do you know the most recent one generated?

6 A. Probably December -- December '09.

7 Q. About how long after the close of the month
 8 is the balance sheet generated?

9 A. Probably by somewhere in the middle of the
 10 month.

11 Q. Okay.

12 A. Usually within 15 days.

13 Q. And do you receive these in hard copy like
 14 this or do you receive them electronically?

15 A. The accountant usually does this.

16 Q. The accountant prepares them?

17 A. Yeah, prepares them.

18 Q. Uh-hmm.

19 I was asking if you received them in hard
 20 copy or if you receive it electronically?

21 A. I'm trying to think.

22 Q. Okay, sorry.

23 A. Sometimes she doesn't send it to me, you
 24 know, sometimes when I ask for it -- I really don't
 25 look at this every month.

1 Q. Okay.
 2 A. Because there's very little change from
 3 month-to-month.
 4 Q. Okay.
 5 A. Yeah. You know, from an operations
 6 standpoint, yeah.
 7 Q. I'm sorry, from an operations standpoint?
 8 A. There's relatively little change.
 9 Q. I see.
 10 A. Yeah.
 11 Q. But when you do receive it, do you recall
 12 whether you receive them in hard copy or
 13 electronically?
 14 A. I think she would send me -- if she
 15 remembers to do this, send me them in soft copy.
 16 Q. Like attached to an e-mail?
 17 A. Yeah, something like that.
 18 MR. DeSANCTIS: Put that aside.
 19 (Lam Exhibit No. 10 was marked for
 20 identification.)
 21 BY MR. DeSANCTIS:
 22 Q. I'm showing you now, Mr. Lam, what has been
 23 marked as Lam No. 10. Take a moment to review it.
 24 Again, just sort of briefly, and if -- I'll
 25 point you to specific language if I'm going to ask

1 specific questions.
 2 A. Sure.
 3 Q. In the meantime, I'll state for the record
 4 that this is a multi-page document, bearing the
 5 Bates label LIVE 8358 through 8364. This one is
 6 single-sided, it bears the heading Management
 7 Discussion and Analysis September 2009.
 8 A. Uh-hmm.
 9 Q. Do you recognize this, Mr. Lam?
 10 A. Yes, I do.
 11 Q. What is it?
 12 A. It's a monthly management discussion and
 13 analysis that I try to compile.
 14 Q. That was going to be my next question. Did
 15 you -- did you compile this?
 16 A. No. Usually different people give different
 17 inputs to accounting, and accounting, you know, put
 18 together the numbers, and then -- and then I would
 19 have final review and -- and -- of this.
 20 Q. I see.
 21 A. Sometimes when we're really, really busy,
 22 for example, last year at the end of the year, you
 23 know, we didn't get to compile this until three
 24 months afterwards.
 25 Q. Okay.

1 A. Yeah.
 2 Q. Well, that begs the question, how often --
 3 this is dated September '09, are these prepared
 4 every month?
 5 A. Supposedly, yeah.
 6 Q. Okay.
 7 But you said in -- in -- in December it
 8 wasn't prepared?
 9 A. No, September, September.
 10 Q. In September it wasn't prepared until a few
 11 months after?
 12 A. No, I said I sometimes, such as, right? I
 13 mean, sometimes we get really busy with other
 14 things.
 15 Q. I see.
 16 A. So the thing that has -- you know.
 17 Q. Are months ever skipped entirely or do they
 18 just get delayed?
 19 A. They get delayed.
 20 Q. And for whom are these reports prepared?
 21 A. For the investors.
 22 Q. Oh, for investors?
 23 A. Yup.
 24 Q. This is sent to investors?
 25 A. Correct.

1 Q. I see.
 2 Is it sent to investors every month or at
 3 least every month that one is prepared?
 4 A. Yup.
 5 Q. And one is prepared for every month,
 6 correct? They just might be late?
 7 A. Supposedly.
 8 Q. They just might be late, but do you ever
 9 skip months?
 10 A. I don't recall that.
 11 Q. Okay.
 12 Who are Live365's -- actually, before I ask
 13 that, Live365 is not a publicly-traded company,
 14 correct?
 15 A. No.
 16 Q. It's privately held?
 17 A. Correct.
 18 Q. Who are its investors?
 19 A. [REDACTED]
 20 Q. How many, approximately?
 21 A. I think, if my recollection is correct,
 22 five.
 23 Q. [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

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1 [REDACTED]
2 A. [REDACTED]
3 Q. BVI stands for what?
4 A. British Virgin Islands.
5 Q. That's where those businesses are
6 incorporated?
7 A. Correct.
8 MR. DeSANCTIS: Let me show you, Mr. Lam,
9 what's been marked as Exhibit 11.
10 (Lam Exhibit No. 11 was marked for
11 identification.)
12 BY MR. DeSANCTIS:
13 Q. I apologize that on a number of these I
14 don't have enough copies, but...
15 Same here, Mr. Lam, there's a lot of numbers
16 on this exhibit, I'm not asking you to know them
17 all, but if you'd just take a look to familiarize
18 yourself with the document.
19 I'll state for the record that this is a
20 multi-page document, bearing the Bates range LIVE
21 1068 through LIVE 1091.
22 Mr. Lam, do you know what this is?
23 A. I think this is a set of document that
24 accounting -- let me -- dispatch -- I haven't had a
25 chance to take a look at the whole thing.

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1 Q. Okay, why don't you take a chance to look
2 through it.
3 A. This actually contains various financial
4 statements -- financial internal, I think financial
5 and operations statements or metrics. I mean,
6 it's --
7 Q. Are these statements that are --
8 A. Some of them that I don't actually even come
9 across.
10 Q. Okay.
11 A. Yeah. I think this is for accounting, some
12 of them are marketing, metrics.
13 Q. Do you recognize them as Live365's numbers
14 as compared to some other company? Is this a
15 Live365 document?
16 A. This should be, but some of them I have
17 never seen.
18 Q. Okay.
19 Let me turn your attention to the fourth
20 page, which is Bates numbered LIVE 1071.
21 A. Uh-hmm.
22 Q. Are these -- is this a set of data that you
23 are familiar with? It's entitled Revenue Trend.
24 A. Yes, somewhat, yeah.
25 Q. On the left, the third line down is unique

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1 REG listeners, does that mean regular listeners or
2 registered listeners or?
3 A. Registered listeners.
4 Q. Registered listeners.
5 A. Yeah.
6 Q. What is a registered listener?
7 A. I think on our website we have -- each of
8 them allows them to register so they can use certain
9 of our features.
10 Q. Listeners don't have to register, right?
11 A. No, they don't.
12 Q. So this unique registered listeners
13 necessarily would be a subset of total unique
14 listeners of the website?
15 A. I believe so, yeah.
16 Q. Below that is unique listeners (M), do you
17 know what that is?
18 A. I think that's unique listeners that come
19 and visit our site or that listen on our site. And
20 M I believe is million, million.
21 Q. I see.
22 So this is total -- total unique listeners
23 in a given month in millions?
24 A. Yeah.
25 Q. And the line above it is unique registered

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1 listeners by month in whole numbers, not in
2 millions?
3 A. Uh-hmm. (Nods head up and down.)
4 MR. DeSANCTIS: Okay. I don't have any more
5 questions on that for now.
6 (Lam Exhibit No. 12 was marked for
7 identification.)
8 BY MR. DeSANCTIS:
9 Q. I'll show you, Mr. Lam, what's been marked
10 as Lam Exhibit 12. Ask you to look it over to
11 familiarize yourself with it generally.
12 And I'll state for the record that this is a
13 multi-page document, bearing the Bates range LIVE
14 4200 through 4208, and it -- the cover page bears
15 the title VIP Membership Review and Forecast. It's
16 dated October 10, 2008.
17 Do you recognize this document, Mr. Lam?
18 A. It's strange, I don't remember this
19 document. I don't remember having seen this
20 document.
21 Q. Okay.
22 Do you remember seeing other VIP membership
23 review and forecasts?
24 A. Yeah. I think previously, you know, the
25 people who were in charge, just in charge of

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1 certain -- certain departments, they put together
2 some stuff. And -- okay.
3 Q. Okay.
4 On the front page, under the title there's a
5 box, do you see that box?
6 A. Uh-hmm.
7 Q. At the top it says "Monty Ma"?
8 A. Uh-hmm.
9 Q. Is that the author of this document?
10 A. Yes.
11 MR. MacDONALD: Objection, calls for
12 speculation.
13 THE WITNESS: Yes, I believe so.
14 MR. DeSANCTIS: Is it, okay.
15 Q. Who is Monty Ma?
16 A. He was previously the VIP person in charge
17 of the VIP.
18 Q. You said previously, he is not -- is he not
19 now?
20 A. Yes, he left the company the end of last --
21 I mean, the end of 2008.
22 Q. Do you know if he's currently employed?
23 A. Yes.
24 Q. With whom?
25 A. I don't know.

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1 Q. Who is in that position now?
2 A. Amy.
3 Q. Last name?
4 A. Jou, J-o-u.
5 Q. J-o-u?
6 A. Yeah.
7 Q. Under the name Monty Ma it says FY '09 Q1,
8 presumably that's fiscal year '09, first quarter,
9 strategy meeting, Live365, Inc.
10 Is -- is there a quarterly strategy meeting
11 at Live365?
12 A. Yes. We used to have one, but, you know,
13 once in a while we'll miss one or so. But during
14 the past year, I think this may have been our last
15 strategic meeting.
16 Q. The one that was on October 10, 2008?
17 A. Yeah.
18 Q. So you've gone more than a year without
19 having one?
20 A. If I don't remember incorrectly.
21 Q. I'm sorry, what?
22 A. If I don't remember incorrectly, I believe
23 so.
24 Q. Did you attend the meetings when they did
25 occur?

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1 A. Yeah. I usually attend the meeting, but
2 sometimes I'm in and out of the meeting, that's why
3 maybe I don't have impression.
4 Q. Were there typically handouts given out at
5 the quarterly strategic meetings when they were
6 held?
7 A. Yeah, typically by some managers, but not in
8 every instance.
9 Q. Right.
10 A. Yeah.
11 Q. So is it the case that various managers --
12 managers of various departments would present
13 forecasts at these strategy meetings?
14 A. Yeah, they present what they have done and
15 they try to present, you know, their forecast.
16 Q. Okay.
17 A. And usually in different scenario too. In
18 this case, you know, for example, he had a baseline
19 and a growth, you know.
20 Q. Do you know if the presentations from the
21 strategy meetings are saved in some central place?
22 A. Theoretically, they should have been saved
23 at a central location.
24 Q. Where?
25 A. I think there must be, you know, a folder in

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1 our system that says strategic meeting or something,
2 but sometimes the managers fail to upload them, that
3 kind of stuff.
4 Q. Do you know why the last quarterly meeting
5 you had was in October 2008? Let me put it this
6 way: Do you know why there hasn't been a meeting
7 since October 2008?
8 A. I think we are really, really shorthanded
9 and, you know, we have been having strategic meeting
10 for four or five years, okay? We found that
11 oftentimes we could talk about a lot of this stuff,
12 but we were not able to execute it, whatever we were
13 trying to do.
14 So -- and that's one reason, and it's also
15 because we were really overwhelmed with different
16 things, and I think -- I don't know exactly the
17 reason why, you know, but that's, you know -- I
18 think those are all contributing factors.
19 MR. DeSANCTIS: Okay.
20 (Lam Exhibit No. 13 was marked for
21 identification.)
22 MR. DeSANCTIS: I'm going to mark this next
23 exhibit, Lam No. 13. And I'm really going to
24 apologize on this one, this is the only copy. I've
25 got one for myself and this original. Obviously we

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1 can make some more copies at the break, it's a
2 document we looked at yesterday with Mr. Floater, so
3 it shouldn't be new to you.
4 Q. Mr. Lam, why don't you look over this
5 document.
6 And I'll state for the record that this is a
7 multi-page document with the Bates range 4210
8 through LIVE 4219. The first page bears the heading
9 Financial Review, Company Meeting, October 10, 2008,
10 Melody Hu, H-u.
11 Do you recognize this document, Mr. Lam?
12 A. Yeah, it's financial put together probably
13 by Ms. Hu. I don't have specific recollection, but
14 looking at the format, I believe it's prepared by
15 Melody.
16 Q. Do you recall this company meeting,
17 October 10, 2008?
18 A. We typically have a monthly meeting around
19 the first full week of the month.
20 Q. And is a financial review presented at all
21 of those?
22 A. Yes.
23 Usually it's just the -- what we did the
24 previous month and then what we -- you know, the
25 month before and the previous month.

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1 Q. This one seems to have more in it than that.
2 A. Yeah.
3 Q. Some slides show --
4 A. Yeah.
5 Q. -- quarters or two quarters. Was that
6 common?
7 MR. MacDONALD: Objection, vague.
8 THE WITNESS: Can you repeat that question?
9 BY MR. DeSANCTIS:
10 Q. Was it common that -- that -- that at some
11 company meetings you would not only discuss the
12 prior month but the prior quarter or two quarters?
13 MR. MacDONALD: Same objection.
14 THE WITNESS: This is a typical.
15 MR. DeSANCTIS: Okay.
16 Q. Let me turn your attention to the page
17 numbered LIVE 4214. This is entitled Financial '08
18 Second Half Year Review --
19 A. Uh-hmm.
20 Q. -- actual versus forecast.
21 A. Uh-hmm.
22 Q. So the first line, for example, is total
23 cost.
24 A. Uh-hmm.
25 Q. On the right is a column entitled Forecast.

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1 A. Uh-hmm.
2 Q. Do you know when the forecast was made? I'm
3 assuming, am I right, that what's in that column are
4 forecasts for the second half of financial '08 that
5 presumably were made at some point prior in time,
6 correct?
7 A. Yeah, I think so previously, but I can't
8 tell you exactly when.
9 Q. You don't know how -- how far back
10 projections --
11 A. It should have been the previous year but
12 sometimes they're late.
13 Q. I see.
14 And then the next column over to the left is
15 actual?
16 A. Correct.
17 Q. So that is -- those are the numbers -- not
18 the forecast, but the actual results of the second
19 half of fiscal year '08?
20 A. Correct.
21 Q. What is EBITA, E-B-I-T-A?
22 A. Earnings before interest, tax and
23 amortization.
24 Q. And here the forecast was [REDACTED] and the
25 actual was [REDACTED] Do you know why the actual

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1 EBITA was so much higher than the forecast?
2 MR. MacDONALD: I'm going to object to the
3 extent it calls for speculation.
4 THE WITNESS: I think if you notice --
5 actually, we -- this is -- when did this occur?
6 October '08.
7 MR. DeSANCTIS: Right.
8 Q. If we were reading this correctly, these are
9 numbers for the first half of fiscal '08 on this
10 page, 4214.
11 A. No, it's the second half.
12 Q. I'm sorry, second half of fiscal '08, you're
13 right, so the projection for the second half of
14 physical year '08 EBITA was [REDACTED] but the actual
15 was [REDACTED] And I'm asking, if you know, why the
16 actual was so much higher than the forecast?
17 A. I think we consciously tried to suppress
18 cost and expense as much as possible. I think even
19 back then I had the sense that the economy's going
20 to turn really bad, so we -- first of all, we -- for
21 some reason we have wanted to recruit more people,
22 but, you know, we haven't been able to bring them
23 in. And then we did whatever we could to try to
24 contain our costs as much as possible. And I think
25 that's the reason why.

214	<p>1 Q. Okay.</p> <p>2 If you -- if you turn the page, this slide,</p> <p>3 which is page LIVE 4215 is entitled FY 2008</p> <p>4 Financial Overview, original versus revised versus</p> <p>5 actual. And it has three columns of numbers: One</p> <p>6 is original forecast, one is revised forecast, one</p> <p>7 is actual. Do you -- these actual numbers are for</p> <p>8 fiscal year 2008; is that correct?</p> <p>9 A. Uh-hmm.</p> <p>10 Q. So that would have closed in September of</p> <p>11 '08?</p> <p>12 A. September 30th, yeah.</p> <p>13 Q. Okay.</p> <p>14 Do you know when the original forecast for</p> <p>15 the fiscal year '08 numbers was made?</p> <p>16 A. The previous year, probably.</p> <p>17 Q. October of the previous year?</p> <p>18 A. Yeah, October, that time frame.</p> <p>19 Q. How about the revised forecast, do you know</p> <p>20 when the revised forecast was made?</p> <p>21 A. I don't remember.</p> <p>22 Q. Is it typical that there are revised</p> <p>23 forecasts in the middle of the year?</p> <p>24 A. I think some years we have revisions, some</p> <p>25 we don't, so I don't know whether if we -- we have</p>	216	<p>1 stand for?</p> <p>2 A. Pro stations.</p> <p>3 Q. Pro as in professional?</p> <p>4 A. Yeah.</p> <p>5 Q. What does that mean in this context of</p> <p>6 Live365?</p> <p>7 A. We use the term kind of loosely, meaning the</p> <p>8 more professional type of stations. We -- the</p> <p>9 broadcasting stations we have, we basically in our</p> <p>10 mind group them into two, you know, like colleges,</p> <p>11 churches, businesses, those are generally considered</p> <p>12 professional stations, and the CBs are generally the</p> <p>13 hobbyists or the smaller stations.</p> <p>14 Q. I see.</p> <p>15 I assume it's not always a clear line which</p> <p>16 is which?</p> <p>17 A. Yeah. I mean, there's different pricing</p> <p>18 and, you know, some of them are not very big, they</p> <p>19 sign up as pros and they're willing to pay more,</p> <p>20 so...</p> <p>21 Q. Is there a pro package and a CB package that</p> <p>22 you offer to webcasters?</p> <p>23 A. Yeah.</p> <p>24 Q. That's sort of how you know which is which,</p> <p>25 it's up to the webcaster to pick one or the other?</p>
215	<p>1 done it a few times, but I don't believe that's the</p> <p>2 case every time.</p> <p>3 Q. That there are revisions?</p> <p>4 A. Yeah.</p> <p>5 Q. When there are revisions, is it at a</p> <p>6 particular time of the year, say, the midpoint or</p> <p>7 the six months?</p> <p>8 A. Not necessarily.</p> <p>9 Q. Okay.</p> <p>10 A. Not necessarily.</p> <p>11 Q. And do you remember when these particular</p> <p>12 revisions were made to the fiscal year 2008</p> <p>13 forecast?</p> <p>14 A. No, I don't remember.</p> <p>15 MR. DeSANCTIS: I don't have any further</p> <p>16 questions on that document. Could we take a short</p> <p>17 break?</p> <p>18 MR. MacDONALD: Absolutely.</p> <p>19 (Recess.)</p> <p>20 BY MR. DeSANCTIS:</p> <p>21 Q. Mr. Lam, I've seen in some of the Live365</p> <p>22 documents that have been produced references to PRO</p> <p>23 stations and CB stations?</p> <p>24 A. Uh-hmm.</p> <p>25 Q. What does that mean? What does PRO station</p>	217	<p>1 A. Correct.</p> <p>2 Q. I see.</p> <p>3 So you're saying typically a certain</p> <p>4 profiled webcaster tends to pick the pro package and</p> <p>5 a certain profiled webcaster tends to pick the CB</p> <p>6 package?</p> <p>7 A. Correct.</p> <p>8 Q. Is the pro package more expensive than the</p> <p>9 CB package?</p> <p>10 A. Generally speaking.</p> <p>11 Q. Are these -- the type of packages that are</p> <p>12 available, what's offered in each, how much each is,</p> <p>13 is that stuff -- is that information available on</p> <p>14 the Live website?</p> <p>15 A. Yes.</p> <p>16 MR. DeSANCTIS: Let me show you what's been</p> <p>17 marked as Exhibit 14.</p> <p>18 (Lam Exhibit No. 14 was marked for</p> <p>19 identification.)</p> <p>20 BY MR. DeSANCTIS:</p> <p>21 Q. I'll ask you to take a general look at it to</p> <p>22 familiarize yourself with it.</p> <p>23 In the meantime, I'll state for the record</p> <p>24 that this is a multipage, double-sided document,</p> <p>25 bearing the Bates LIVE 9297 through 9371. This is</p>

218	<p>1 as it was produced by Live and it does not contain a 2 restricted label.</p> <p>3 The title is Net Music Radio 2007 through 4 2010: Listening hour analysis by site and brand. 5 And in the middle of the first page it says 6 AccuStream I media research.</p> <p>7 Mr. Lam, do you know generally what this is? 8 A. Yeah, I knew about AccuStream. 9 Q. What's AccuStream? 10 A. I think it's -- it's a media research 11 company, it measures various -- measures, you know, 12 various players in the industry. 13 Q. How often does Live365 receive data from 14 AccuStream? 15 A. I really don't know, I'm embarrassed to tell 16 you that. 17 Q. That's okay, don't be embarrassed. 18 Have you ever seen this document before? 19 A. I actually have not read this document. 20 Q. Okay. 21 Are these AccuStream reports things that 22 Live365 relies on or in any other way uses in their 23 business? 24 MR. MacDONALD: Objection, vague. 25 MR. DeSANCTIS: Admittedly, I'm asking a</p>	220	<p>1 Let me direct your attention to page 41 of 2 this report, and by that I mean the page numbers 3 inserted by AccuStream, it's page 41, it bears the 4 Bates number LIVE 9340. 5 A. Uh-hmm. 6 Q. This has a -- a table entitled Listening 7 Hour Annual Share By Brand. 8 A. Uh-hmm. 9 Q. 2007 ranking. 10 A. Uh-hmm. 11 Q. Live365.com is one of the brands reported. 12 A. Uh-hmm. 13 Q. Does Live365 report data to AccuStream that 14 you know of? 15 A. Not that I'm aware of. 16 Q. Do you know how AccuStream gathers data on 17 Live365 and other -- I'll just stop there, on 18 Live365? 19 A. I think they have a technology that somehow 20 was able to pick up this type of stuff. 21 Q. Okay. 22 A. Yeah. 23 I don't know the particulars. 24 Q. Do you know anyone who works at AccuStream? 25 A. Not personally.</p>
219	<p>1 broad question and we can -- we can get more 2 specific. 3 Q. But is -- are they used in any way in -- in 4 the business? 5 A. I don't know whether we rely on this report, 6 per se, or not. 7 Q. Do you know whether you rely on other 8 AccuStream data? 9 A. I think we one way or the other probably 10 came across the data. Like I told you, I'm little 11 bit embarrassed to say that I don't know whether we 12 actually bought the reports or not, I think these 13 are not free, and so... 14 Q. Oh, these are purchased by Live365 from 15 AccuStream? 16 A. I don't think these are free, I'm saying -- 17 okay. 18 Q. Okay. 19 A. I mean, these type of reports, typically you 20 have to pay. 21 Q. I see. 22 You pay per report or is it like a 23 subscription? 24 A. I don't really know, yeah. 25 Q. Okay.</p>	221	<p>1 MR. DeSANCTIS: Put that document aside. 2 (Lam Exhibit No. 15 was marked for 3 identification.) 4 BY MR. DeSANCTIS: 5 Q. Showing you now a one-page document that's 6 been marked as Exhibit 15. It is entitled Live365 7 Business Decisions Affecting ATH. 8 Mr. Lam, have you ever seen this document 9 before? 10 A. Yes. 11 Q. Where? 12 A. I believe it's part of my exhibits in my -- 13 Q. To your written testimony? 14 A. Yeah. 15 Q. Did you prepare this document? 16 A. No, not personally. 17 Q. Do you know who did? 18 A. My staff did. 19 Q. At your direction or did they bring it to 20 you? 21 A. I think there was a discussion among the 22 managers and we tried to, you know -- amongst 23 managers about, you know, that I will -- you know, 24 we tried to track what happened, okay? 25 Q. Okay.</p>

222	<p>1 What was the -- what's the point in the</p> <p>2 context of your written direct testimony of</p> <p>3 including this information? What point are you</p> <p>4 making here?</p> <p>5 MR. MacDONALD: Objection, vague.</p> <p>6 THE WITNESS: Could I have my documents?</p> <p>7 MR. DeSANCTIS: If it's many, you can tell</p> <p>8 me it's many.</p> <p>9 Q. Yeah, do you want to see your testimony?</p> <p>10 A. Yeah, yeah.</p> <p>11 I think one of the points I was trying to</p> <p>12 make was that we did take, you know, certain</p> <p>13 actions, we take caused the hillage to drop.</p> <p>14 Q. But that was intentional, right?</p> <p>15 A. Yeah.</p> <p>16 Q. So each of the -- of the solid dots on the</p> <p>17 chart of deposition Exhibit 15, which actually is</p> <p>18 Exhibit 3 to your testimony.</p> <p>19 A. Okay.</p> <p>20 Q. Each one of those represents a business</p> <p>21 decision by Live365 to implement some measure</p> <p>22 intended to decrease ATH; is that right?</p> <p>23 MR. MacDONALD: Objection, vague.</p> <p>24 THE WITNESS: Yeah. I think these are</p> <p>25 some -- I'm sure that they're not -- not inclusive</p>	224	<p>1 Q. Was there other reasons?</p> <p>2 A. Not right off the top of my head, because</p> <p>3 royalty was a really serious issue for us.</p> <p>4 Q. But Live365 was always in the business of</p> <p>5 maximizing its revenue, correct?</p> <p>6 A. Trying to, anyhow.</p> <p>7 Q. Yeah.</p> <p>8 A. Yeah, we always try to maximize our revenue.</p> <p>9 Q. Right.</p> <p>10 A. Without equivocation.</p> <p>11 Q. So is it true that you would not have done</p> <p>12 any of the measures presented here on Exhibit 15 if</p> <p>13 you thought that they would have had a net effect of</p> <p>14 decreasing revenue?</p> <p>15 MR. MacDONALD: Objection, calls for</p> <p>16 speculation, it's vague.</p> <p>17 THE WITNESS: Could you reask the question?</p> <p>18 MR. DeSANCTIS: Sure.</p> <p>19 Q. And revenue might not be quite the right</p> <p>20 word here, let's put it this way, if you think of</p> <p>21 profit as revenue minus cost.</p> <p>22 A. Yup.</p> <p>23 Q. Very basic definition.</p> <p>24 A. Uh-hmm.</p> <p>25 Q. Was it -- did Live365 in implementing each</p>
223	<p>1 of all the actions we have taken. Maybe just for</p> <p>2 this particular chart that, you know, we were</p> <p>3 looking at big things such as, you know, the iTunes</p> <p>4 Radio and putting the parking meter, but I'm sure</p> <p>5 this is not the only thing that we did to -- to</p> <p>6 effect the range.</p> <p>7 BY MR. DeSANCTIS:</p> <p>8 Q. And this is what you were -- are these the</p> <p>9 measures that you're referring to -- that you were</p> <p>10 referring to earlier today, when you described</p> <p>11 measures that would contain royalty costs to a</p> <p>12 greater degree than they may reduce revenue? Was</p> <p>13 that the -- was that the objective for each of these</p> <p>14 measures?</p> <p>15 MR. MacDONALD: Objection, vague, compound.</p> <p>16 THE WITNESS: Could you reask that question?</p> <p>17 MR. DeSANCTIS: Sure.</p> <p>18 Q. Each of these measures was intended to</p> <p>19 reduce ATH, correct?</p> <p>20 A. Yes.</p> <p>21 Q. And the reason why Live365 implemented each</p> <p>22 of these measures to reduce ATH was to contain</p> <p>23 royalty costs, correct? Or was there a different</p> <p>24 reason?</p> <p>25 A. I think that's at least one of the reasons.</p>	225	<p>1 of these measures think that the measures would</p> <p>2 reduce profit or were they intended to increase</p> <p>3 profit while containing cost?</p> <p>4 MR. MacDONALD: I'm going to object, it's</p> <p>5 still -- it's still --</p> <p>6 BY MR. DeSANCTIS:</p> <p>7 Q. Well, do you see the difference?</p> <p>8 MR. MacDONALD: Hold on.</p> <p>9 Still vague as to profit, and the question's</p> <p>10 still compound.</p> <p>11 MR. DeSANCTIS: Okay.</p> <p>12 THE WITNESS: How do you define profit?</p> <p>13 BY MR. DeSANCTIS:</p> <p>14 Q. Let's just define profit in the very basic</p> <p>15 sense as --</p> <p>16 A. EBITA?</p> <p>17 Q. Okay, I was going to say revenue minus cost,</p> <p>18 just in a very, very basic sense.</p> <p>19 A. Okay.</p> <p>20 Q. Revenue minus cost.</p> <p>21 A. That's before depreciation, interest, tax</p> <p>22 and all that?</p> <p>23 Q. Yes.</p> <p>24 A. So basically gross profit?</p> <p>25 Q. Yes, okay.</p>

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1 A. Okay.
2 Q. I don't think the answers will change if we
3 make it EBITA, but you can tell me if they do.
4 You said, if I remember correctly, that each
5 of the measures on this exhibit, deposition
6 Exhibit 15, was taken for the purpose of reducing or
7 at least containing royalty costs, right?
8 A. Yes, I believe I said that, yeah.
9 Q. Okay.
10 Did you also think that any of these
11 measures would decrease profits or was the hope with
12 each of them that they would contain costs while
13 maximizing profit?
14 MR. MacDONALD: Objection, calls for
15 speculation and it's a bit on the compound side.
16 THE WITNESS: Let's try to make it very
17 simple.
18 MR. DeSANCTIS: Okay.
19 THE WITNESS: Really simple,
20 straightforward, okay?
21 MR. DeSANCTIS: Okay, I will try.
22 THE WITNESS: I want to answer your question
23 but by the time I get to the answer it's okay, what
24 do you want.
25 BY MR. DeSANCTIS:

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1 Q. Let's look at one in particular, okay?
2 A. Uh-hmm.
3 Q. The -- in April '07, maybe it's March,
4 April, there's a dot on the exhibit.
5 A. Maybe February.
6 Q. Maybe February, there's a dot that says set
7 listening limits, parking meter (2), do you see
8 that?
9 A. Yup.
10 Q. So when Live365 set the listening limits
11 that this is referring to, it was for the express
12 purpose of reducing ATH, correct?
13 MR. MacDONALD: Objection, vague.
14 MR. DeSANCTIS: I thought that's what we
15 were talking about all day.
16 Q. Is that not right?
17 A. Yeah. I think when we did that, our intent
18 was to make sure that -- because revenue was -- was
19 so much higher than before -- I mean, not revenue,
20 the royalty costs were so much higher than before,
21 you know, we really need to be cognizant of that,
22 because that is one of our biggest costs, okay?
23 Q. Right.
24 A. So the way it jumped, I mean, we necessarily
25 have to look at that very carefully, yeah.

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1 Q. Right.
2 And so the -- the reason that Live365 set
3 the limits referred to here in the exhibit was to
4 reduce ATH, correct? Wasn't that the purpose of the
5 limit?
6 A. Yes.
7 Q. And by reducing ATH, the goal was to reduce
8 or at least contain royalty costs, correct?
9 A. Yes, contain the costs.
10 Q. Okay.
11 Did you also intend for the setting of the
12 listening limits to reduce revenue?
13 A. No. I mean, the intent is maximize the
14 revenue as long and as much as we could.
15 Q. So the intent of this measure that we've
16 been discussing --
17 A. Yeah.
18 Q. -- setting limits in the spring of '07 --
19 A. Yup.
20 Q. -- was to reduce or contain royalty costs --
21 A. Yup.
22 Q. -- while not reducing revenue; is that
23 correct?
24 A. I think.
25 Q. Or preserving revenue?

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1 A. We also did other things to try to increase
2 revenue.
3 Q. Oh, sure, I didn't mean to say this was
4 exclusive.
5 A. Yeah.
6 Q. But that was the concept behind this
7 measure?
8 A. In this particular case, I think we did some
9 calculation, the costs, the costs was far greater
10 than any incremental revenue that we could generate.
11 Q. Okay.
12 And does that same analysis go for each of
13 the measures described on this deposition Exhibit
14 15, in the sense that these measures were intended
15 to decrease or contain royalty costs while
16 maintaining revenues as high as possible?
17 MR. MacDONALD: Objection vague.
18 THE WITNESS: In everything we do, right, in
19 business what you try to do, any reasonable,
20 rational business person is to try to make -- I
21 mean, to increase revenue and decrease costs, and I
22 believe everything we did, we tried to do is with a
23 view toward that.
24 MR. DeSANCTIS: Okay. Thank you. I get it.
25 THE WITNESS: Yeah.

230	<p>1 (Lam Exhibit No. 16 was marked for 2 identification.) 3 MR. DeSANCTIS: Let me show you what's being 4 marked as Exhibit 16. 5 I'll state for the record that this is a 6 one-page document entitled Live365: Historical US 7 Internet Radio Network Revenue. 8 Q. Do you recognize this, Mr. Lam? 9 A. I don't really -- I don't believe -- I'm not 10 sure that I've seen this before. But that looks 11 like it's something that's produced by our 12 accounting department. 13 Q. Okay. 14 A. Yeah. 15 Q. But you're not sure whether you've ever seen 16 this document before? 17 A. This particular document, yeah, because a 18 lot of stuff goes over my desk like this, yeah. 19 Q. Okay. 20 And do I take it from that answer that you 21 are not prepared -- you were not involved in 22 preparing this document? 23 A. Usually the accounting, right, the different 24 department, accounting would gather the information 25 and put this together. As I told you earlier, maybe</p>	232	<p>1 A. Uh-hmm. 2 Q. That has been marked as Exhibit 17. 3 A. Uh-hmm. 4 Q. Have you seen this document before, Mr. Lam? 5 A. I probably did. 6 Q. Probably, do you recall when? 7 A. No. 8 Q. No? 9 A. Like I say, I see a lot of financials, I see 10 a lot of documents. 11 Q. Right. 12 A. So I don't -- I can't tell you when I saw 13 it. 14 Q. Okay. 15 A. Yeah. 16 But it's in the format that we prepare a 17 report, so this -- unless I'm mistaken, this was 18 generated by -- by our accounting department, yeah. 19 Q. But you don't recall ever seeing this 20 particular document before? 21 A. Yeah. I mean, the numbers look -- look 22 right, you know, so I don't have any reason to 23 believe that -- 24 Q. Right. But the question is: Do you recall 25 seeing this particular document before?</p>
231	<p>1 I'm so overloaded, that sometimes I really don't 2 have time to look over the financial, per se. I did 3 not say this wasn't produced by them. I mean, I 4 told you earlier that this looked like the format 5 which, you know, it's probably -- it's produced by 6 them. 7 Q. Okay. 8 A. But I just don't recall this particular 9 document, per se, that, you know, I have looked at 10 it before. I may well have looked at it, you know. 11 Q. Okay. 12 A. If you want to ask questions, you could try 13 to the extent I can answer, I will try to answer. 14 MR. DeSANCTIS: Yeah. I was just sort of 15 trying to decide whether that was worth it or not, 16 if you don't actually remember reviewing this 17 particular document. 18 Okay, let me show you a different document, 19 then. 20 (Lam Exhibit No. 17 was marked for 21 identification.) 22 BY MR. DeSANCTIS: 23 Q. This is a one-page document bearing the 24 title Live365: Historical Operating Income 25 Statement.</p>	233	<p>1 A. This particular document, I think I probably 2 did see it. 3 Q. I'm sorry? 4 A. I probably did see it. 5 Q. Do you recall when? 6 A. No, I don't. 7 MR. DeSANCTIS: Okay. 8 Can we take a ten-minute housekeeping break 9 and I'll see how quickly I can wrap this all up? 10 MR. MacDONALD: That's fine. 11 (Recess.) 12 BY MR. DeSANCTIS: 13 Q. Could we take out what has previously been 14 marked Exhibit 7. We've discussed that a little bit 15 ago today, Mr. Lam, do you remember that? 16 A. Yeah. 17 Q. Put that aside for now and just keep it 18 handy. One of the ways, obviously, that Live365 19 generates revenue is to sell advertisements on the 20 channels that stream on the Live365 website, 21 correct? 22 A. Right. 23 Q. And you mentioned earlier today that there 24 are some Live365 webcasters for whom Live365 pays 25 the royalties and there are some for who Live365</p>

234

1 does not pay the royalties, correct?
2 A. Uh-hmm.
3 Q. Do you know what the rough breakdown is
4 there, what percentage Live365 pays for versus what
5 percentage they don't, very roughly?
6 A. No. I told you earlier, I don't really have
7 that number in my head.
8 Q. Okay.
9 A. I mean, you know, if I have, I would give it
10 to you happily, okay?
11 Q. Okay.
12 A. I just don't want to give you a number and
13 that's off base.
14 Q. Fair enough.
15 A. Yeah.
16 Q. Do you know whether Live365 advertises on
17 channels both for which Live365 pays royalties and
18 for ones that Live365 does not pay the royalties?
19 MR. MacDONALD: Objection, compound.
20 THE WITNESS: What do you mean by
21 advertises, what do you mean by --
22 MR. DeSANCTIS: Let's put it this way:
23 Q. Live365 sells advertising space on the
24 channels it broadcasts, correct? Isn't that what
25 Mr. Floater does for a living?

235

1 A. Yeah.
2 Q. Okay.
3 Does Live365 sell advertising space on the
4 channels for which it does not pay the royalties?
5 MR. MacDONALD: I'm going to object to the
6 extent that foundation hasn't been set.
7 BY MR. DeSANCTIS:
8 Q. Well, I'm sorry, this is -- again, I don't
9 mean this to be tricky and I'm sorry if my questions
10 aren't making sense, it's late in the day.
11 The foundation I think was that there are --
12 Live365 sells ad space on the channels it webcasts,
13 correct?
14 A. Yes.
15 Q. Correct?
16 A. Yeah.
17 Q. And that's part one of the foundation. Part
18 two is that there are certain channels for which
19 Live365 pays the webcasters royalties and there are
20 other channels for which Live does not.
21 A. Uh-hmm.
22 Q. Right?
23 A. Uh-hmm.
24 Q. For those the webcaster is responsible for
25 paying his or her own royalties?

236

1 A. Correct.
2 Q. On those channels, where the webcaster is
3 responsible for paying his or her own royalties,
4 does Live365 sell ad space on those channels?
5 A. No.
6 MR. DeSANCTIS: Okay. I don't think I have
7 any further questions.
8 MR. MacDONALD: I have a couple questions.
9 THE WITNESS: Okay.
10 -O-
11 EXAMINATION
12 BY MR. MacDONALD:
13 Q. Mr. Lam?
14 A. Yes.
15 Q. Do you recall you were asked questions about
16 Exhibits 16 and 17 to your deposition?
17 A. Yes.
18 Q. And the court reporter has just handed
19 you --
20 MR. DeSANCTIS: Wait, let me get those
21 exhibits in front of me. 15 and 16 you said?
22 MR. MacDONALD: 16 and 17.
23 MR. DeSANCTIS: Okay.
24 THE WITNESS: Okay.
25 BY MR. MacDONALD:

237

1 Q. The court reporter has just handed you
2 Exhibit 16 and Exhibit 17 to your deposition.
3 A. Uh-hmm.
4 Q. Do you recall your testimony regarding both
5 Exhibits 16 and 17, that you may have seen these
6 documents before but you weren't a hundred percent
7 certain, do you recall that testimony?
8 A. Yeah, I think that's something I said.
9 Q. Now, do you also recall, Mr. Lam, submitting
10 multiple exhibits with your written direct
11 testimony?
12 A. Yes.
13 Q. Now, I only have my own copy, but I'm not
14 going to enter this into evidence, and I just want
15 to show you my own copy of the testimony of Mark Lam
16 that was submitted in connection with the web III
17 proceeding.
18 A. Uh-hmm.
19 Q. And I'm going to turn to Exhibit 4 of your
20 written direct testimony. Are you looking at
21 Exhibit 4 of the Lam written direct testimony?
22 A. Yes.
23 Q. Does Exhibit 4 resemble Exhibit 16 to your
24 deposition?
25 A. It's identical.

238

1 MR. DeSANCTIS: Objection, the two documents
 2 speak for themselves, but okay.
 3 THE WITNESS: It's identical.
 4 BY MR. MacDONALD:
 5 Q. Turning to Exhibit 5 of the Lam written
 6 direct testimony, does Lam Exhibit 5 to the written
 7 direct testimony resemble Lam Exhibit 17 to your
 8 deposition?
 9 A. They are identical.
 10 Q. Does this refresh your recollection as to
 11 whether you have seen Exhibits 16 and 17 to your
 12 deposition before?
 13 A. Yes, I've seen them.
 14 I -- when I said I wasn't sure, because
 15 there's a lot of numbers, you know, I wasn't sure,
 16 you know, I mean, looking at the documents, because
 17 I see a lot of documents. So -- but anyhow, they
 18 are identical to my exhibits.
 19 Q. To the best of your knowledge, do the
 20 numbers reflected in Lam deposition Exhibit 16 and
 21 17 --
 22 A. Yup.
 23 Q. -- represent true and correct numbers with
 24 respect to Live365's business?
 25 A. Yes.

239

1 Q. Do you have any reason to dispute the
 2 authenticity of the information presented in Lam
 3 deposition Exhibit 16 and 17 of your deposition?
 4 A. No.
 5 MR. MacDONALD: I have no further questions.
 6 MR. DeSANCTIS: Do I get to retake him,
 7 then?
 8 MR. MacDONALD: Go ahead.
 9 THE WITNESS: If you want to.
 10 MR. DeSANCTIS: No further questions.
 11 (Whereupon, the deposition adjourned at
 12 4:54 p.m.)
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240

1 I hereby declare under penalty of perjury
 2 under the laws of the State of California that the
 3 foregoing is true and correct.
 4
 5
 6 EXECUTED: _____, _____, on
 7 _____ 2010.
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 N. MARK LAM

241

1 REPORTER'S CERTIFICATE
 2 I hereby certify that the witness in the
 3 foregoing deposition, N. MARK LAM, was by me duly
 4 sworn to testify to the truth, the whole truth, and
 5 nothing but the truth, in the within-entitled cause;
 6 that said deposition was taken at the time and place
 7 herein named; that the deposition is a true record
 8 of the witness' testimony as reported by me, a duly
 9 certified shorthand reporter and a disinterested
 10 person, and was thereafter transcribed into
 11 typewriting by computer.
 12 I further certify that I am not interested
 13 in the outcome of the said action, nor connected
 14 with, nor related to any of the parties in said
 15 action, nor to their respective counsel.
 16 IN WITNESS WHEREOF, I have hereunto set my
 17 hand February 8, 2010.
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LUCY CARRILLO-GRUBBS, RPR
 CSR No. 6766
 STATE OF CALIFORNIA

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ERRATA

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PAGE LINE

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WITNESS' SIGNATURE DATE

E R R A T A

I wish to make the following changes,
for the following reasons:

PAGE LINE

137 13 CHANGE: Change "fees" to "free listeners"

REASON: Typographic error

149 20 CHANGE: Change "use" to "using"

REASON: Typographic error

152 2 CHANGE: Change "block" to "broadcasting"

REASON: Typographic error

190 21 CHANGE: Change "advocate" to "aggregate"

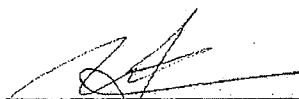
REASON: Typographic error

222 13 CHANGE: Change "hillage" to "usage"

REASON: Typographic error

____ CHANGE: _____

REASON: _____



N. Mark Lam
WITNESS' SIGNATURE

3/9/10

DATE

HOVANESIAN & HOVANESIAN
A Professional Corporation

301 EAST COLORADO BOULEVARD, Suite 514
PASADENA, CALIFORNIA 91101-1919
(626) 737-7288
(626) 737-0318 Fax

March 9, 2010

VIA USPS & EMAIL

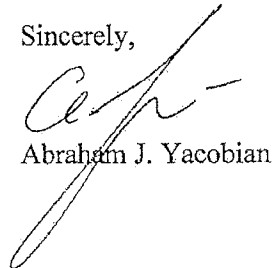
William Alvarez
David Feldman Worldwide, Inc. Production
450 7th Avenue, Suite 2803
New York, NY 10123

Re: N. Mark Lam's Errata

Mr. Alvarez:

Please find attached N. Mark Lam's Errata with respect to his January 28, 2010 deposition. Absent any objections, we ask that Mr. Lam's official deposition be changed to reflect the proposed changes. Thank you for your assistance in this matter.

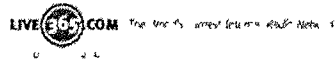
Sincerely,



Abraham J. Yacobian

cc: Jared Freedman, Jenner & Block LLP (via email only)
Chad Breckinridge, Wiltshire & Grannis LLP (via email only)

Attachment



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★ Home

- Solutions
- Technology
- Royalties
- Syndication
- Pricing
- Company

Username Password

Live365's Professional Broadcasting Services

And You Are...?

- Company or business
- (AM/FM) radio station
- Sports team
- Internet only broadcaster
- Faith Based
- Musical artist or label
- Educational institution

PRO FAQ

Ready to Get Started?



Live365's Professional Broadcasting Services (PRO) enables you or your company to broadcast audio easily and affordably via the Internet. Live365's PRO services are scalable, which makes them perfect for the large and small broadcaster alike. Use our award winning services to broadcast your audio content Live, Archived, On Demand, or just relay your existing Internet broadcast via our network.

Live365 clients use our PRO services to broadcast all kinds of audio, including music, lectures, sermons, news, training, educational information, sports, speeches, meetings, events or good old fashioned self promotion.

Live365 offers full royalty/licensing coverage for SoundExchange, ASCAP, BMI and SESAC. In addition, Live365's PRO broadcasting services will allow you to broadcast without any Live365 advertising in or on your broadcast.

You won't need to buy extra bandwidth, pay expensive server-licensing fees, or outsource your audio broadcast to expensive vendors.

Visit the [PRO Frequently Asked Questions](#) for more info.

Live365's PRO services are perfect if you are a

- Company or business
- (FM/AM) radio station
- Sports team
- Internet only broadcaster
- Faith based broadcaster
- Musical artist or label
- Educational institution

Reach Your Listeners

"We tried out more than a half dozen companies to handle our live streaming audio before we found Live365 - and, they haven't given us a reason to switch in the four years we've been a customer. Their impressive reliability and customer support -- not to mention great pricing -- has allowed us to think creatively about adding more audio side channels to super serve our listeners. I highly recommend them to other broadcasters without any reservations."

Patricia Monteith, General Manager (WUMB Folk Radio Network)

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SX Trial Ex. 14



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PRO Broadcast / FAQ

1. Why should I broadcast with Live365? Live365 has many advantages. Our site attracts 4 million plus listeners every month, and being listed in our directory provides exposure in and of itself. Also, our expanding distribution network includes TiVo, Philips Streamium, D-Link, Windows Media Player, Windows Media Center, iTunes, and others. On the technical side, our service is flexible in its delivery. It is an end to end solution with broadcasting software, bandwidth, tracking, reporting, licensing, customization, and support. Basically, Live365 is a one stop shop.

2. How much computer knowledge do I need to be a professional broadcaster? Broadcasters should have working knowledge of Windows or OSX. Additionally, it is helpful to have a basic understanding of MP3 files.

3. What kind of hardware do I need to broadcast?

Minimum requirements

PC: 300MHZ or faster processor and a sound-card that supports your desired broadcast source (i.e. Microphone, Line-In, etc).

MAC: G3 or faster processor and a sound-card that supports your desired broadcast source (i.e. Microphone, Line-In, etc).

4. What is "up to 64k," "up to 96k," "up to 128k" and how does it affect my broadcast? These are all bitrates available to broadcast in. The higher the bitrate the better the quality of the audio. We call 64k "FM Quality," with 128k being "CD Quality" and 96k falling between the two. To reach dial-up listeners, you would select an "up to 64k" package and stream at 32k or lower.

5. What is TLH and SL? TLH is Total Listening Hours This is the number of collective hours that people listen to your station. If one person tunes into your station for one hour, that's 1 TLH. If two people tune into your station for one hour each, that's 2 TLH, and so on. Keep in mind, these are listening hours, not broadcast hours. TLH is calculated to the nearest minute. SL is simply the number of simultaneous listeners tuned into your station.

6. Can I broadcast live? Yes, provided that you have a high speed internet connection (DSL, Cable, etc). We recommend that the upload speed be double your broadcast bitrate.

7. Why do I need storage space? Storage space is used for uploading MP3s for basic mode (playlist based) broadcasting.

8. Does Live365 run ads on my station? As a professional broadcaster Live365 will not run any advertising in your broadcast. If a listener launches your broadcast from the Live365 directory they will still receive any pre-roll or graphic ads. No audio ads are inserted into a professional broadcast.


9. How is this different than satellite radio? Live365 is available anywhere there is an internet connection. Satellite radio is available only with subscription, proprietary hardware, and where a signal to the satellite can be established,.

10. How can I generate revenue from my broadcast? Most broadcasters use the advertising/sponsorship model to drive revenue. We provide the back end for your business, how you generate revenue is entirely up to you. Live365 does not require any percentage of your ad revenue.

Here are some ideas:

- Re-sell your broadcast hours to other content providers. Provide an e-commerce link to your website/store from the player interface. Create a subscription model associated with your broadcast.
- Live365 does have a couple built in revenue generating opportunities

Sponsor



Save on 3G phones that bring her music, video, email and more.

[Learn More](#)

Listen Better



Optimized for Live365 stations, listen with Player365 More Info

Ad-Free Listening!



Immediate access to this station, commercial-free listening, VIP access to "full" stations, CD-quality sound on select stations Become a VIP Member now!

available, including:

- o VIP Listenership: for every VIP that tunes into your station, you receive a small portion of the profit of their membership based on how much they listen to your station. It's not much, but it adds up if you attract a large VIP audience.
- o Bounties: Live365 has banner ads available for your website. For every person that clicks the ad, and then signs up for a VIP account, you get a \$1.50 one time award.

11. What ad rates or sponsorship rates should I charge? You are free to charge whatever your market will bear.

12. How do I insert ads into my broadcast and on to my player window? You can insert audio ads just as any MP3. As for the player window, if you have the HTML or Flash knowledge you can build your own that features any advertising you want.

13. How do I acquire listeners? First, Live 365 lists your station in our directory, which gives our over 4 million unique listeners access to your station. You can also be included in our distribution network which can place you on devices such as TiVo, D-Link, Windows Media Player 10, Windows Media Center, iTunes, Squeezebox, Palm, Terra.com, Planetatv.com, Philips Streamium, etc. For additional tips, you can visit your broadcast home page here: <http://www.live365.com/broadcast/promote.live> (must be logged in to access)

14. Does Live365 censor its stations? Live365 does not generally censor its stations. There is no FCC governance over internet radio. You can broadcast explicit content, but it is recommended you label your station as such. For complete details on broadcasting rules, you can read our Terms of Use [<http://www.live365.com/info/terms.html>].

15. What is the DMCA and what legal guidelines does it lay down for internet broadcasts? The Digital Millennium Copyright Act ("DMCA") was passed by Congress and details the rules regarding Internet broadcasts that are eligible for compulsory licenses.

There is an excellent section on the wiki devoted to this:
<http://wiki.live365.com/pmwiki.php?n=Broadcasting.DMCA>

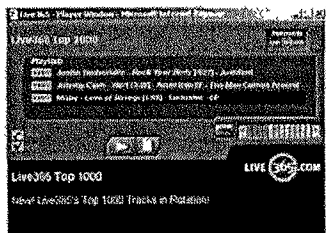
16. Can exceptions to the DMCA be made? Yes. If you own the rights to all material contained in your broadcast, or have permission from the copyright holder (s), it may be possible to exempt you from the Live365 DMCA filter.

17. Do I have to use the Live365 Player Window? No. Our service is available for launching in iTunes, WinAmp, Real Player, Windows Media Player, and just about any MP3 player. Also, you can integrate our service directly into your website via your own custom player.

18. Can I launch the station directly from my website? YES! As a Pro Broadcaster, you do have this ability. See below for examples.

19. Can I customize my player window? Yes, certainly. There are a number of options. The first is our standard player window, which is available in a number of colors and can display your logo and custom text information. We do provide templates for custom HTML, Flash, and desktop players. But their implementation is entirely up to your web designer.

Pop-Up Player launch:



<http://www.live365.com/help/launch-pro.html>

Embedded Website Player:



<http://www.live365.com/pro/embeddedplayer.html>

Flash Player:



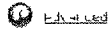
<http://www.live365.com/pro/flashplayer.html>

- 20. Can I use Flash as part of my player interface?** Yes. You may use our flash template or design your own to link to your broadcast. [See above]
- 21. Can I launch my station from other websites as a pop up window?** Yes. As a pro broadcaster you have this option. Keep in mind that if the content is copyrighted, any website launching the audio will need to have their own proper licensing in place.
- 22. What other digital devices pick up my station?** There are a wide variety of consumer level devices that connect to Live365 stations. These devices include stand alone internet radio boxes, home based media centers, and mobile devices. PocketTunes allows for the Palm Treo to connect, D-Link Products, Philips Streamium, Roku Soundbridge, Tivo, and other wireless enabled devices can connect at home. More are being added all the time!
- 23. Do I have to be listed in the Live365 directory?** No, your station can be delisted upon request.
- 24. Do I need to store my audio on your servers?** No. If you wish to host your own audio content you can use our Live mode broadcasting to deliver the audio to your Live365 server. Only in Basic Mode do you need to store audio on our servers.
- 25. Can I do a live call in show with Live365 software?** Yes, although Live365 does not provide all the software needed for calling in. However, programs such as SKYPE [<http://www.skype.com>] can allow you to use your computer as a phone that people will be able to call into. This software combined with Live365 allows you to run a talk show with the ability to call in. There are also professional hardware solutions that allow you to digitize your phone line and run the audio into your broadcast computer or mixer. Check out <http://www.bswusa.com> for more information.
- 26. How do I create a Podcast on Demand audio station?** For broadcasters who own the rights to all the content they plan on broadcasting, Live365 offers on demand services, where in listeners can go to your station page or website and select audio segments managed by you to listen to. This is a great option for podcasters who want immediate streaming of their content in addition to a more traditional podcast.
- 27. Can I move to a different Pro package after I sign up?** Yes, upgrades are available at any time. Should you desire more TLH for an expanding fan base or more storage space for a bigger playlist, we can accommodate either or both. Contact your sales rep or customer support for details.
- 28. Do you have discounts for purchasing more than 1 broadcast package at a time?** Yes, please contact us! <http://www.live365.com/pro/contact.html>
- 29. Can licensing cover more than 1 broadcast?** Yes. Our ASCAP/BMI/SESAC, which accounts for \$48/month of the Royalty Included rates, licenses a URL. All stations launched off of the same URL can be covered under one license.
- 30. What's the difference between Basic and Live mode?** In Basic mode you upload MP3s to our server, create playlists, and schedule them to be aired. This does not require a constant connection to our servers. Live mode is where, through a

constant connection to our servers, you stream audio in real time, and as such have real time control over the how

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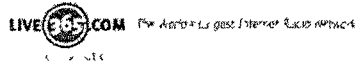


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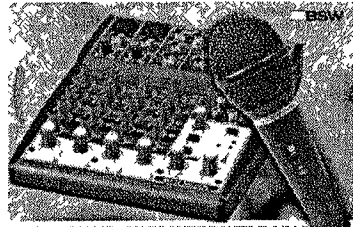


Username Password

Professional Broadcasting Pricing

And You Are...?

- Company or business
- (AM/FM) radio station
- Sports team
- Internet-only broadcaster
- Faith Based
- Musical artist or label
- Educational institution



START YOUR OWN INTERNET RADIO BROADCAST WITH Live365 AND GET A PROFESSIONAL MIXER AND MIC FREE!

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ALL RIGHTS RESERVED. TERMS & CONDITIONS APPLY.

In respect of current legislation and laws enacted to protect copyrighted/licensed audio on the Internet, Live365 is proud to offer two pricing plans based on the type of audio you are considering broadcasting on your Internet radio station. Please be aware that this legislation and these laws are for **any** Internet audio broadcast whether you use Live365 or some other method. Live365 is committed to being at the forefront of these issues. We are proud to be the only company offering the options below.

If you are planning on playing any amount of copyrighted/licensed material that you do not own the rights to, or do not have expressed written consent from the copyright and/or license holder, we would like to offer these **Royalty Included Professional Broadcast** options that will ensure your Internet broadcast is covered for any United States royalty and licensing fees from SoundExchange, ASCAP, BMI and SESAC. If you are either planning on broadcasting non-copyrighted material (such as a talk show) or you will be licensing yourself directly with the royalty agencies mentioned above, Live365 is pleased to offer these Standard Professional Broadcasting Packages.

PRO FAQ

Ready to Get Started?

Outside the United States?
[Click Here](#)

If you have any questions as to which package you should select, please feel free to [Contact Us](#).

"Royalty Included" Listening Hours-Based Rates - (Explanation)


Package	Intro	Small	Medium	Large	Deluxe
Setup Fee	\$199	\$199	\$199	\$199	\$199
Monthly Listening Hours	500	1,000	2,500	5,000	15,000
Monthly Fee (Up to 64k) Royalty/Licensing Included**	\$107	\$147	\$217	\$297	\$507
Monthly Fee (Up to 96k) Royalty/Licensing Included**	\$136.50	\$196.50	\$301.50	\$421.50	\$736.50
Monthly Fee (Up to 128k) Royalty/Licensing Included**	\$166	\$246	\$386	\$546	\$966
Storage Space*	100 MB	200 MB	300 MB	400 MB	600 MB
"Additional Services"					
Cost Per Additional Hour *** (Up to 64k)	\$0.052	\$0.042	\$0.032	\$0.022	\$0.020
Cost Per Additional Hour *** (Up to 96k)	\$0.078	\$0.063	\$0.048	\$0.033	\$0.030
Cost Per Additional Hour *** (Up to 128k)	\$0.104	\$0.084	\$0.064	\$0.044	\$0.040
Additional Storage Space	\$5 per 100 MB	\$5 per 100 MB	\$5 per 100 MB	\$5 per 100 MB	\$5 per 100 MB
BSW PRO Hardware	X	X			
mp3PRO Broadcasting	✓	✓	✓	✓	✓
Advanced Station Statistics	✓	✓	✓	✓	✓
Station Listing on Live365.com	✓	✓	✓	✓	✓
Custom Player Window	✓	✓	✓	✓	✓
Subscription Service	X	X	Available Upon Request	Available Upon Request	Available Upon Request
Customer Support	Email Only	Email Only	Email & Phone	Email & Phone	Email & Phone


Setup Fee: \$199 for all packages.

* Disk space is only necessary for archived or on-demand broadcasting.

** SoundExchange, ASCAP, BMI and SESAC fees covered. Certain broadcaster limits apply to ASCAP, BMI and SESAC fees. Please ask Live365 representative for details.

*** Once your 'Monthly Listening Hours' have been reached you will automatically be charged for any additional hours based on the 'Cost Per Additional Hour' rates above.

 [Printable "Royalty Included" Rate Card \(pdf\)](#)

 [Printable PRQ Broadcast Agreement \(pdf\)](#)

"Standard" Listener-Based Rates - (Explanation)

Package	Intro	Small	Medium	Large	Deluxe
Simultaneous Listeners (SL)	25	50	100	300	500
Setup Fee	\$199	\$199	\$199	\$199 \$0	\$199 \$0
Monthly Fee (Up to 64k)	\$75	\$125	\$200	\$600	\$750
Monthly Fee (Up to 96k)	\$100	\$175	\$300	\$900	\$1,500
Monthly Fee (Up to 128k)	\$112.50	\$212.50	\$400	\$1,200	\$2,000
Storage Space*	100 MB	200 MB	300 MB	400 MB	600 MB

"Additional Services"


Additional 25 SL's (Up to 64k)	\$50	\$50	\$50	\$50	\$50
Additional 25 SL's (Up to 96k)	\$75	\$75	\$75	\$75	\$75
Additional 25 SL's (Up to 128k)	\$100	\$100	\$100	\$100	\$100
Additional Storage Space	\$5 per 100 MB	\$5 per 100 MB	\$5 per 100 MB	\$5 per 100 MB	\$5 per 100 MB
mp3PRO Broadcasting	✓	✓	✓	✓	✓
Advanced Station Statistics	✓	✓	✓	✓	✓
Station Listing on Live365.com	✓	✓	✓	✓	✓
Subscription Service	Available Upon Request	Available Upon Request	Available Upon Request	Available Upon Request	Available Upon Request
Customer Support	Email Only	Email Only	Email & Phone	Email & Phone	Email & Phone


Setup Fee: \$199 for all packages.

* Disk space is only necessary for archived or on-demand broadcasting.

** This Rate Card is only applicable for broadcasts either playing non-copyrighted/licensed material or for those broadcasters who either wholly own the copyright/license to the broadcasted audio or have expressed written consent that can be furnished to Live365.

Pre-payment Discounts: Pay for 12 months, get the 13th for free


 [Printable "Standard" Rate Card \(pdf\)](#)

 [Printable PRO Broadcast Agreement \(pdf\)](#)

Optional Features (additional cost, [contact us](#) for details):

- Custom Colors
- Additional Listeners
- Additional Disk Space
- Single or Short-Term Events

Interested in a custom package or discounts for multiple broadcasts? Write to us!

Ready to Get Started? 

[Home](#) - [Solutions](#) - [Technology](#) - [Royalties](#) - [Syndication](#) - [Pricing](#) - [Company](#)
[Contact Us](#) - [Support](#)

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LIVE365.COM Listen to Radio Broadcast Community Free Downloads Shop | Help | My Account

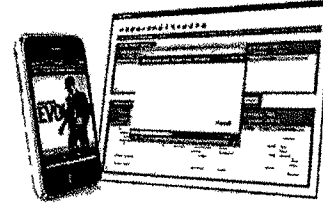
Personal Broadcasting PRO Broadcasting Free Software

Select a Personal Broadcasting Package

Upload your favorite music, broadcast your content - *It's Your Radio Station!*

Reach millions of Live365 listeners website iPhone TiVo Sony Blackberry Windows Mobile and more!
Hosting included or broadcast Live/Relay from your own system! Free [music library](#) tracks

- ✓ FREE 7-Day Trial on select packages (P Intro P1 P2 P3 P4)
- ✓ Unlimited VIP listening slots on all packages Up to 128k audio quality on all packages
- ✓ Live365 pays all royalties (SoundExchange BMI ASCAP and SESAC)
- ✓ Revenue Share! Earn bounties for each new VIP and share of VIP listening revenue



[How Broadcasting Works](#) | [How to Broadcast](#)

Which package is right for me?


<p>P Intro</p>  <p>\$5.95 month</p> <p>BUY</p>	<p>P1</p>  <p>\$9.95 month</p> <p>BUY</p>	<p>P2</p>  <p>\$19.95 month</p> <p>BUY</p>
<p>P3</p> <p>Most Popular</p>  <p>\$29.95 month</p> <p>BUY</p>	<p>P4</p>  <p>\$39.95 month</p> <p>BUY</p>	<p>P5</p>  <p>\$59.95 month</p> <p>BUY</p>
<p>P6</p>  <p>\$99.95 month</p> <p>BUY</p>	<p>Live365 Professional Broadcasting <small>BSW</small></p>  <p>DETAILS</p>	

*Basic Listeners when your playlist and tracks reside on Live365's servers Live Listeners when your station is being streamed from your own computer and served by Live365

SX Trial Ex. 15

Compare Broadcasting Packages

Upgrade any time!



Royalties Paid by Live365 (SoundExchange, BMI, ASCAP, SESAC) ?	✓	✓	✓	✓	✓	✓	✓
Revenue Share ?	✓	✓	✓	✓	✓	✓	✓
Disk Space (Playlist length based on 64k bitrate) ?	200 MB (7 hour playlist)	300 MB (10 hour playlist)	400 MB (14 hour playlist)	750 MB (28 hour playlist)	1,500 MB (52 hour playlist)	3,000 MB (104 hour playlist)	6,000 MB (208 hour playlist)
Max. Listening Hours per Month (Applies to non-VIP listeners only) ?	2,232 (unlimited VIPs)	7,440 (unlimited VIPs)	14,880 (unlimited VIPs)	29,760 (unlimited VIPs)	44,640 (unlimited VIPs)	59,520 (unlimited VIPs)	74,400 (unlimited VIPs)
Max. Simultaneous Listeners (SL) ?							
Basic Listeners: ?	3 SL	10 SL	20 SL	40 SL	60 SL	80 SL	100 SL
Live Listeners:	3 SL	5 SL	10 SL	20 SL	30 SL	40 SL	60 SL
VIP Listeners:	Unlimited SL	Unlimited SL	Unlimited SL	Unlimited SL	Unlimited SL	Unlimited SL	Unlimited SL
Audio Quality	Up to 128k	Up to 128k	Up to 128k	Up to 128k	Up to 128k	Up to 128k	Up to 128k
Price	1 yr. starting at \$595 <small>(month)</small> 7-day free trial	1 yr. starting at \$995 <small>(month)</small> 7-day free trial	1 yr. starting at \$1995 <small>(month)</small> 7-day free trial	1 yr. starting at \$2995 <small>(month)</small> 7-day free trial	1 yr. starting at \$3995 <small>(month)</small> 7-day free trial	1 yr. starting at \$5995 <small>(month)</small> 7-day free trial	1 yr. starting at \$9995 <small>(month)</small> 7-day free trial Includes FREE VIP

*Disk space is only necessary for archived broadcasting, there are no playlist duration limits on live broadcasts

[How Broadcasting Works](#) | [How to Broadcast](#) | [Give Broadcasting! Send a Live365 Gift Certificate](#)

You can upgrade your package at any time by returning and selecting a different package. We do not offer refunds on prepaid services. See our [cancellation policy](#) for more info.

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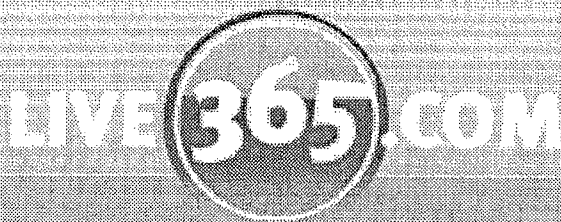
This exhibit is Restricted (under the Protective Order) in its entirety and is therefore omitted from this public version of the exhibits binder.

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Company Meeting

November 7, 2008



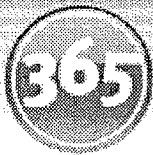
LIVE 012870



The Numbers

**standard month to month review
7 year overview**

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WHAT'S GOING ON?

- **PRODUCT DEVELOPMENT**

Weekly Monday morning status review

Project Tracking Worksheet

PPC Committee: Proposals, Review, Approval & Prioritization

- **MARKETING ACTIVITY**

Team Driven Projects

Project Tracking Worksheet

MBD Committee: Proposals, Review, Approval & Prioritization

Happy Birthday!!

Happy Birthday!

Lawrence A

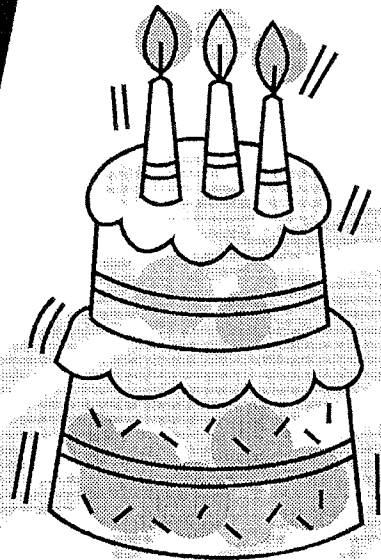
Kevin

Hubert

Svetlana

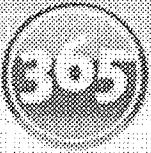
Tony

John G



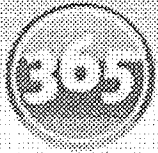
LIVE 365.COM

LIVE 012877



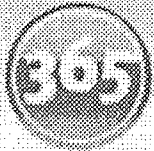
Company Meeting

December 11, 2009



The Numbers

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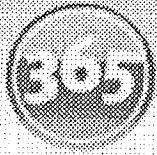
Legal Update

- **Constitutional Law Challenge**

Redacted

- **CRB – Discovery Upcoming**

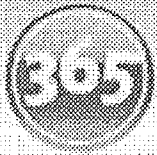
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Legal Update

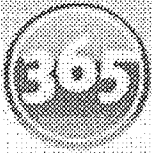
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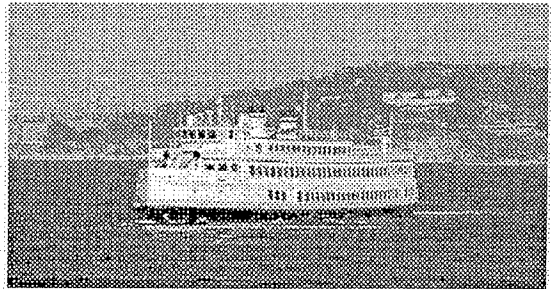
Investors Representative's visit

- Investors' representative, Mr. Ho, will be here the week of November 30
- Meetings will be scheduled for various managers

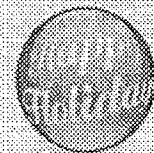


Live365 Christmas Party

12/12/2009 Saturday 3-6PM
Hornblower Cruises, Pier 3
(next to the Ferry Building)

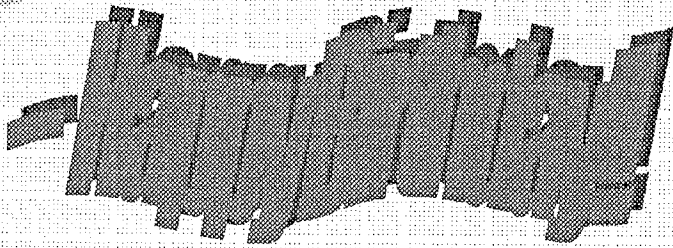


- Hors d'oeuvres, Desserts, Wine and Drinks will be served at the party
- \$10 parking fee at the Hornblower Cruises parking lot
- Please attend the party if you've already RSVP

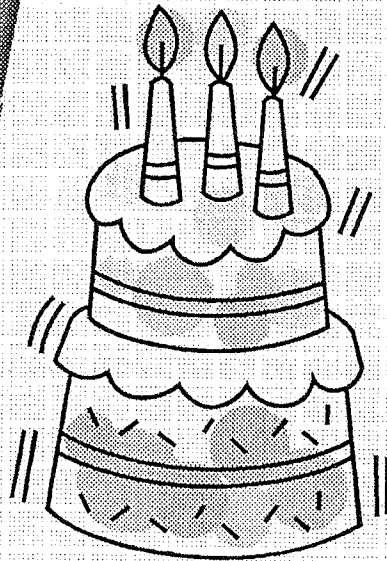


365

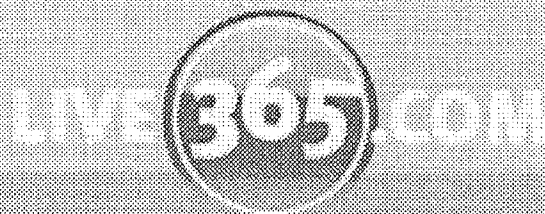
Happy Birthday!!



**Melody
Walter
Adam**



Thank You



Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

WRITTEN REBUTTAL TESTIMONY OF

JANUSZ ORDOVER

**Professor of Economics
and former Director of the Masters in Economics Program at New York University**

Witness for SoundExchange, Inc.

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

WRITTEN REBUTTAL TESTIMONY OF

JANUSZ ORDOVER

Professor of Economics
and former Director of the Masters in Economics Program at New York University

June 2010

I. Introduction and Qualifications

1. My name is Janusz A. Ordover. I am Professor of Economics and former Director of the Masters in Economics Program at New York University, where I have taught since 1973.¹ During 1991-92, I served as Deputy Assistant Attorney General for Economics at the Antitrust Division of the United States Department of Justice. As the chief economist for the Antitrust Division, I was responsible for formulating and implementing the economic aspects of antitrust policy and enforcement of the United States, including co-drafting the 1992 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines. I also had ultimate responsibility for all of the economic analyses conducted by the Department of Justice in connection with its antitrust investigations and litigation.
2. My areas of specialization include industrial organization economics, particularly antitrust and regulatory economics. I served on the Board of Editors of *Antitrust Report* and as an advisor on antitrust, regulatory, and intellectual property issues to many organizations, including the American Bar Association, the World Bank, the Organization for Economic Cooperation and Development (OECD), the Inter-American Development Bank, and the governments of Poland, Hungary, Russia, the Czech Republic, Australia, and other countries. I have provided economic testimony in policy hearings conducted by the Federal Trade Commission and the United States Senate.
3. Finally, I have on numerous occasions served as a consulting or testifying expert in matters involving the music, and other content, industries. In this regard, I previously served as an expert economist for SoundExchange in its proceeding with

¹ A copy of my *curriculum vitae* and a list of recent testimony are attached as Appendix One.

the satellite radio operators,² and for Sony and BMG in connection with their recorded music joint venture. I also testified on behalf of Universal Music in support of the company's petition to adjust the royalty rate for mechanical rights in the European Union, and in connection with the FTC's investigation of the Three Tenors joint venture. I have conducted several analyses of issues relating to the distribution and pricing of content in the cable television industry, and have written and testified in many proceedings dealing with pricing of access to telecommunications networks. Finally, I served as an economic consultant to the Commission on New Technological Uses of Copyrighted Works (CONTU) with respect to the pricing of copyrighted materials.

II. Assignment and Overview of Testimony

A. Assignment

4. I have been asked by SoundExchange, through its counsel, to assess from an economic perspective the opinions and analyses put forward by Dr. Mark Fratrick, the economic expert for Live365. My review of Dr. Fratrick's testimony focused principally on two areas: (i) his proposed methodology for developing a schedule of royalty rates over the period 2011-2015 for the compulsory license covering digital audio transmission of sound recordings by statutory webcasters; and (ii) his conclusion that the rates negotiated between SoundExchange and the NAB do not fall within the range of rates consistent with the willing buyer/willing seller standard that guides the Copyright Royalty Judges' (the "Judges") determination in this matter.

B. Summary of Conclusions

5. Based on my review and consideration of Dr. Fratrick's testimony, I have reached the following key conclusions.

² In the Matter of Determination Of Rates And Terms For Preexisting Subscription Services And Satellite Digital Audio Radio Services, Docket No. 2006-1 CRB DSTRA ("SDARS Proceeding").

6. To begin with, the methodology Dr. Fratrik employs to develop his recommended rates is severely flawed in several respects.
 - a. First, Dr. Fratrik's framework is premised on his assertion that Live365 is a representative (or typical) webcaster.³ This assertion is implausible. The webcasting industry is highly diverse, especially with respect to the business models employed by webcasters. Given this diversity in business models, Dr. Fratrik's assumption that Live365 is somehow typical is unsupported and untenable, particularly because Live365's business model integrates webcasting and broadcasting services in a manner that is, to my knowledge, unusual if not unique. There is no reason to think that Live365's operating costs and subscription revenues, as well as the percentage breakdown in Live365's revenues between advertising and subscription, can serve as reasonable proxies for webcasters more generally.
 - b. Second, Dr. Fratrik's framework seeks to determine a rate for digital performance rights that is calibrated in such a way as to permit a webcaster to earn a minimum expected operating margin of 20%. I see no sound economic principle guiding the willing buyer/willing seller construct that is consistent with such an approach. Dr. Fratrik's selection of a minimum expected margin of 20% is based on margins earned by terrestrial radio broadcasters, who operate in a market with higher fixed capital and other costs and therefore do not provide a useful benchmark from which to determine a reasonable operating margin.
7. My second key conclusion is that the voluntarily negotiated licensing deals between SoundExchange and the National Association of Broadcasters (and Sirius-

³ See, e.g., Hearing Transcript – Volume VI, April 27, 2010, at p. 1105; Corrected & Amended Testimony of Mark R. Fratrik, Ph.D., February 15, 2010 (“Fratrik Corrected & Amended Testimony”), at p. 16.

XM)⁴ should inform the Judges' determination of a rate schedule for other webcasters who are parties to the 2011-2015 Webcasting Proceeding.⁵ Dr. Fratrik asserts that the Judges should not consider, without substantial adjustment, the voluntary agreement between SoundExchange and the NAB governing the rates and terms for simulcasts of terrestrial radio signals (the "NAB Agreement").⁶ However, he fails to support his criticisms of the NAB Agreement with sound economic analysis. Indeed, his criticisms are inconsistent with standard economic theory. As I demonstrate later in this report, the rates from the NAB agreement are highly probative of rates consistent with the statutory standard.

- a. Dr. Fratrik asserts that the NAB Agreement provides little useful information because the broadcasters who are the beneficiaries of that Agreement have a lower cost structure than commercial webcasters such as Live365. Even if that is true – an issue on which I do not opine – it does not matter because SoundExchange cannot directly control the magnitude of listener consumption at each of the services, *i.e.*, SoundExchange cannot take measures to limit listening at services that pay a low rate. Consequently, SoundExchange would be unlikely to agree to rates below those in the NAB Agreement. In other words, while SoundExchange can agree to different rates across webcasters, it cannot control the consumption of music on the various webcasting services. Thus, a relatively low rate offered to one webcaster, insofar as that rate makes the webcaster a more effective competitor in the marketplace, can shift demand away from webcasters who are paying higher rates, quite likely leading to a reduction in total royalty payments collected by SoundExchange from statutory webcasters.

⁴ See, *e.g.*, Broadcaster Webcasting Settlement Agreement, February 15, 2009 (SXW3_00000978 – 00001001) ("NAB Agreement"); Commercial Webcasting Settlement Agreement between SoundExchange, Inc. and Sirius XM Radio, July 30, 2009 (SXW3_00001908 – 00001916) ("Sirius-XM Agreement").

⁵ In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2009-1 CRB Webcasting III ("Webcasting III").

⁶ Fratrik Corrected & Amended Testimony at pp. 40-44.

b. Dr. Fratrik also suggests that the parties' desire to avoid the costs of litigation, and the fact that the buyers obtained a limited performance complement waiver from each of the four major record companies, may have had an impact on the ultimately negotiated rate. In my opinion it is not likely that such considerations lowered the negotiated rates. This is so because the parties likely both wished to avoid the costs of litigation, and the performance complement waivers provided benefits to both the buyers and the record companies.





d. In addition, the statutory standard, as interpreted by the Judges, raises a second theoretical issue because the NAB Agreement involved on the seller side the record companies negotiating under the auspices of SoundExchange. The statutory standard, on the other hand, contemplates on the seller side the individual record companies each separately licensing its own catalog of sound recordings.⁹ In the circumstances of this case, however, where the NAB companies needed to acquire rights from all four major record companies, economic theory indicates that SoundExchange might well have offered a lower royalty than the aggregate rate that NAB could have obtained had it negotiated separately with each of the four major record companies.

8. In the remainder of this report, I discuss more fully the general conclusions summarized above.

III. Dr. Fratrik's Methodology

A. Overview

9. Dr. Fratrik's proposed methodology for determining compulsory license rates rests on the premise that a webcaster is entitled to earn a "fair operating margin" and that the royalty rate for music should be set in such a way as to ensure (presumably in the expected value sense) that the webcaster earns such a rate.¹⁰ In order to calculate such a rate, he analyzes the revenue and cost data for Live365, which he treats as a reasonable proxy for the financial performance of webcasters more generally.¹¹ That is, he concludes that the rates derived on the

⁹ Final Rule and Order, In the Matter of Digital Performance Right In Sound Recordings And Ephemeral Recordings, Docket No. 2005-1 CRB DTRA, 72 Fed. Reg. 24084, 24091 (May 1, 2007).

¹⁰ Fratrik Corrected & Amended Testimony at p. 5.

¹¹ Id. at pp. 4-5; Fratrik Deposition at pp. 65-66, 165.

basis of Live365's revenue and cost data can be used to calculate the rates for other webcasters.

10. Dr. Fratrik presents three different versions of calculations to derive a recommended royalty. In the first, he uses all components of Live365's revenues and costs allegedly related to its webcasting operations, except the royalty payments due to SoundExchange pursuant to the compulsory license that is the subject of this proceeding. He also includes as an element of cost a guaranteed operating margin (operating income/revenues) of 20% net of all costs, including digital performance royalty payments. This enables him to calculate the royalty rate and resulting royalty payments at which Live365, based upon its fiscal year 2008 webcasting operations,¹² would have achieved a net operating margin of 20%.¹³ Dr. Fratrik's second and third versions use estimates of total Internet radio advertising revenues rather than company-specific data for Live365; in each version he uses Live365 subscription revenue and operating cost data.¹⁴
11. Dr. Fratrik's methodology, and hence the recommended royalty rate derived from it, is deeply flawed as a matter of economics. The specific critiques that I offer below are not an exhaustive list of the problems in Dr. Fratrik's analysis, but merely represent some of the more glaring and critical flaws.

B. Conceptual Flaws in Dr. Fratrik's Methodology

12. The starting point for Dr. Fratrik's proposed framework is his assumption that Live365 is a typical webcaster in terms of its operating costs and subscriber revenues. Dr. Fratrik offers no analysis in support of this assertion.¹⁵ Rather, he

¹² Live365's fiscal year 2008 covers the period October 1, 2007 through September 30, 2008. (Fratrik Corrected & Amended Testimony at p. 18.)

¹³ Fratrik Corrected & Amended Testimony at p. 21 (Table 2).

¹⁴ Id. at p. 26 (Table 4) and p. 28 (Table 5).

¹⁵ *See, e.g.*, Hearing Transcript – Volume VI, April 27, 2010, at p. 1224 (Dr. Fratrik has not verified that Live365's costs are typical of other webcasters.).

bases his assumption on the fact that Live365 is a relatively mature webcaster, *i.e.*, it has operated as a webcaster for more than ten years, has reached a scale of operation sufficient to realize certain scale economies, and has recently executed various cost-cutting measures.¹⁶ Of course, Live365's longevity does not imply its "typicality" as a webcaster.

13. Even a cursory assessment of the webcasting industry makes clear that Dr. Fratrick's characterization of Live365 as a typical webcaster is not defensible. With respect to Live365 itself, Dr. Fratrick claims that the company operates a webcasting business that generates revenues from both advertising and subscriptions, and a so-called "broadcast-services" business that generates an additional revenue stream related to the provision of services that enable operators of individual Internet radio stations to promote and transmit their programming to listeners.¹⁷ Live365's provision of broadcast services is relatively unique among statutory webcasters. Moreover, unlike almost all other statutory webcasters, Live365 does not develop its own programming and thus does not incur the costs associated with such efforts. Instead of providing its own programming, Live365 operates as an aggregator of thousands of individual webcasters that independently program their own channels. Those webcasters that sign up with Live365 are listed on the company's directory of available channels.¹⁸
14. Dr. Fratrick ignores the broadcast-services portion of Live365's business by attempting to construct a financial profile limited to the company's webcasting operation. Such an exercise is necessarily arbitrary and unreasonable in my view

¹⁶ Fratrick Corrected & Amended Testimony at p. 16; Hearing Transcript – Volume VI, April 27, 2010, at p. 1105.

¹⁷ In analyzing Live365's business model, and specifically its division of its business into two components, I am relying on the definitions offered by Live365. I understand that Live365 classifies as "broadcast-services" the components of its business that individual webcasters purchase to allow them to webcast through Live365. (Deposition of N. Mark Lam, January 28, 2010 ("Lam Deposition"), at pp. 24-28; Hearing Transcript – Volume VI, April 27, 2010, at pp. 1204-09.)

¹⁸ Lam Deposition at pp. 34-38.

because it disregards the wholly integrated (*i.e.*, synergistic) nature of Live365's business. In particular, Live365's webcasting service helps it to promote its broadcasting services, and the royalty rate that Live365 would be willing to pay necessarily is influenced by the revenue it generates through its broadcasting services.¹⁹ As a result, even if one assumes (contrary to sound economics) that Live365's financial performance has some relevance for purposes of determining a reasonable rate (or range of rates) in this proceeding, an assessment of the company's financial performance should not arbitrarily attempt to carve out the webcasting segment of the overall business.

15. As the above description of Live365's business model shows, it is not a "typical" webcaster – assuming even that a typical webcaster exists – in any material sense because it combines webcasting with broadcast services that few if any other webcasters offer. More broadly, webcasters operate a number of different business models, which makes it improper to characterize Live365 as typical of the whole. I will quickly note several different types of webcasters to illustrate the point that Live365 reasonably cannot serve as a proxy for webcasters in general.
 - a. *Simulcasters*: A number of terrestrial radio broadcasters transmit their programming over the Internet. These services typically are available for free (ad-supported basis), *i.e.*, there is no subscription option available. Besides generating revenues directly through ad sales, an online simulcast benefits the broadcaster to the extent it helps the broadcaster to maintain or gain terrestrial audience.²⁰

¹⁹ Dr. Fratrik's allocation of the joint and common costs of operating Live365's business and the revenues it generates highlights the synergistic nature of the two components of the business that Dr. Fratrik arbitrarily attempts to segregate. Specifically, customers of Live365's broadcasting services, *i.e.*, independent webcasters who pay Live365 to transmit their channels, pay fees to Live365 intended to cover the royalties incurred through their webcasting channels and the accompanying bandwidth. Under this arrangement, Live365 is actually paid fees by its broadcasting-services customers that cover the most fundamental costs incurred by all webcasters. Yet in his calculations, Dr. Fratrik excludes all revenue related to broadcasting services, but at the same time allocates all of the costs associated with, among other things, bandwidth, to the webcasting service. (Hearing Transcript – Volume VI, April 27, 2010, at pp. 1190-92, 1210-18, 1275.)

²⁰ Insofar as Internet radio competes with terrestrial broadcasts, simulcasting provides a terrestrial broadcaster with an ability to internalize some listener substitution to Internet radio.

- b. *Portals*: Companies like AOL and Yahoo! provide webcasting services not just to generate advertising and subscription revenues but also to drive traffic to their other revenue-producing websites. Dr. Fratrick acknowledges that the value of music to portals might differ from the value of music to a webcaster like Live365.²¹
- c. *Custom radio*: These are webcasting services that provide consumers with a greater degree of control over their listening experience relative to webcasters in general. Dr. Fratrick acknowledges that custom radio services might have higher or lower cost structures relative to Live365. Similarly, he acknowledges that custom radio operators might have a greater or lesser ability to monetize their services.²²
- d. *Services that use statutory webcasting to stimulate sales of another product or service*: Certain firms offer statutory webcasting as a way to entice listeners to purchase another service. A prime example of this type of service is Rhapsody, which offers statutory webcasting as “Rhapsody Radio” in an effort to attract subscribers to its interactive on-demand audio streaming service. Indeed, Live365 uses webcasting to sell its broadcasting services, which appear to be highly profitable.²³
- e. *Traditional Internet-only webcasters*: These webcasters offer only fully pre-programmed, non-customized audio streaming. Some are dedicated to specific genres of music, while others offer a wide variety of programming across multiple genre-specific channels. These services are primarily ad-supported but often also offer monthly subscription-based services that provide higher audio quality and no advertisements.
- f. *Subscription Services*: Sirius-XM, the satellite radio service that is only available via subscription, offers webcasting of much of its programming to subscribers. This service operates in a similar manner to simulcasting, in that the webcasted content is also available through another delivery method. But unlike simulcasters, Sirius-XM is subscription-only, and there is no free to the consumer, ad-supported option.

16. The variety of uses of statutory webcasting highlights the serious problems in Dr. Fratrick’s assumption that Live365 is typical of this category of services. All of these types of webcasting services compete with each other for listeners and, in many

²¹ Hearing Transcript – Volume VI, April 27, 2010, at p. 1239.

²² *Id.* at p. 1238.

²³ *Id.* at p. 1184.

cases, for ad revenue as well.²⁴ These services are characterized by varying ratios of subscription and ad-supported listening. The substantial degree of heterogeneity across the existing webcasting business models makes any attempt to characterize Live365 as a typical webcaster fatally flawed.

17. The data that Dr. Fratrick ultimately relies upon to calculate his recommended rate further exposes the inherent problem of seeking typicality in the webcasting marketplace. Dr. Fratrick's recommended rate of \$0.0009 per performance²⁵ is derived from Live365's costs and subscription revenue data, and also from industry-wide advertising revenue data reported by ZenithOptimedia.²⁶ Notably, because Dr. Fratrick's calculations generate a significantly higher advertising revenue per aggregate tuning hour (ATH) using the ZenithOptimedia data as compared to Live365's own data, his recommended rate is above the rate at which Live365 would have earned a 20% operating margin for its webcasting service in its fiscal year 2008. In other words, Dr. Fratrick's methodology is premised on the notion that the rate for digital performance rights should be set at a level that allows a "typical" webcaster (such as Live365, using Dr. Fratrick's framework) to earn a 20% margin, but in the end, his recommended rate does not accomplish this objective because Live365 itself would not earn a 20% margin for its webcasting business under Dr. Fratrick's proposed rate. In fact, at Dr. Fratrick's proposed rate of \$0.0009, the operating margin for the fiscal year 2008 for Live365's webcasting business would have been negative.²⁷

²⁴ Id. at p. 1249.

²⁵ Dr. Fratrick recommends that a rate of \$0.0009 per performance be applied to all "commercial webcasters" in each of the five years during the statutory period (2011-2015). (Fratrick Amended & Corrected Testimony at p. 5.) Dr. Fratrick recommends a different, and lower, rate for "aggregation services," or Internet radio operators that combine at least one hundred small, independently operated webcasters into a single network. (Id. at p. 4.)

²⁶ Dr. Fratrick does not use Live365's advertising revenue data in the calculations used to generate his recommended rate. (Fratrick Corrected & Amended Testimony at p. 28 (Table 5).)

²⁷ Fratrick Corrected & Amended Testimony at p. 21 (Table 2).

18. I should also point out Dr. Fratrik's conclusion that a webcaster would be unwilling to license digital performance rights at a rate that results in an operating margin of less than 20%.²⁸ What this means is that under a literal application of Dr. Fratrik's methodology, Live365 should either exit the webcasting business or continue to webcast only if it is paid by the record labels to play their music.²⁹ This outcome highlights the fallacy of his treatment of Live365 as a typical webcaster, and more generally demonstrates the unsound nature of his proposed framework.
19. Moreover, the figure for advertising revenue per-ATH calculated by Dr. Fratrik from the ZenithOptimedia data is nearly double the analogous figure generated from Live365's financial data.³⁰ In any case, whether or not the advertising revenue per-ATH figure from the ZenithOptimedia is representative of a typical webcaster, Dr. Fratrik's methodology is fatally flawed. If the figure is representative of a typical webcaster, the fact that it is nearly two times the analogous value obtained from Live365's financial data precludes Dr. Fratrik from utilizing Live365 as a representative webcaster. If, on the other hand, the figure is not representative of a typical webcaster, then it should not serve as the basis for Dr. Fratrik's recommended rate.
20. In sum, one principal shortcoming of Dr. Fratrik's proposed framework is that it is premised on an assumption that Live365 is a typical webcaster. This assumption is inconsistent with marketplace realities. Even if Dr. Fratrik's assumption about the typicality of Live365 were correct, however, his approach has another serious flaw.
21. Dr. Fratrik's selection of a 20% floor is inconsistent with the relatively low barriers to entry into webcasting. He selects 20% as a "reasonable" operating profit margin

²⁸ Fratrik Deposition at p. 174; Hearing Transcript – Volume VI, April 27, 2010, at p. 1164.

²⁹ This is so because Live365's webcasting operations, according to Table 2 in Dr. Fratrik's Corrected & Amended Testimony, would have earned an operating margin of 20% only if it were paid \$0.0003 per performance.

³⁰ Fratrik Corrected & Amended Testimony at p. 29 (Table 6).

based upon his conclusion that companies in a “comparable” industry – terrestrial radio – earn operating margins, on average, slightly above 20%.³¹ However, as Dr. Fratrick acknowledged, the terrestrial radio industry has substantially higher barriers to entry and higher capital costs than webcasting.³² As Dr. Fratrick concedes, firms in an industry with low barriers to entry and low capital costs will earn lower operating margins, all else being the same, than firms in an industry with high barriers to entry and high capital costs.³³ This is the case because the long-run economic viability of a firm requires recoupment of all of its costs, including fixed costs. When there are high fixed costs and low variable costs, the firm must earn higher operating margins in order to recover its fixed expenditures. Alternatively, when the fixed costs associated with firm’s operations are relatively modest, *i.e.*, entry barriers are low, recoupment of fixed costs requires less contribution from the firm’s operating margins. In either case, competition is expected to drive margins down toward the point where the firm earns a normal, risk-adjusted rate of return on its invested capital.

22. Highlighting the arbitrariness of Dr. Fratrick’s selection of a 20% operating margin benchmark is that Live365, based upon its fiscal year 2008 financials, would be unable to earn such a margin while paying any positive royalty rate. Indeed, SoundExchange would be required to pay Live365 in order to generate Dr. Fratrick’s proposed benchmark margin. Of course, Dr. Fratrick does generate a positive recommended rate, but only because he adopts an estimate of industry advertising revenues that is substantially greater than Live365’s own data.

³¹ Fratrick Corrected & Amended Testimony at pp. 17, 21-22.

³² Hearing Transcript – Volume VI, April 27, 2010, at pp. 1168-72.

³³ Id. at pp. 1170-71.

IV. Dr. Fratrick's Critiques of the SoundExchange-NAB Rates Are Unfounded

23. Dr. Fratrick offers several arguments why the SoundExchange-NAB rates do not, without substantial downward adjustment, reflect an outcome that would obtain through unfettered market bargaining.³⁴ His arguments are flawed, as I will show presently.

A. The Higher Cost Structure of Commercial Webcasters

24. Dr. Fratrick's first contention is that the higher cost structure of commercial webcasters as compared to terrestrial broadcasters would make them unwilling to pay rates at the level of those contained in the NAB Agreement.³⁵ There is, however, no principle underlying the willing buyer/willing seller construct that acts to protect the economic viability of any particular webcaster. If a webcaster is unable to earn an at least normal risk-adjusted rate of return at appropriately determined market-based rates for digital performance rights, then economic efficiency mandates not a lower rate but rather a realignment of the webcaster's business model or its exit from the marketplace.³⁶

25. The fact that some webcasters might not be able or willing to pay the rates established in the NAB Agreement because of their cost structure does not necessarily mean that record companies or SoundExchange would offer them a

³⁴ Fratrick Corrected & Amended Testimony at pp. 40-41.

³⁵ *Id.* at pp. 41-42. For purposes of my discussion I accept as true Dr. Fratrick's assertion that commercial webcasters do indeed have higher cost structures. In doing so, I do not convey my agreement with this assertion.

³⁶ One might argue that the incremental cost of licensing digital performance rights to any given webcaster is zero, and thus that economic efficiency is enhanced by licensing the rights to a webcaster at any rate that covers this incremental cost. Such an argument is flawed for several reasons. First, relevant incremental cost in this instance is not necessarily zero because lower (or zero) rates provided to higher-cost webcaster can distort competitive forces in the downstream market (distribution of music to listeners), *i.e.*, shift listener demand away from lower-cost webcasters that are paying higher rates. Second, in the same vein, insofar as webcasting cannibalizes other sources of revenues for the record companies, *e.g.*, downloads, the marginal cost associated with licensing digital performance rights to webcasters is not zero. And third, if suppliers in all channels of distribution paid only the incremental cost of licensing digital performance rights to them, record companies and artists would not receive sufficient revenues to cover their upfront investments and in the long-run the supply of music would either dry up or be vastly curtailed.

lower rate.³⁷ As a matter of standard economics, a licensor likely will be unwilling to offer lower rates to a higher-cost licensee unless it has the ability to price discriminate *at the level of the ultimate consumer*. SoundExchange can, of course, price discriminate between various licensees; it can offer a lower rate to one licensee without concern that another licensee will be able to take advantage of that lower rate, *i.e.*, there is little possibility of arbitrage across licensees. However, the ability to price discriminate at the level of licensee is not the only relevant focus of the analysis.³⁸ This is because SoundExchange is concerned about the revenues it collects on behalf of its members, and if a lower rate has the effect of shifting listener demand towards the services paying the lower rate, the result may be that the revenues collected by SoundExchange will decrease.³⁹

26. There is reason to believe that lower rates for higher-cost webcasters would indeed shift some consumer demand to those services. Dr. Fratrick agrees that both terrestrial broadcasters (simulcasters) and commercial webcasters compete for listeners and advertisers.⁴⁰ Lower rates offered to certain webcasters may allow them to compete more successfully for listeners. With the benefit of a lower rate,

³⁷ In this discussion, I use the term “higher-cost webcaster” as shorthand for a webcaster with relatively low profitability (gross of digital performance license fees) and thus a lower willingness to pay for digital performance rights relative to a “lower-cost webcaster,” *i.e.*, one with relatively high profitability and thus a higher willingness to pay.

³⁸ For a technical discussion of this issue, see, Ordovery, J.A. and J.C. Panzar, “On the nonlinear pricing of inputs,” 23 *International Econ. Rev.* 659-76 (1982).

³⁹ Given the already large number of webcasters operating different business models and offering thousands of individual channels of music, as a general proposition it seems unlikely that offering lower rates to higher cost webcasters will substantially stimulate overall demand for music and thus overall revenues to SoundExchange. This is so for the simple reason that, given that many already existing choices, demand is likely to be stimulated only if lower rates allow a webcaster with a materially different product (service) offering to enter the market. Thus, one might hypothesize that SoundExchange could agree to a lower rate for a higher cost webcaster (or category of webcasters) only if that webcaster offered a service that for whatever reason is expected to fill an important consumer demand and stimulate (after accounting for demand diversion) net consumer demand for music beyond existing levels. Absent such meaningful product differentiation from the entrant, SoundExchange is unlikely to have any incentive to offer lower rates to higher-cost webcasters because the likely effect of such rates will be to divert demand from webcasters who pay higher rates.

⁴⁰ Hearing Transcript – Volume VI, April 27, 2010, at p. 1249.

these webcasters may be able to charge a lower subscription price than they otherwise would, enhance their service offering, or otherwise compete more effectively for listeners. Alternatively, with the benefit of a lower rate, such webcasters may simply remain in the market as a competitive alternative when they might otherwise withdraw from the market. By shifting demand away from webcasters who pay higher royalties relative to the higher-cost webcasters who receive a lower rate, the revenues collected by SoundExchange, and ultimately record companies and artists, can decline and thereby impair production of new music.⁴¹ This suggests that SoundExchange would be unwilling to agree to a rate structure for commercial webcasters below the structure in its agreement with the NAB.

B. Threat of Litigation

27. Dr. Fratrick's second argument is that a desire to avoid the costs of litigation led the NAB to agree to higher rates relative to those that would obtain in the absence of a regulatory default for setting rates.⁴² For reasons that I discuss below, both SoundExchange and the NAB likely have a high degree of confidence that the Judges will establish rates that are consistent with the willing buyer/willing seller construct. Accordingly, I would expect that neither party likely would be willing to incur litigation costs in the event of a disagreement insofar as the predicted outcome would be a schedule of rates to which both sides likely would have been willing to agree to in any event.
28. Dr. Fratrick further claims that the desire to avoid litigation costs is one-sided insofar as these costs are nonrecoverable by webcasters but can be funded by SoundExchange through the collection of royalties from webcasters.⁴³ Dr. Fratrick's

⁴¹ Such lower revenues would have the effect of weakening incentives to create and promote musical content in the first place.

⁴² Fratrick Corrected & Amended Testimony at p. 43.

⁴³ Id.

assertion is without merit. Webcasters collect revenues from their transmission of music to listeners and/or from the advertising revenues they earn as a function of the size of their listening audience. The fact that the source(s) of revenues for webcasters differ from the source of SoundExchange's revenues does not mean that webcasters lack the ability to fund the costs of litigation. For both sides, the payment of litigation costs is a first-order loss in income or profits.

29. Moreover, it is worth pointing out that the NAB, or any individual webcaster (or group of webcasters), need not settle in order to avoid litigation costs. The NAB simply could elect not to participate in the proceeding before the Judges. In such a case, it is my understanding that rates paid by the NAB would be established by the Judges. These rates similarly would apply to all statutory webcasters unless they are a party to a voluntary agreement with SoundExchange.⁴⁴ It does not follow that the NAB would agree to a higher-than-market rate in order to avoid litigation, when it was not compelled to litigate in any event.

C. Sound Recording Performance Complement Waiver

30. Dr. Fratrick highlights the fact that in addition to the NAB Agreement negotiated with SoundExchange, the NAB negotiated independently with each of the four major record labels to obtain a limited waiver of the sound recording performance complement rules.⁴⁵ According to Dr. Fratrick, because the waiver has unique value to NAB members, the NAB rates reflect a higher willingness to pay relative to commercial webcasters.⁴⁶

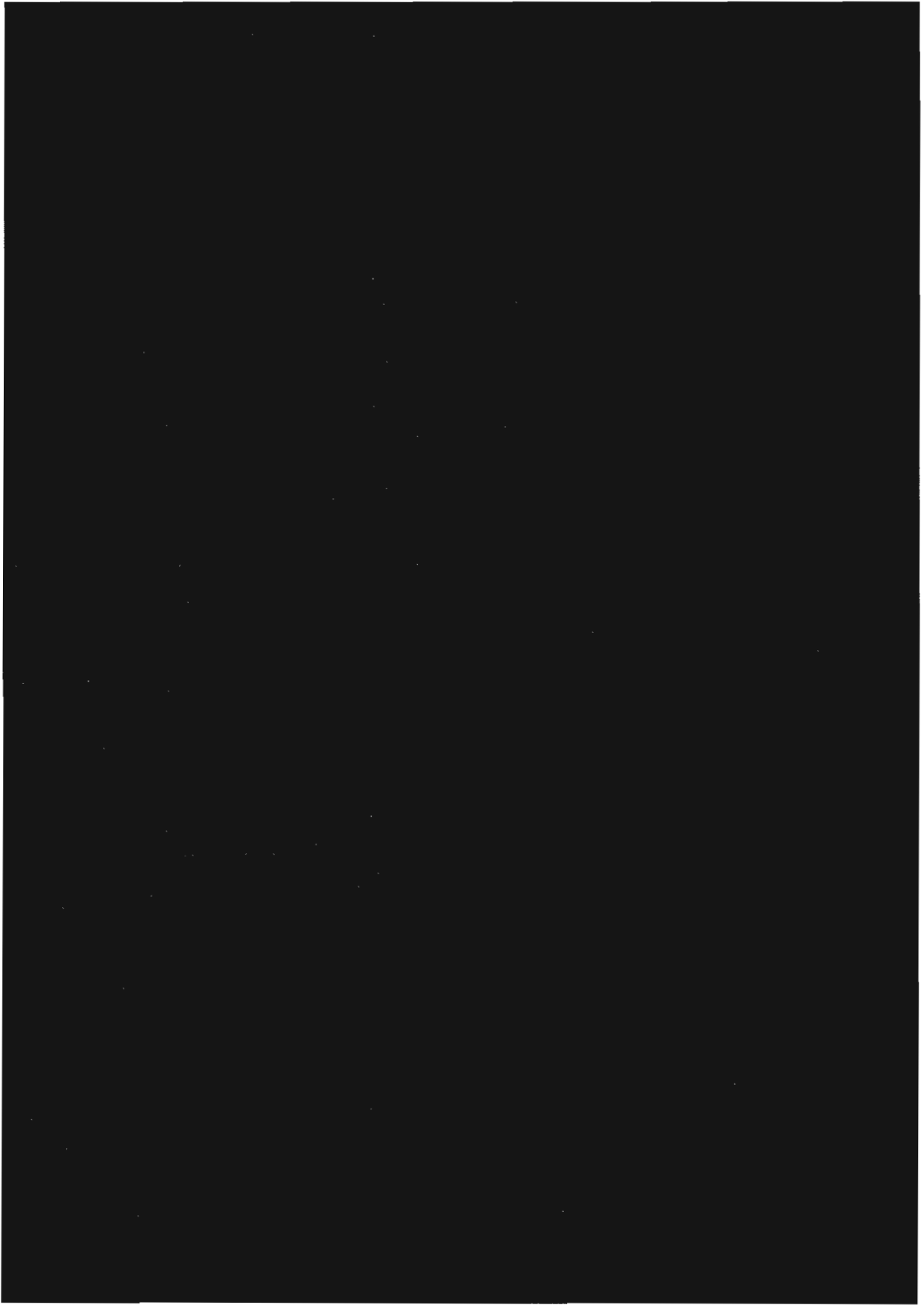
⁴⁴ In the *Webcasting II* decision, for example, the Judges set rates for commercial webcasters and non-commercial webcasters, and a webcaster was required to pay whichever rate applied based on the relevant definitions.

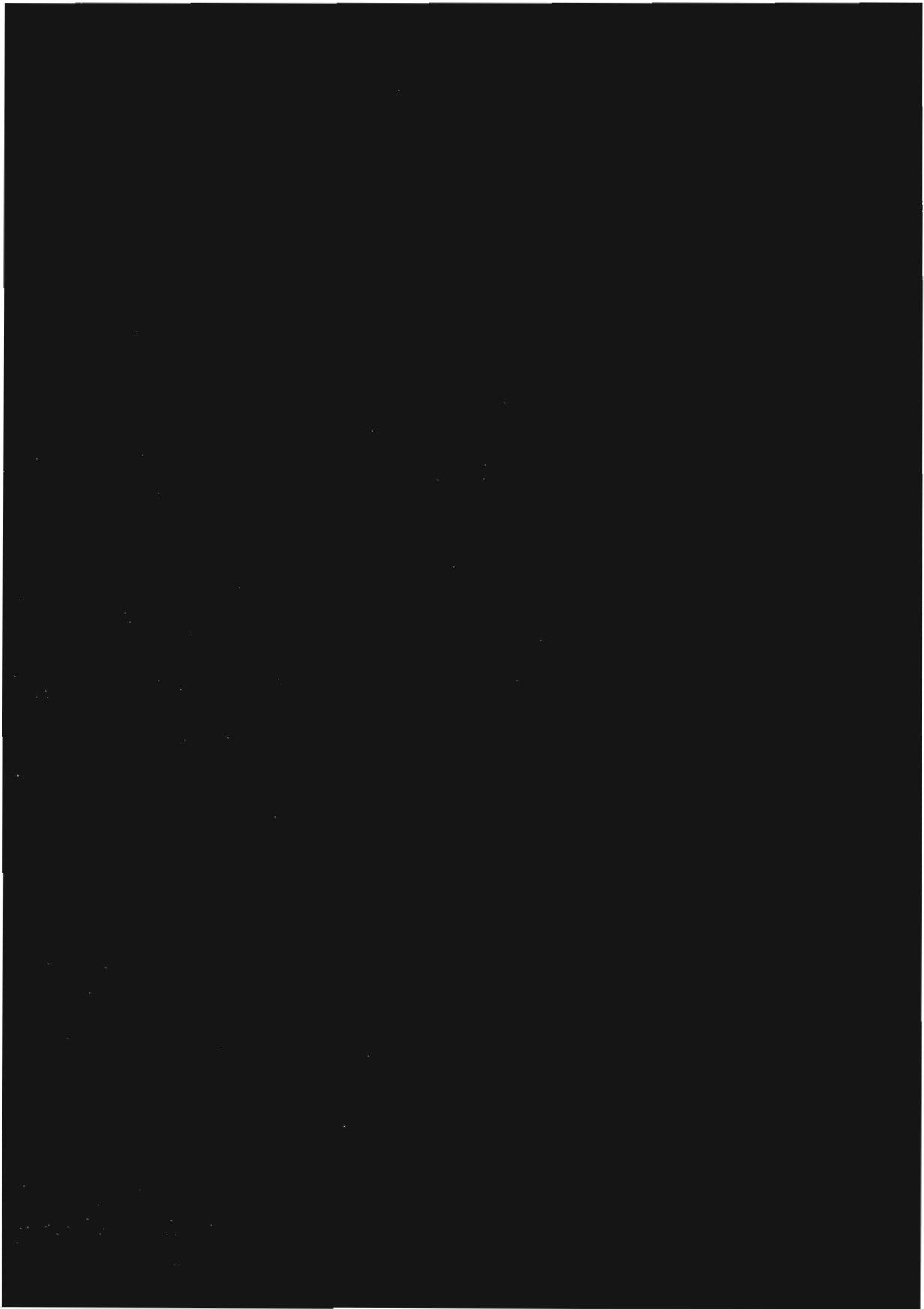
⁴⁵ The sound recording performance complement limits the number and frequency of recordings by a given artist or from a given album that may be played within a specified time period. (Testimony of W. Tucker McCrady, September 2009, at p. 5.)

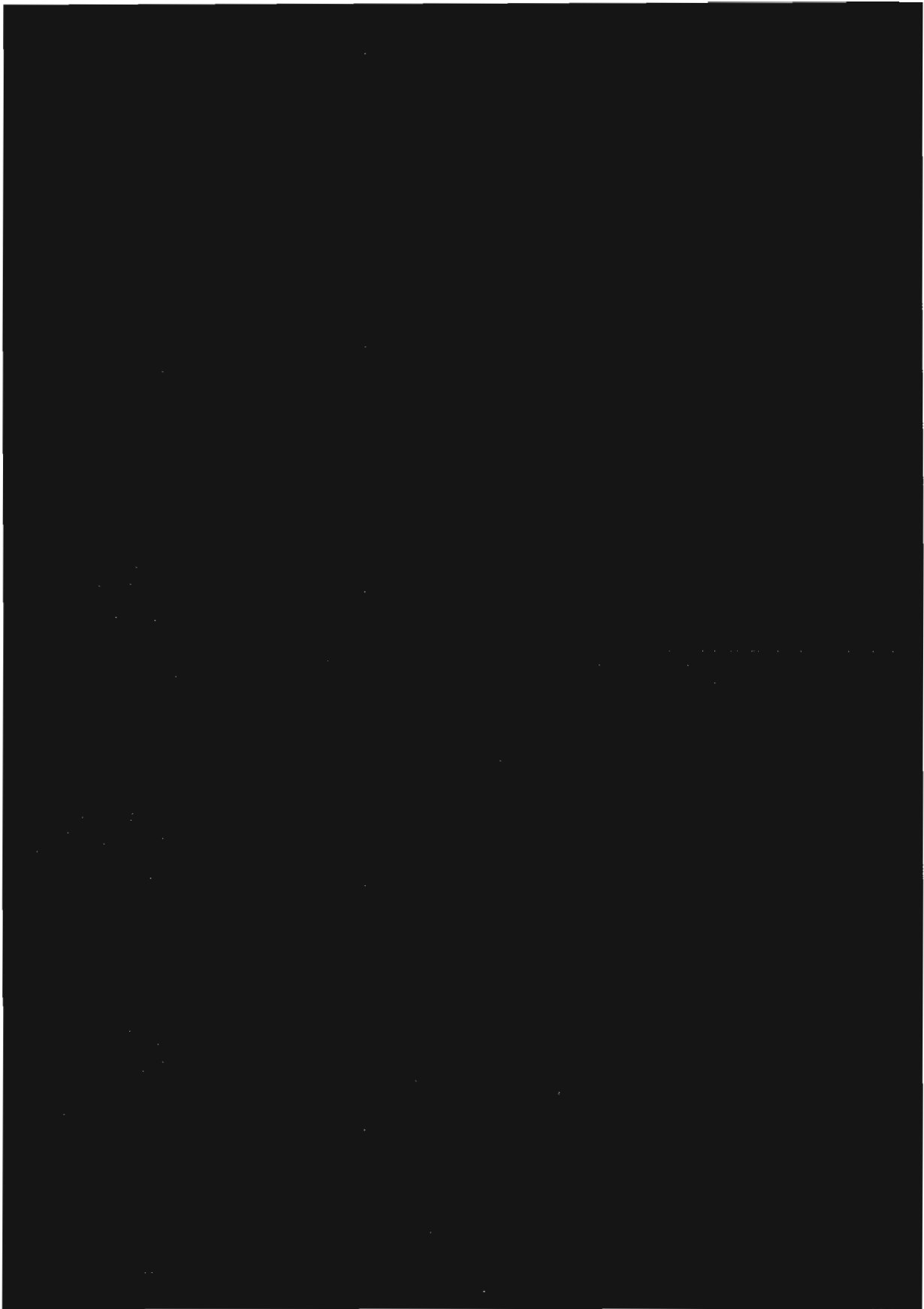
⁴⁶ Fratrick Corrected & Amended Testimony_at pp. 43-44.

31. Dr. Fratrick's argument is not compelling. First, the record labels did not negotiate similar waivers of the performance complement rules with Sirius-XM, and yet the Sirius-XM Agreement stipulates nearly identical rates *vis-à-vis* the NAB rates. This suggests that the market value of the waiver is quite small. Second, even assuming that the waiver provides significant value for NAB members, it also appears to be the case that the waiver provides value to the record labels. Following the execution of the NAB Agreement and the performance complement waivers, close to 100 terrestrial broadcasters, accounting for over 300 individual stations, that had not previously been paying SoundExchange webcasting royalties began doing so. The initiation of webcasting royalty payments to SoundExchange following execution of the NAB agreement suggests that these webcasting services were launched after the NAB agreement was finalized. Thus, there is no reason to believe that inclusion of the waiver had the effect of elevating the SoundExchange-NAB rates to any material degree (if at all) above the rates the parties would have agreed to without the waiver provision.











E. There Is No Basis to Conclude that the SoundExchange-NAB Rates Are Elevated as a Result of an Exercise of Market Power by SoundExchange

43. A further issue regarding the probative value of recently negotiated rates concerns the fact that these rates were negotiated collectively by the record companies under the auspices of SoundExchange, and thus may reflect, to some extent, the additional bargaining power held by SoundExchange relative to the bargaining power held by individual record companies. In other words, the concern might be that the negotiated rates include a premium attributable to the hypothesized incremental bargaining advantage in the hands of SoundExchange. While this concern may be valid under certain market conditions, it is also the case that economic theory actually predicts the opposite outcome under certain relevant market conditions, *i.e.*, there are plausible conditions under which the rate negotiated by SoundExchange would be lower than the average rate that would obtain if record companies negotiated individually.
44. In order to assess the consequences of SoundExchange's operation as the negotiating entity on the NAB-SoundExchange rates it is important to ask if it effectively operates as a cartel. By this I mean whether SoundExchange replaces the record labels in the sense that they can no longer negotiate individually. If the answer is yes, then concerns regarding SoundExchange's bargaining power (relative to an individual label) plausibly warrant examination. Alternatively, if SoundExchange properly is viewed as another licensor of digital performance rights, *i.e.*, in addition to the individual record labels, then concerns regarding SoundExchange's bargaining power likely are at least mitigated.
45. It is my understanding that SoundExchange, under the law, is permitted to negotiate the statutory webcasting rates only on a non-exclusive basis. That is, SoundExchange does not replace the record companies but rather operates as an

additional seller through which the record companies have the opportunity, but not the obligation, to bargain collectively. The testimony presented by Live365 offers no evidence that SoundExchange did, in fact, act as a cartel, and I am not otherwise aware of any evidence that SoundExchange effectively acts as a cartel.

46. Moreover, it should be pointed out that the NAB may also enjoy some degree of added bargaining power relative to that held by individual broadcasters precisely because it negotiates on behalf of a large group of buyers. According to data from SoundExchange, the broadcasters on whose behalf the NAB negotiated accounted for over 50% of the royalty revenues received by SoundExchange from webcasters in 2008, the last full year prior to the negotiation of the NAB Agreement. Such added market power on the buyer side tends to mitigate, if not fully offset, additional leverage that SoundExchange might bring to the negotiations.
47. Finally, if SoundExchange indeed functioned as a cartel, its ability to extract above-market rates in a negotiation with the NAB would be limited to some degree by the existence of the regulatory process. At some point, buyers such as the NAB members would simply elect to seek rates established by the Judges – which would be free of any potential cartel effects – rather than voluntarily agree to pay above-market rates.
48. Accordingly, I do not assume that SoundExchange functions as a cartel, or that if it did so, its market power would not be mitigated by corresponding market power resulting from the buyers acting through a single entity, or by the existence of a regulatory rate-setting mechanism. Nevertheless, in the analysis that follows, I will show that SoundExchange, acting as a single seller in an unregulated market, might well agree to lower royalty rates compared to the average of the rates that would emerge in a market in which individual record companies function as sellers.
49. The directional effect of the record companies negotiating as a single entity under the auspices of SoundExchange depends partially on the assumption one makes about whether a webcaster requires access to the repertoires of all four major

record companies in order to operate an economically viable business, or only to a subset. If one assumes that the catalogs of all four majors are needed,⁵² then economic theory predicts that a rate negotiated with SoundExchange can actually be *lower* than the average rate that would be reached through individual negotiations.⁵³

50. I have undertaken no independent assessment regarding the validity of this assumption with respect to all webcasters. If it were the case that the catalogs of all four majors were not needed to operate an economically viable service, then the effect of the four majors negotiating as a collective unit under the auspices of SoundExchange, as compared to individual negotiations, could go either way depending upon several factors, including the minimum number of major record company catalogs required and the incremental value to the distribution service from adding each additional catalog.
51. In this context, it is important to note that the webcasters on whose behalf NAB negotiated a deal with SoundExchange are predominantly simulcasters, *i.e.*, entities that offer terrestrial broadcasts of their programming and simultaneously transmit that same programming on the Internet. The core business of these entities is the terrestrial broadcast of programming, and for their terrestrial broadcasts these companies are not required to pay a sound recording royalty. In order to maximize listener volumes and hence advertising revenues, one would expect these entities to include in their terrestrial programming sound recordings from the catalogs of all four major record companies and at least some independent record companies. This is especially the case given that a

⁵² See, e.g., In the Matter of Digital Performance Right In Sound Recordings And Ephemeral Recordings, Docket No. 2005-1 CRB DTRA, Hearing Transcript - Volume 22, June 21, 2006, at pp 313-15 (Robert Roback testifying that “to offer the most competitive and compelling product you need the entire catalogue for your radio offering”).

⁵³ The average rate is best understood as the sum of the rates paid to all holders of the relevant copyrights, with each rate scaled (weighted) according to the fraction of total music played from each copyright holder.

performance rights license is not required for the terrestrial broadcast of sound recordings. Having programmed their terrestrial broadcasts to include sound recordings from all of the major record companies, however, the failure to obtain licenses from all of the majors in connection with their webcasting services would, by definition, eliminate the ability to simulcast. Because they cannot re-broadcast their terrestrial signal over the Internet without access to the catalogs of the four majors, economic theory would predict that the rates voluntarily negotiated between SoundExchange and the NAB are actually lower than the rates that would obtain through negotiations between a single NAB member and one of the four major labels, *i.e.*, through arms-length bargaining between a willing buyer and a willing seller.⁵⁴

52. Support for this outcome comes from the economic literature on royalty stacking, which refers to situations wherein a downstream firm requires licenses to multiple upstream patents in order to sell lawfully its product in the marketplace.⁵⁵ In such a setting, failure to strike a deal with every relevant patent-holder precludes the supplier from operating its business. Royalty stacking is an extreme version of the situation facing simulcasters, and perhaps webcasters more generally, insofar as they require licenses to the digital performance rights pertaining to the music content of all four major record companies in order to operate an economically viable service.
53. More specifically, under the condition that webcasters require licenses from all major record companies, a setting in which multiple record companies negotiate their licenses separately rather than cooperatively is expected to increase the

⁵⁴ The points made in this paragraph apply with equal force to Sirius-XM, whose webcasting operations consist of simulcasting the company's core satellite radio transmissions and thus require access to the catalogs of the four majors plus numerous independent labels.

⁵⁵ See, *e.g.*, Lemley, M.A. and C. Shapiro, "Patent Holdup and Royalty Stacking," 85 *Texas Law Review*, at p. 2010 (2007) for a non-technical exposition.

average royalty rate paid by downstream webcasters. The reason is that individual negotiations give rise to a well-known pricing issue commonly referred to by economists as *Cournot-complements*. As a result, the overall demand for music would tend to decline and also the overall revenues from music licensing. Thus, under some conditions, individualized licensing is a “loss-loss” proposition for all the stakeholders. Below and in Appendix Two, I explain this effect in more detail.

54. The revenue earned by each record company can be calculated as the royalty rate charged by the record company multiplied by the total quantity sold to consumers (in the instant case the number of performances). A higher royalty rate charged by a record company increases the marginal costs incurred by each webcaster. Because webcasters pass on to downstream consumers at least some portion of the increase in marginal costs in the form of higher prices, the result of a higher royalty rate charged by any record company is decreased demand for the webcaster’s service by downstream consumers, and hence for music. In turn, this decreased demand negatively affects the revenues earned by *all* record companies, not just the company charging a higher royalty rate.
55. Stated differently, when a record company charges a higher royalty rate it imposes an externality on all other record companies because each and every record company is impacted adversely by the resulting lower demand for the webcaster’s service. However, an individual record company only takes into account the adverse effect of lower demand on its own revenues, ignoring the effect that its decision imposes on the revenues of the other record companies. This failure to account for the full effect of reduced demand weakens the constraint faced by an individual firm when it contemplates an increase to its royalty rate.⁵⁶

⁵⁶ Importantly, this same dynamic can operate in situations involving webcasters that provide ad-supported (free) services to consumers. While higher royalty rates should not lead to higher subscription fees (because the services are designed to be free to listeners), the services could adopt other measures to account for increases in marginal cost due to hypothesized higher royalty payments. In particular, the services could respond to higher royalty rates

(footnote continued ...)

56. In contrast, under a scenario in which a single firm (SoundExchange) effectively controls all pertinent copyrights, the firm will set a royalty rate that fully accounts for the effect of that rate on the downstream supplier's output, *i.e.*, the firm will internalize the full effect that a higher royalty has on market demand. Such internalization tightens the constraint faced by the firm when it considers raising its royalty, which results in lower rates compared to individually-negotiated rates.
57. Appendix Two presents a numerical example that illustrates this idea. Moreover, the Appendix illustrates a well-known result that the more independent licensors there are, the lower is the royalty rate applied to the whole repertoire as a result of collective negotiations *vis-à-vis* the rates that would emerge through individual negotiations.
58. Thus, insofar as there are concerns about SoundExchange's market power and how the exercise of that market power might lead to higher negotiated rates, economic theory predicts that rates negotiated by SoundExchange can, in fact, be lower relative to the average of individually negotiated rates at least under a scenario that assumes each webcaster requires access to the catalogs of all four major record companies in order to remain economically viable.

V. Conclusion

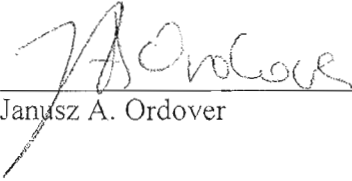
59. For the reasons detailed above, I conclude that there is no sound economic basis for the Judges to adopt the analysis and recommended rate presented by Dr. Fratrick and Live365. The assumptions at the core of his financial modeling are unsupported and indefensible. Furthermore, contrary to Dr. Fratrick, I believe that

(... footnote continued)

by placing caps on listening time, which would reduce the volume of royalty-bearing performances, and hence royalty payments. It is my understanding that Live365 has implemented caps on listening time for this very purpose. (Lam Deposition, at pp. 42-44.) An ad-supported service could also attempt to run more advertising in order to defray the increase in marginal costs arising from higher royalty rates. Insofar as a webcaster undertook any measure that degraded the overall quality of the service, demand for the service would be expected to decline.

economic theory supports the use of the negotiated rates in the NAB Agreement as probative evidence of rates that would occur under the willing buyer/willing seller statutory standard.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: June 7, 2010 
Janusz A. Ordover

Appendix One

May 2010

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EDUCATION

- 1968-1973 Columbia University, New York, New York
Graduate Department of Economics and European Institute of the School of International Affairs
Doctoral Dissertation: Three Essays on Economic Theory (May 1973). Ph.D 1973.
- 1967-1968 McGill University, Montreal, Canada
Departments of Economics and Political Science
- 1963-1966 Warsaw University, Warsaw, Poland
Department of Political Economy. B.A. (equiv.), 1966.

HONORS

- 1973 Columbia University: Highest distinction for the doctoral dissertation
- 1971-1972 Columbia University: Honorary President's Fellow
- 1969-1971 Columbia University: President's Fellow
- 1967-1968 McGill University: Honors Student
- 1964, 1965 Warsaw University: Award for Academic Achievement, Department of Political Economy
- Who's Who in the World
Who's Who in America
Who's Who in the East

PROFESSIONAL EXPERIENCE

- June 1982 - present Professor of Economics
Department of Economics, New York University, New York, New York
- Sept. 1996 - Aug. 2001 Director of Masters in Economics Program
Department of Economics, New York University, New York, New York

Summer 1996-2000 Lecturer
 International Program on Privatization and Reform
 Institute for International Development, Harvard University, Cambridge, Massachusetts

Aug. 1991 - Oct. 1992 Deputy Assistant Attorney General for Economics
 Antitrust Division
 United States Department of Justice, Washington, D.C.

Sept. 1989 - July 1990 Visiting Professor of Economics
 School of Management, Yale University, New Haven, Connecticut

 Lecturer in Law
 Yale Law School

Mar. 1984 - June 1988 Visiting Professor of Economics
 Universita Commerciale "Luigi Bocconi", Milan, Italy

June 1982 - Feb. 1985 Director of Graduate Studies
 Department of Economics, New York University

Sept. 1982 - June 1986 Adjunct Professor of Law (part-time)
 Columbia University Law School, New York, New York

Feb. 1982 - June 1982 Acting Director of Graduate Studies
 Department of Economics, New York University

June 1978 - June 1982 Associate Professor of Economics
 Department of Economics, New York University

Sept. 1979 - May 1990 Lecturer in Economics and Antitrust
 New York University Law School

Sept. 1977 - June 1978 Member, Technical Staff
 Bell Laboratories, Holmdel, New Jersey

 Associate Professor of Economics
 Columbia University

 Visiting Research Scholar
 Center for Law and Economics, University of Miami, Miami, Florida

Sept. 1973 - Aug. 1977 Assistant Professor of Economics
 New York University

Summer 1976 Fellow, Legal Institute for Economists,
 Center for Law and Economics, University of Miami

Summer 1976 Visiting Researcher Bell Laboratories, Holmdel, New Jersey

OTHER PROFESSIONAL ACTIVITIES

2006 - present Special Consultant, Compass Lexecon (formerly Compass)/FTI Company, Washington, D.C.

2003 - 2006 Director, Competition Policy Associates, Inc. (“Compass”), Washington, D.C.

1997 – 1999 Consultant, Inter-American Development Bank, Washington, D.C.

1997 – present Board of Editors, *Antitrust Report*

1995 – 2001 Consultant, The World Bank, Washington, D.C.

1998 – 2004 Senior Consultant
Applied Economic Solutions, Inc., San Francisco, California

1995 - 2000 Senior Affiliate
Cornerstone Research, Inc., Palo Alto, California

various Testimony at Hearings of the Federal Trade Commission

1994 - 1996 Senior Affiliate
Law and Economics Consulting Group, Emoryville, California

1994 - 2000 Senior Affiliate
Consultants in Industry Economics, LLC, Princeton, New Jersey

1993 - 1994 Director
Consultants in Industry Economics, Inc., Princeton, New Jersey

1992 - 1993 Vice-Chair (*pro tempore*)
Economics Committee, American Bar Association, Chicago, Illinois

1990 - 1991 Senior Consultant
1992 - 1995 Organization for Economic Cooperation and Development, Paris, France

1991 Member
Ad hoc Working Group on Bulgaria's Draft Antitrust Law
The Central and East European Law Initiative
American Bar Association

1990 - 1991 Advisor
Polish Ministry of Finance and Anti-Monopoly Office
Warsaw, Poland

1990 - 1991 Member
Special Committee on Antitrust
Section of Antitrust Law, American Bar Association

1990 - 1991 Director and Senior Advisor
Putnam, Hayes & Bartlett, Inc., Washington, D.C.

1990 - 1996 Member
Predatory Pricing Monograph Task Force
Section of Antitrust Law, American Bar Association

- 1989 Hearings on Competitive Issues in the Cable TV Industry
Subcommittee on Monopolies and Business Rights of the Senate Judiciary Committee
Washington, D.C.
- 1989 Member
EEC Merger Control Task Force, American Bar Association
- 1988 -
present Associate Member
American Bar Association
- 1987 - 1989 Adjunct Member
Antitrust and Trade Regulation Committee, The Association of the Bar of the City of New York
- 1984 Speaker, "Industrial and Intellectual Property: The Antitrust Interface"
National Institutes, American Bar Association, Philadelphia, Pennsylvania
- 1983 - 1990 Director
Consultants in Industry Economics, Inc
- 1982 Member
Organizing Committee
Tenth Annual Telecommunications Policy Research Conference, Annapolis, Maryland
- 1981 Member
Section 7 Clayton Act Committee, Project on Revising Merger Guidelines
American Bar Association
- 1980 Organizer
Invited Session on Law and Economics
American Economic Association Meetings, Denver, Colorado
- 1978 - 1979 Member
Department of Commerce Technical Advisory Board
Scientific and Technical Information Economics and Pricing Subgroup
- 1978 – present Referee for numerous scholarly journals, publishers, and the National Science Foundation

MEMBERSHIPS IN PROFESSIONAL SOCIETIES

American Economic Association
American Bar Association

PUBLICATIONS

A. Journal Articles

- "Coordinated Effects in Merger Analysis: An Introduction," *Columbia Bus. Law Review*, No. 2, 2007, 411-36.
- "Wholesale access in multi-firm markets: When is it profitable to supply a competitor?" with Greg Shaffer, *International Journal of Industrial Organization*, vol. 25 (5), October 2007, 1026-45.
- "Merchant Benefits and Public Policy towards Interchange: An Economic Assessment," with M. Guerin-Calvert, *Review of Network Economics: Special Issue*, vol. 4 (4), December 2005, 381-414.
- "All-Units Discounts in Retail Contracts," with S. Kolay and G. Shaffer, *J. of Economics and Management Strategy*, vol. 13 (3), September 2004, 429-59.
- "Archimedean Leveraging and the GE/Honeywell Transaction," with R. J. Reynolds, *Antitrust Law Journal*, vol. 70, no. 1, 2002, 171-98.
- "Entrepreneurship, Access Policy and Economic Development: Lessons from Industrial Organizations," with M. A. Dutz and R. D. Willig, *European Economic Review*, vol. 4, no. 4-6, May 2000.
- "Parity Pricing and its Critics: Necessary Condition for Efficiency in Provision of Bottleneck Services to Competitors," with W. J. Baumol and R. D. Willig, *Yale Journal on Regulation*, vol. 14, Winter 1997, 146-63.
- "Competition and Trade Law and the Case for a Modest Linkage," with E. Fox, *World Competition, Law and Economics Review*, vol. 19, December 1995, 5-34.
- "On the Perils of Vertical Control by a Partial Owner of Downstream Enterprise," with W.J. Baumol, *Revue D'économie industrielle*, No. 69, 3^e trimestre 1994, 7-20.
- "Competition Policy for Natural Monopolies in Developing Market Economy," with R.W. Pittman and P. Clyde, *Economics of Transition*, vol. 2, no. 3, September 1994, 317-343. Reprinted in B. Clay (ed), *De-monopolization and Competition Policy in Post-Communist Economies*, Westview Press 1996, 159-193.
- "The 1992 Agency Horizontal Merger Guidelines and the Department of Justice's Approach to Bank Merger Analysis," with M. Guerin-Calvert, *Antitrust Bulletin*, vol. 37, no. 3, 667-688. Reprinted in *Proceedings of the 1992 Conference on Bank Structure and Competition: Credit Markets in Transition*, Federal Reserve Bank of Chicago, 1992, 541-560.
- "Entry Analysis Under the 1992 Horizontal Merger Guidelines," with Jonathan B. Baker, *Antitrust Law Journal*, vol. 61, no. 1, Summer 1992, 139-146.
- "Economics and the 1992 Merger Guidelines: A Brief Survey," with Robert D. Willig, *Review of Industrial Organization*, vol. 8, 139-150, 1993. Reprinted in E. Fox and J. Halverson (eds.), *Collaborations Among Competitors: Antitrust Policy and Economics*, American Bar Association, 1992, 639-652.
- "Equilibrium Vertical Foreclosure: A Reply," with G. Saloner and S.C. Salop, *American Economic Review*, vol. 82, no. 3, 1992, 698-703.
- "A Patent System for Both Diffusion and Exclusion," *Journal of Economic Perspectives*, vol. 5, Winter 1991, 43-60.
- "R&D Cooperation and Competition," with M. Katz, *Brookings Papers on Economic Activity: Microeconomics*, 1990, 137-203.

"Equilibrium Vertical Foreclosure," with G. Saloner and S. Salop, *American Economic Review*, vol. 80, March 1990, 127-142.

"Antitrust Policy for High-Technology Industries," with W.J. Baumol, *Oxford Review of Economic Policy*, vol. 4, Winter 1988, 13-34. Reprinted in E. Fox and J. Halverson (eds.), *Collaborations Among Competitors: Antitrust Policy and Economics*, American Bar Association, 1991, 949-984.

"Conflicts of Jurisdiction: Antitrust and Industrial Policy," *Law and Contemporary Problems*, vol. 50, Summer 1987, 165-178.

"Market Structure and Optimal Management Organization," with C. Bull, *Rand Journal of Economics*, vol. 18, no. 4, Winter 1987, 480-491.

"A Sequential Concession Game with Asymmetric Information," with A. Rubinstein, *Quarterly Journal of Economics*, vol. 101, no.4, November 1986, 879-888.

"The G.M.-Toyota Joint Venture: An Economic Assessment," with C. Shapiro, *Wayne Law Journal*, vol. 31, no. 4, 1985, 1167-1194.

"Economic Foundations and Considerations in Protecting Industrial and Intellectual Property: An Introduction," *ABA Antitrust Law Journal*, vol. 53, no. 3, 1985. 503-518, Comments, 523-532.

"Antitrust for High-Technology Industries: Assessing Research Joint Ventures and Mergers," with R.D. Willig, *Journal of Law and Economics*, vol. 28, May 1985, 311-334.

"Use of Antitrust to Subvert Competition," with W.J. Baumol, *Journal of Law and Economics*, vol. 28, May 1985, 247-266. Reprinted in *Journal of Reprints for Antitrust Law and Economics*, vol. 16, no. 2.

"Advances in Supervision Technology and Economic Welfare: A General Equilibrium Analysis," with C. Shapiro, *Journal of Public Economics*, vol. 25/3, 1985, 371-390.

"Predatory Systems Rivalry: A Reply," with A. O. Sykes and R. D. Willig, 83 *Columbia Law Review*, June 1983, 1150-1166. Reprinted in *Corporate Counsel*, Matthew Bender & Company, 1984, 433-450.

"The 1982 Department of Justice Merger Guidelines: An Economic Assessment," with R. D. Willig, 71 *California Law Review*, March 1983, 535-574. Reprinted in *Antitrust Policy in Transition: The Convergence of Law and Economics*, E. Fox and J. Halverson (eds.), American Bar Association Press, 1984, 267-304.

"Unfair International Trade Practices," with A. O. Sykes and R. D. Willig, 15 *Journal of International Law and Politics*, Winter 1983, 323-338.

"On Non-linear Pricing of Inputs," with J. Panzar, *International Economic Review*, October 1982, 659-675.

"Herfindahl Concentration, Rivalry and Mergers," with A. O. Sykes and R. D. Willig, *Harvard Law Review*, vol. 95, June 1982, 1857-1875.

"A Reply to 'Journals as Shared Goods: Comment,'" with R. D. Willig, *American Economic Review*, June 1982, 603-607.

"Proposed Revisions to the Justice Department's Merger Guidelines," with S. Edwards, *et al.*, *Columbia Law Review*, vol. 81, December 1981, 1543-1591.

"An Economic Definition of Predation: Pricing and Product Innovation," with R.D. Willig, *Yale Law Journal*, vol. 91, November 1981, 8-53.

"On the Consequences of Costly Litigation in the Model of Single Activity Accidents: Some New Results," *Journal of Legal Studies*, June 1981, 269-291.

"On the Political Sustainability of Taxes," with A. Schotter, *American Economic Review Papers and Proceedings*, May 1981, 278-282.

"Information and the Law: Evaluating Legal Restrictions on Competitive Contracts," with A. Weiss, *American Economic Review Papers and Proceedings*, May 1981, 399-404.

"Redistributing Incomes: *Ex Ante* or *Ex Post*," *Economic Inquiry*, April 1981, 333-349.

"On the Nonexistence of *Pareto Superior* Outlay Schedules," with J. Panzar, *The Bell Journal of Economics*, Spring 1980, 351-354.

"The Role of Information in the Design of Public Policy Towards Externalities," with R. D. Willig, *Journal of Public Economics*, December 1979, 271-299.

"On the Concept of Optimal Taxation in the Overlapping-Generations Model of Efficient Growth," with E.S. Phelps, *Journal of Public Economics*, August 1979, 1-27.

"Products Liability in Markets With Heterogeneous Consumers," *Journal of Legal Studies*, June 1979, 505-525.

"Costly Litigation and the Tort Law: Single Activity Accidents," *Journal of Legal Studies*, June 1978, 243-261.

"On the Optimal Provision of Journals Qua Excludable Public Goods," with R. D. Willig, *American Economic Review*, June 1978, 324-338.

"Distortionary Wage Differentials in a Two-Sector Growth Model: Some Theorems on Factor Earnings," *International Economic Review*, June 1978, 321-333.

"On the Optimality of Public-Goods Pricing with Exclusion Devices," with W.J. Baumol, *Kyklos*, Fasc. 1, 1977, 5-21.

"Public Good Properties in Reality: The Case of Scientific Journals," with W.J. Baumol, *Proceedings of the ASIS Meetings*, San Francisco, October 1976.

"Merger Illusions and Externalities: A Note," with A. Schotter, *Eastern Economic Review*, November 1976, 19-21.

"Distributive Justice and Optimal Taxation of Wages and Interest in a Growing Economy," *Journal of Public Economics*, January 1976, 139-160.

"Linear Taxation of Wealth and Wages for Intragenerational Lifetime Justice: Some Steady-State Cases," with E.S. Phelps, *American Economic Review*, September 1975, 660-673.

B. Books and Monographs

Proceedings of the Tenth Annual Telecommunications Policy Research Conference, editor with O. Gandy and P. Espinosa, ABLEX Publishers, 1983.

Obstacles to Trade and Competition, with L. Goldberg, OECD, Paris, 1993.

Predatory Pricing, with William Green, *et al.*, American Bar Association, Section of Antitrust Law, Monograph 22, 1996.

C. Book Chapters

"Coordinated Effects," chap. 27, in *Issues in Competition Law and Policy*, vol. 2, American Bar Association, 2008, 1359-1384.

"Practical Rules for Pricing Access in Telecommunications," with R. D. Willig, Chap. 6, in *Second-Generations Reforms in Infrastructure Services*, F. Besanes and R. D. Willig (eds.), Inter-American Development Bank, Washington, D.C., April 2002, 149-76.

"Sustainable Privatization of Latin American Infrastructure: The Role of Law and Regulatory Institutions," with Evamaria Uribe, Chap. 1 in F. Basanes, E. Uribe, R. D. Willig (eds.), *Can Privatization Deliver? Infrastructure for Latin America*, The Johns Hopkins U. P. for Inter-American Development Bank, 1999, 9-32.

"Access and Bundling in High-Technology Markets," with R. D. Willig, Chap. 6, in J. A. Eisenach and T. M. Leonard, (eds.), *Competition, Innovation, and the Microsoft Monopoly: The Role of Antitrust in the Digital Marketplace*, Kluwer Academic Press, 1999, 103-29.

"The Harmonization of Competition and Trade Law," with E. Fox, Chap. 15 in L. Waverman, *et al.* (eds.), *Competition Policy in the Global Economy*, Routledge, 1997, 407-439.

"Transition to a Market Economy: Some Industrial Organization Issues," with M. Iwanek, Chap. 7 in H. Kierzkowski, *et al.* (eds.), *Stabilization and Structural Adjustment in Poland*, Routledge, 1993, 133-170.

"Competition Policies for Natural Monopolies in a Developing Market Economy," with Russell Pittman, *Butterworth's Trade and Finance in Central and Eastern Europe*, Butterworth Law Publishers Ltd., 1993, 78-88, Reprinted in *Journal for Shareholders* (published by the Russian Union of Shareholder), Moscow, January 1993, 33-36; *Versenyfelügyeleti Ertesito* (Bulletin of Competition Supervision), Budapest, vol. 3, no. 1-2, January 1993, 30-41; *Narodni Hospodarstvi* (National Economy), Prague; *ICE: Revista de Economia*, No. 736 (December 1994) (in Spanish), 69-90.

"Antitrust: Source of Dynamic and Static Inefficiencies?" with W.J. Baumol, in T. Jorde and D. Teece (eds.), *Antitrust, Innovation, and Competitiveness*, Oxford University Press, 1992, 82-97. Reprinted in "The Journal of Reprints for Antitrust Law and Economics," vol. 26, no. 1, 1996.

"Economic Foundations of Competition Policy: A Review of Recent Contributions," in W. Comanor, *et al.*, *Competition Policy in Europe and North America: Economic Issues and Institutions, Fundamentals of Pure and Applied Economics* (Vol. 43), Harwood Academic Publishers, 1990, 7-42.

"The Department of Justice 1988 Guidelines for International Operations: An Economic Assessment," with A.O. Sykes, in B. Hawk (ed.), *European/American Antitrust and Trade Laws*, Matthew Bender, 1989, 4.1-4.18.

"Predation, Monopolization, and Antitrust," with G. Saloner, in R. Schmalensee and R.D. Willig (eds.), *Handbook of Industrial Organization*, vol. 1, North Holland, 1989, 538-596.

"Supervision Technology, Firm Structure, and Employees' Welfare," in *Prices, Competition and Equilibrium*, M. Peston and R.E. Quandt (eds.), Philip Allan Publishers, Ltd., 1986, 142-163.

"Perspectives on Mergers and World Competition," with R.D. Willig, in *Antitrust and Regulation*, R. Grieson (ed.), Lexington Books, 1986, 201-218.

"Transnational Antitrust and Economics," in *Antitrust and Trade Policies in International Trade*, B. Hawk (ed.), Matthew Bender, 1985, 233-248.

"Pricing of Interexchange Access: Some Thoughts on the Third Report and Order in FCC Docket No. 78-72," in *Proceedings of the Eleventh Annual Telecommunications Policy Research Conference*, Vincent Mosco (ed.), ABLEX Publishers, 1984, 145-161.

"Non-Price Anticompetitive Behavior by Dominant Firms Toward the Producers of Complementary Products," with A.O. Sykes and R.D. Willig, in *Antitrust and Regulation: Essays in Memory of John McGowan*, F. Fisher (ed.), MIT Press, 1985, 315-330.

"Local Telephone Pricing in a Competitive Environment," with R.D. Willig, in *Regulating New Telecommunication Networks*, E. Noam (ed.), Harcourt Brace Jovanovich, 1983, 267-289.

"An Economic Definition of Predatory Product Innovation," with R.D. Willig, in *Strategy, Predation and Antitrust Analysis*, S. Salop (ed.), Federal Trade Commission, 1981, 301-396.

"Marginal Cost," in *Encyclopedia of Economics*, D. Greenwald (ed.), McGraw-Hill, 2nd ed. 1994, 627-630.

"Understanding Economic Justice: Some Recent Development in Pure and Applied Welfare Economics," in *Economic Perspectives*, M. Ballabon (ed.) Harwood Academic Publishers, vol. 1, 1979, 51-72.

"Problems of Political Equilibrium in the Soviet Proposals for a European Security Conference," in *Columbia Essays in International Affairs*, Andrew W. Cordier (ed.) Columbia University Press, New York, 1971, 1951-197

D. Other Publications

"The Economics of Price Discrimination," with Doug Fontaine and Greg Shaffer, in *The Economics of the Internet, The Vodafone Policy Paper Series*, No. 11, April 11, 2010, 27-51.

"How Loyalty Discounts Can Perversely Discourage Discounting: Comment," with Assaf Eilat, et al, *The CPI Antitrust Journal*, April 2010 (1).

"Economic Analysis in Antitrust Class Certification: *Hydrogen Peroxide*," with Paul Godek, *Antitrust Magazine*, vol. 24, No. 1, Fall 2009, pp. 62-65.

"Comments on Evans & Schmalensee's 'The Industrial Organization of Markets with Two-Sided Platforms'," *Competition Policy International*, vol. 3(1), Spring 2007, 181-90.

"Safer Than A Known Way? A Critique of the FTC's Report on Competition and Patent Law and Policy," with I. Simmons and D. A. Applebaum, *Antitrust Magazine*, Spring 2004, 39-43.

"Predatory Pricing," in Peter Newman (ed.), *The New Palgrave Dictionary of Economics and the Law*, Grove Dictionaries, New York, 1999. Revised in *The New Palgrave Dictionary of Economics*, 2nd edition, S. Durlauf and L. Blume (editors) (forthcoming 2007).

Book review of L. Phlips, *Competition Policy: A Game Theoretic Perspective*, reviewed in *Journal of Economic Literature*, vol. 35, No.3, September 1997, 1408-9.

"The Role of Efficiencies in Merger Assessment: The 1997 Guidelines," *Antitrust Report*, September 1997, 10-17.

"Bingaman's Antitrust Era," *Regulation*, vol. 20, No. 2, Spring 1997, 21-26.

"Competition Policy for High-Technology Industries," *International Business Lawyer*, vol. 24, No. 10, November 1996, 479-82.

"Internationalizing Competition Law to Limit Parochial State and Private Action: Moving Towards the Vision of World Welfare," with E.M. Fox, *International Business Lawyer*, vol. 24, No. 10, November 1996, 458-62.

"Economists' View: The Department of Justice Draft for the Licensing and Acquisition of Intellectual Property," *Antitrust*, vol. 9, No. 2, Spring 1995, 29-36.

"Competition Policy During Transformation to a Centrally Planned Economy: A Comment," with R.W. Pittman, in B. Hawk (ed.), *1992 Fordham Corporate Law Institute*, 533-38.

"Poland: The First 1,000 Days and Beyond," *Economic Times*, vol. 3, no. 9, October 1992, 6-7.

"Interview: Janusz A. Ordover: A Merger of Standards? The 1992 Merger Guidelines," *Antitrust*, vol. 6, no. 3, Summer 1992, 12-16.

"Interview: U.S. Justice Department's New Chief Economist: Janusz A. Ordover," *International Merger Law*, no. 14, October 1991.

"Poland: Economy in Transition," *Business Economics*, vol. 26, no. 1, January 1991, 25-30.

"Economic Analysis of Section 337: Protectionism versus Protection of Intellectual Property," with R.D. Willig, in *Technology, Trade and World Competition*, JEIDA Conference Proceedings, Washington, D.C., 1990, 199-232.

"Eastern Europe Needs Antitrust Now," with E. Fox, *New York Law Journal*, November 23, 1990, 1-4.

"Understanding Econometric Methods of Market Definition," with D. Wall, *Antitrust*, vol. 3, no. 3, Summer 1989, 20-25.

"Proving Entry Barriers: A Practical Guide to Economics of Entry," with D. Wall, *Antitrust*, vol. 2, no. 2, Winter 1988, 12-17.

"Proving Predation After Monfort and Matsushita: What the New 'New Learning' has to Offer," with D. Wall, *Antitrust*, vol. 1, no. 3, Summer 1987, 5-11.

"The Costs of the Tort System," with A. Schotter, Economic Policy Paper No. PP-42, New York University, March 1986. Reprinted in *Congressional Record*, U.S. Government Printing Office, Washington, D.C., 1987.

"An Economic Definition of Predation: Pricing and Product Innovation," with R.D. Willig, Report for the Federal Trade Commission, October 1982, 131 pp.

"Market Power and Market Definition," with R.D. Willig, Memorandum for ABA Section 7 Clayton Act Committee, Project on Revising the Merger Guidelines, May 1981.

"Herfindahl Concentration Index," with R.D. Willig, Memorandum for ABA Section 7 Clayton Act Committee, Project on Revising the Merger Guidelines, March 1981.

"Public Interest Pricing of Scientific and Technical Information," Report for the Department of Commerce Technical Advisory Board, September 1979.

"Economics of Property Rights as Applied to Computer Software and Databases," with Y.M. Braunstein, D.M. Fischer, W.J. Baumol, prepared for the National Commission on New Technological Uses of Copyrighted Works, June 1977, 140 pp. Reprinted in part in *Technology and Copyright*, R.H. Dreyfuss (ed.), Lemond Publications, 1978.

Book review of O. Morgenstern and G.L. Thompson, *Economic Theory of Expanding and Contracting Economies*, reviewed in *Southern Economic Journal*, September 1978.

"Manual of Pricing and Cost Determination for Organizations Engaged in Dissemination of Knowledge," with W.J. Baumol, Y.M. Braunstein, D.M. Fischer, prepared for the Division of Science Information, NSF April 1977, 150 pp.

UNPUBLISHED PAPERS

"Exclusionary Discounts," with Greg Shaffer, August 2006.

"Regulation of Credit Card Interchange Fees and Incentives for Network Investments," with Y. Wang, Competition Policy Associates WP, Washington D.C. September 2005.

"Economics, Antitrust and the Motion Picture Industry," C.V. Starr Center Policy Paper, July 1983.

"On Bargaining, Settling, and Litigating: A Problem in Multiperiod Games With Imperfect Information," with A. Rubinstein, C.V. Starr Working Paper, December 1982.

"Supervision and Social Welfare: An Expository Example," C.V. Starr Center Working Paper, January 1982.

"Should We Take Rights Seriously: Economic Analysis of the Family Education Rights Act," with M. Manove, November 1977.

"An Echo or a Choice: Product Variety Under Monopolistic Competition," with A. Weiss; presented at the Bell Laboratories Conference on Market Structures, February 1977.

GRANTS RECEIVED

Regulation and Policy Analysis Program, National Science Foundation, Collaborative Research on Antitrust Policy, Principal Investigator, July 15, 1985 - December 31, 1986.

Regulation of Economic Activity Program, National Science Foundation, Microeconomic Analysis of Antitrust Policy, Principal Investigator, April 1, 1983 - March 31, 1984.

Economics Division of the National Science Foundation, "Political Economy of Taxation," Principal Investigator, Summer 1982.

Sloan Workshop in Applied Microeconomics (coordinator), with W.J. Baumol (Principal Coordinator), September 1977 - August 1982.

Economics Division of the National Science Foundation, "Collaborative Research on the Theory of Optimal Taxation and Tax Reform," July 1979 to September 1980, with E.S. Phelps.

Division of Science Information of the National Science Foundation for Research on "Scale Economies and Public Goods Properties of Information," W.J. Baumol, Y.M. Braunstein, M.I. Nadiri, Fall 1974 to Fall 1977.

National Science Foundation Institutional Grant to New York University for Research on Taxation and Distribution of Income, Summer 1974.

May 2010

**Expert Testimony Provided by
Dr. Janusz A. Ordover 2003 – 2010**

In Re: Gemstar Development Corporation Patent Litigation, MDL-1274-WBH (N.D. Ga.) (deposition testimony)

College Loan Corporation v. SLM Corporation, Sallie Mae, Inc., and Sallie Mae Servicing L.P., Civil Action No. 02-1377A (E.D. Va.) (deposition testimony)

Aventis Environmental Science et al., v. Scotts Company and Monsanto Co., 99 Civ. 4015 (LAP) (S.D. NY) (deposition testimony)

The Citizenship of DHL Airways, Inc. under 49 USC 40102 (a) (15), U.S. Department of Transportation Docket 13089 (trial testimony)

United States of America, et al., v. First Data Corporation and Concord EFS, Inc., 1:03CV02169 (RMC) (pre-trial testimony, deposition testimony)

Carolyn Fears, et al., v. Wilhelmina Model Agency, Inc., et al., U.S. Dist. Court, S.D.N.Y., Case No. 02-CV-4911 (HB)(HBP) (deposition testimony)

CSC Holdings, Inc. v. Yankee Entertainment and Sports Network, LLC., American Arbitration Assoc. (February 2004) (deposition testimony)

Masimo Corporation v. Tyco Health Care Group L.P. and Mallinckrodt, Incorporated, No. CV 02-4440 MRP, (C.D. Ca.), (deposition testimony and trial testimony in 2005, deposition and trial testimony in 2006, trial testimony in 2007)

Qantas Airways Ltd. and Air New Zealand Ltd. v. ACCC, (The Australian Competition Tribunal, Sydney, Australia) (tribunal testimony)

GE v. Commission, (Case T-210/01) (The Court of First Instance, Luxembourg) (Testimony for the Commission of the European Communities) (Testimony at the Hearing for UTC In re GE/Honeywell Merger, European Commission, Brussels, Belgium)

Sony/BMG Joint Venture (Case No. Comp/M3333) (Oral hearing testimony at the EC, Brussels, Belgium)

In Re: Remeron Direct Purchaser Antitrust Litigation, Master Docket No.03-CV-85 (FSH)(New Jersey) (deposition testimony)

Qantas Airways Ltd. and Air New Zealand Ltd. v. NZ Commerce Commission (High Court of New Zealand, Auckland Registry Case CIV 2003 404 6590, Auckland, New Zealand) (Appeal hearing testimony)

Reading International, Inc., et al., v. Oaktree Capital Management, et al., No. 03 Civ. 1895, (S.D. NY), (deposition testimony)

Natural Gas Anti-Trust Cases I, II, III, & IV (J.C.C.P. Nos. 4221 through 00000), Superior Court of the State of California, County of San Diego (deposition testimony)

In Re: NCAA I-A Walk-On Football Players Litigation, U.S. Dist. Court, Western District of Washington at Seattle, Master File No. C-04-1254-C (deposition testimony in 2005 and 2006)

Canadian Lumber Trade Alliance, et al. v. United States, et al. and Coalition for Fair Lumber Imports Executive Committee, et al. Consolidated Court No. 05-00324 (U.S. Court of International Trade) (deposition and trial testimony)

Jame Fine Chemicals, Inc. v. Hi-Tech Pharma Co., Inc., v. Medpointe Inc., U.S. Dist. Court, Dist. of New Jersey, Civ. Action No. 00-3545 (AEI) (deposition testimony)

Jason White, et al. v. NCAA, U.S. Dist. Court, Central District of California, No. CV06-0999 RKG (MANx) (deposition testimony)

In Re: Hydrogen Peroxide Antitrust Litigation, U.S. Dist. Court, Eastern District of Pennsylvania, Civ. Action No. 05-DV-666 (MDL No.:1682) (deposition testimony)

Rochester Medical Corp. v. C.R. Bard International et al., U.S. Dist. Court, E.D. of Texas (Texarkana Div.), No. 504-CV-060 (deposition testimony)

Natchitoches Parish Hospital et al. v. Tyco International, Ltd. et al., U.S. Dist. Court, District of Massachusetts, Civ. Action No. 05-12024 PBS (deposition testimony twice, court hearing, jury trial testimony)

In the Matter of Adjustment of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, Docket No. 20006-1 CRB DSTRA, Copyright Royalty Board, Library of Congress, Washington, D.C. (deposition testimony, hearing testimony)

Allied Orthopedic Appliances, Inc. v. Tyco Health Care Group L.P. et al., U.S. Dist. Court, Central District of California (Western Div.), CV-05-6419 MRP (AJWx) (deposition testimony twice)

Delco LLC and Edward Decker v. Giant of Maryland LLC, Wakefern Food Corp., and Stop & Shop Supermarket Company LLC, U.S. Dist. Court, District of New Jersey (Camden Vicinage), No. 07-CV-03522 (JBS-AMD) (deposition and PI hearing testimony)

Woolworths Ltd. and The Warehouse Group v. The Commerce Commission, High Court of New Zealand, Wellington Registry, CIV 2007-485-1255 (hearing on the appeal from the determination of the NZ Commerce Commission)

IGT v. Alliance Gaming et al., U.S. Dist. Court, Dist. of Nevada, No. CV-S-04 (1676-RCJ-(RJJ)) (deposition testimony)

In Re: New Motor Vehicle Canadian Export Antitrust Litigation, MDL Docket No. 03-md-1532-P-H (All Cases) (deposition testimony)

The European Commission Case Comp. 39.188 Bananas, European Commission, Brussels, Belgium (Oral Hearing testimony)

The European Commission Case Comp. 37.990 Intel, European Commission, Brussels, Belgium (Oral Hearing testimony)

Appeal No. 25: PCCW versus Telecommunications Authority, In the Telecommunications (Competition Provisions) Appeal Board, Hong Kong (Testimony)

Michael Siegel et al., v. Shell Oil Co., et al., U.S. District Court, Northern District of Illinois, Eastern Div., No. 06 C 0035 (deposition testimony)

The Commerce Commission v. Telecom Corp. of New Zealand Ltd., High Court of New Zealand, Auckland Registry, Civ. 2004-404-1333 ("hot tub" testimony)

Daniels Shapsmart Inc., Plaintiff, v. Tyco International, (US) Inc., and Tyco Healthcare Group, L.P., Defendants, U.S. District Court, Eastern District of Texas, Texarkana Division, No. 5:05-CV-169 (deposition testimony)

FTC v. CCC Holdings, Inc., et al, U.S. District Court for the District of Columbia, CA 08-2043 (deposition and trial testimony)

Rambus Inc. v. Micron Technology, Inc. et al., Superior Court of the State of California, County of San Francisco, Case No. 04-431105 (deposition testimony)

In The Matter of Herring Broadcasting, Inc. d/b/a Wealth TV vs. Bright House Networks, LLC and Cox Communications, Inc., Federal Communications Commission, Washington, DC, File Nos. CSR-7709-P, 7822-P, 7829-P, 7907-P. (deposition testimony, FCC hearing testimony)

In the matter of Rubber Chemicals Antitrust Litigation: Bridgestone Americas Holdings, Inc., et al v. Chemtura Corp., et al, U.S. District Court, Northern District of California, Individual Case No. C 06-5700-MJJ (testimony in an arbitration hearing)

International Business Machines v. T3 Technologies, Inc., U.S. District Court, Southern District of New York, Civ. Action No. 06-cv-13565-LAK (deposition testimony)

In the matter of BP America Production Company v. Repsol YPF, S.A., Arbitration under the Uncitral Arbitration Rules (testimony in an arbitration hearing)

Tessera Technologies, Inc. v. Hynix Semiconductor, Inc., Case No. 106CV-07668, Sup. Ct. of the State of California, County of Santa Clara (deposition testimony)

In Re: TFT-LCD (Flat Panel) Antitrust Litigation, U.S. Dist. Court, N.D. of California, No. M 07-1827 SI, MDL No. 1827

Enron Coal Services Ltd. And English Welsh and Scottish Railway Ltd., In the Competition Appeal Tribunal (London, U.K.), Case No. 1106/5/7/08 (testimony in the Hearing)

Geoffrey Pecover, et al v. Electronic Arts, Case No. C08-02820VRW, US Dist. Court, N.D. of CA, San Francisco Div. (deposition testimony)

Darren Berry, et al v. Volkswagen of America, Inc., Case No. 0516-CV01171-01, Cir. Court of Jackson County, Missouri at Independence (deposition testimony)

Ekaterini Kotaras, et al v. Whole Foods Market, U.S. Dist. Court, Dist. of Columbia, 1:08-cv-01832 - PLF

Appendix Two

1. In this appendix, I illustrate with straightforward numerical examples the arms-length bargaining outcomes predicted by economic theory under two different scenarios: negotiations between a webcaster and individual record companies and, alternatively, negotiations between a webcasters and the record companies represented collectively by SoundExchange. I also present a model to demonstrate the more general result that the more licensors there are in the market, the lower will be the combined royalties charged by the companies under collective negotiations vis-à-vis individual negotiations.
2. Suppose that there are two symmetric record companies in the market, Company 1 and Company 2. Webcasters in this example are assumed to be perfectly competitive, and each webcaster must obtain a license from both Company 1 and Company 2 in order to operate an economically viable service. Let R_1 and R_2 denote the royalties charged by Company 1 and Company 2, respectively. For simplicity, assume that webcasters have no costs other than the royalties paid pursuant to their license agreements with the record companies. Webcasters sell to downstream consumers, whose total demand is given by the function $D = 12 - P$, where D denotes total demand and P denotes the price charged by webcasters.
3. First, assume that Company 1 and Company 2 negotiate their licenses collectively. Because webcasters are perfectly competitive, they fully pass the royalty costs to downstream consumers and therefore the price charged to downstream consumers is exactly equal to the sum of the royalties charged by the two firms, i.e., $P = R_1 + R_2$. The combined profit of the record companies is $(R_1 + R_2) * D$, or equivalently $(R_1 + R_2) * (12 - P)$, or equivalently $(R_1 + R_2) * (12 - (R_1 + R_2))$. The first order condition dictates that $(12 - 2 * (R_1 + R_2)) = 0$, and therefore the royalty that maximizes the combined profit is $(R_1 + R_2) = 6$. The market outcome is such that $P = (R_1 + R_2) = 6$, $D = 12 - P = 12 - 6 = 6$, and

the combined profit of the two companies is equal to $P * D = 6 * 6 = 36$.

Consumer surplus is $(12 - 6) * 6/2 = 18$.

4. Now suppose that each company sets its royalty individually. Under this scenario, each company can only affect its own royalty while taking the royalty charged by the other company as given. Take the decision of Company 1. The profit of company 1 is given by $R_1 * D = R_1 * (12 - P) = R_1 * (12 - (R_1 + R_2))$. Maximizing with respect to R_1 , the first order condition faced by Company 1 is $12 - 2R_1 - R_2 = 0$, or $R_1 = \frac{12-R_2}{2}$. Company 2 solves a symmetric problem, and therefore its first order condition is $R_2 = \frac{12-R_1}{2}$. Solving for R_1 and R_2 , it is easy to show that $R_1 = R_2 = 4$. The combined royalty charged by the two companies is $4 + 4 = 8$. Demand is given by $D = 12 - P = 12 - (R_1 + R_2) = 12 - 8 = 4$. Each company earns a profit equal to its royalty times the demand, or $4 * 4 = 16$. Consumer surplus in this case is $(12 - 8) * 4/2 = 8$.
5. Comparing the outcomes of these two scenarios, it is easy to see that when the two companies negotiate collectively, the combined royalties that they charge are lower, the market price is lower, market demand is higher, and therefore consumer surplus is also higher. This result is based on the intuition discussed in Section V: collective negotiations allow the two companies to internalize the negative effect that their royalties impose on market demand, resulting in lower royalties and lower market prices.
6. More generally, suppose that there are N symmetric record companies in the market, denoted Company 1, Company 2, ..., Company N . Let R_i denote the royalty charged by Company i , where $i = 1, 2, \dots, N$. As in the numerical example, Webcasters are perfectly competitive, and each webcaster must obtain a license from all record companies in order to operate an economically viable service. Webcasters sell to downstream consumers, whose total demand is given by the function $D = A - BP$, where D denotes total demand, P denotes the price charged by webcasters, and A and B are parameters.

7. Suppose that Companies 1,2, ..., N negotiate their licenses collectively. As before, the fact that webcasters are perfectly competitive implies that $P = R_1 + R_2 + \dots + R_N$. The combined profit of the record companies is $P * D$, or equivalently $P * (A - BP)$. The first order condition dictates that $(A - BP) + P(-B) = 0$, and therefore $P = \frac{1}{2} \frac{A}{B}$.
8. Now suppose that each company sets its royalty individually. The profit of each company i is given by $R_i * D$, or equivalently $R_i * (A - BP) = R_i * (A - B(R_i + P_{-i}))$ where P_{-i} denotes the sum of the royalties of all the companies except for company i . As in the numerical example, each company takes P_{-i} – i.e. the prices of the other companies – as given. Maximizing with respect to R_i , the first order condition faced by Company i is $(A - B(R_i + P_{-i})) + R_i(-B) = 0$, which implies that $R_i = \frac{A - BP_{-i}}{2B}$. Since all the companies are symmetric, in equilibrium it is the case that $P_{-i} = (N - 1)R_i$, and therefore $R_i = \frac{A - B(N-1)R_i}{2B}$, or $R_i = \frac{1}{N+1} \frac{A}{B}$. The sum of the prices of all the companies is equal to $P = N * R_i = \frac{N}{N+1} \frac{A}{B}$.
9. The market price under individual bargaining, $\frac{N}{N+1} \frac{A}{B}$, is always higher than the market price under collective bargaining, $\frac{1}{2} \frac{A}{B}$. This implies that under collective bargaining the quantity is higher and therefore consumer surplus is higher. Moreover, the difference between the two prices, $\frac{N}{N+1} \frac{A}{B} - \frac{1}{2} \frac{A}{B} = \frac{N-1}{2(N+1)} \frac{A}{B}$, is increasing in the number of firms N . Therefore, the more licensors there are in the market, the higher the combined royalties charged by the companies (and the lower the consumer surplus) under individual negotiations vis-à-vis collective negotiations.

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

WRITTEN REBUTTAL TESTIMONY OF

KYLE FUNN

Manager, Licensing & Enforcement
SoundExchange, Inc.

Witness for SoundExchange, Inc.

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
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WRITTEN REBUTTAL TESTIMONY OF

KYLE FUNN

Manager, Licensing & Enforcement
SoundExchange, Inc.

June 2010

WRITTEN REBUTTAL TESTIMONY OF KYLE FUNN

Background and Qualifications

I am Manager, Licensing and Enforcement, at SoundExchange. I have worked at SoundExchange since May 2005. I have held my current position since early 2008. I previously served as Licensing and Enforcement Specialist at SoundExchange. My current job responsibilities include monitoring licensees' compliance with the regulations related to payment and reports of use, and communicating deficiencies to them. I act as a liaison between SoundExchange and licensees related to their compliance with statutory and regulatory requirements. In monitoring licensees' compliance, I work both with SoundExchange's finance department, which receives and processes royalty payments and statements of account from licensees, and its distribution services department, which receives and processes reports of use. In addition, I field questions from current and prospective licensees regarding general licensing, reporting and payment issues.

Discussion

I am submitting this rebuttal testimony to respond to Live365's proposal that it should receive a 20% aggregator discount from its proposed rates applicable to commercial webcasters. Live365 has proposed that "a streaming service that operates a network of at least one hundred (100) independently-operated 'aggregated webcasters'" should receive a 20% discount from the royalty rate set for commercial webcasting services. *See* Live365 Rate Proposal, Section I.B (Sept. 29, 2009). Live365 claims that it is entitled to this discount because of alleged "administrative savings" and other benefits it provides to copyright owners and SoundExchange. *See, e.g.*, Corrected and Amended Testimony of Mark R. Fratrick at 38-39.

In reality, however, Live365 has engaged in conduct that has created more work for SoundExchange, not less. As I understand the Court has already heard from other witnesses, after the Webcasting II decision, Live365 paid royalties at the incorrect royalty rate. In May 2008, we sent a letter to Live365 that notified Live365 that, among other things, it was failing to pay at the appropriate royalty rates. In April 2009 and August 2009, we contacted Live365 again because it still was not complying with the rates and terms set in the Webcasting II proceeding, and we repeated our demand that it pay in compliance with the regulations. Despite our repeated efforts, Live365 did not comply with the rates set in the Webcasting II proceeding until very recently.

Live365's decision not to pay royalties in compliance with the Webcasting II decision imposed a burden on SoundExchange. Over the course of approximately two years, SoundExchange had to spend time and money analyzing Live365's lack of compliance and repeatedly notifying Live365 about its failure to pay royalties at the correct rates. Moreover, because Live365 pays royalties to SoundExchange on behalf of thousands of webcasters, when Live365 was paying at the incorrect rates, it was causing thousands of webcasters to be out of compliance with the statutory license, even as those webcasters may have believed that they were compliant. And because Live365 has not provided SoundExchange with a list of the thousands of webcasters for whom it purports to pay SoundExchange, it can be more time-consuming for SoundExchange to determine whether a webcaster is complying with the statutory licenses.

Live365 also interfered with SoundExchange's collection and processing of information related to the webcasters for whom Live365 pays and reports to SoundExchange. In order to collect information in an efficient and uniform fashion from licensees, SoundExchange makes

template statement of account forms available on its web site. I am attaching the template 2009 statement of account for commercial webcasters as SoundExchange Rebuttal Exhibit 1 to my testimony. That template provides spaces for a webcaster to input the number of performances for each month, and then directs webcasters to multiply the number of performances by the applicable royalty rate for 2009 (\$0.0018). The template statement of account form is designed to make it as easy as possible for webcasters to calculate the royalties they owe to SoundExchange. Most webcasters that pay SoundExchange use the template statement of account forms. Having the statement of account information in a standardized format makes it easier to review, and decreases the potential for errors due to human intervention and discretion. It is for this reason that SoundExchange is proposing in its revised rate proposal that webcasters be required to use the template statement of account form that SoundExchange makes available on its web site.¹

If a webcaster does not use the standard statement of account form, it creates additional work for SoundExchange because the information that is submitted in a non-standard format cannot be processed as easily. Unfortunately, after the Webcasting II decision, Live365 did not use the correct statement of account template, and instead submitted statement of account forms that appear to have been doctored. For example, in December 2009, Live365 submitted the statement of account form that is attached hereto as SoundExchange Rebuttal Exhibit 2 (Restricted). The form that Live365 submitted appears designed to look like an official SoundExchange form, but it calculates royalties at incorrect royalty rates for the current rate period. It appears that Live365 took a statement of account form from the prior rate period and

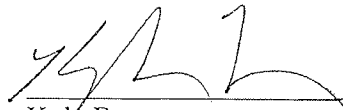
¹ In connection with statement of account forms, SoundExchange is also proposing that licensees should be allowed to submit electronic signatures instead of handwritten signatures. The purpose of this proposal is to make it easier for licensees to submit statements of account.

altered it so that it purports to be a 2009 form. As you can see from looking at this exhibit, the form claims to be a "Statement of Account for Commercial Webcasters Per Performance 2009," and includes the SoundExchange logo and other information that make it look like a form issued by SoundExchange for 2009. But on the first page of the form, in the section where a webcaster calculates the royalties due, the form instructs a webcaster to multiply its total performances by "\$0.000762," and it instructs the webcaster to take a 4% deduction on the total number of reported performances. That, of course, is the Webcasting I rate and was not applicable in 2009. By submitting doctored Statement of Account forms, Live365 interfered with SoundExchange's efforts to administer the statutory licenses as efficiently as possible. This deliberate non-compliance creates additional work for SoundExchange and undermines the claim that Live365 should receive a discount.

Finally, I should also note that Live365 and other services with 100 or more stations or channels already obtain a benefit from SoundExchange that is not available to other services. Under the final regulations adopted by the CRJs for 2006 - 2010 (37 C.F.R. § 380.3(b)(1)), and under the Stipulation (May 14, 2010) submitted by Live365 and SoundExchange in Webcasting III for 2011 - 2015, the \$500 per station or channel minimum fee is capped at \$50,000. Thus, a service such as Live365 that aggregates thousands of stations already receives a substantial benefit because it is required to pay only \$50,000 in minimum fees as opposed to, for example, the \$2.5 million it would have to pay in minimum fees if it paid minimum fees for 5,000 stations or channels.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: 06/07/2010



Kyle Funn

STATEMENT OF ACCOUNT FOR A COMMERCIAL WEBCASTER 2009 USAGE

Send payments and statements to:



SoundExchange, Inc.
1121 Fourteenth St., N.W., Suite 700
Washington, DC 20005
Attn: Royalty Administration

Please refer to page 4 for instructions to filling out this form.

1	For the 2009 month of:	
2	Name of service:	
3	URL:	
4	Station/channel name (e.g., call letters)*: <small>*If reporting more than one, list on page 3</small>	

	2009 Month	Total Performances
5	January	
6	February	
7	March	
8	April	
9	May	
10	June	
11	July	
12	August	
13	September	
14	October	
15	November	
16	December	
17	Sum of lines 5 - 16 above	0
18	Line 17 multiplied by \$0.0018	\$ -
19	Enter the total amount of stations/channels transmitting in 2009.	
20	Line 19 multiplied by \$500. This is your total 2009 minimum fee liability.	\$ -
21	The greater of (a) Line 18 or (b) Line 20. This is the total current 2009 liability for the station(s) or channel(s) listed on Line 4.	\$ -
22	Enter amounts previously paid for 2009 liability (including both usage and minimum fee payments).	
23	Line 22 subtracted from Line 21. This is the current amount that is due. Payments are due within 45 days of the end of each month, and must be accompanied by a statement of account form.	\$ -

**STATEMENT OF ACCOUNT FOR A COMMERCIAL WEBCASTER
2009 USAGE
CERTIFICATION PAGE**

I, the undersigned owner or agent of the Licensee, or officer or partner, if the Licensee is a corporation or partnership, have examined this Statement of Account and hereby certify that the information provided herein is true, accurate and complete to my knowledge after reasonable due diligence.

[All of the below information is required by federal regulations. See 72 Fed. Reg. 24,084, (May 1, 2007) (37 C.F.R. § 380.4(f).)]

Signature: _____

Name: _____

Title: _____

E-mail Address: _____

Address: _____

City, State, Zip: _____

Telephone Number: _____

Date: _____

**STATEMENT OF ACCOUNT FOR A COMMERCIAL WEBCASTER
2009 USAGE
STATION/CHANNEL LIST**

	STATION/CHANNEL NAME (e.g., Call Letters)	URL	DATE OF INITIAL TRANSMISSION
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			

(If the number of stations/channels exceed 25, please submit an accompanying list to accommodate.)

**STATEMENT OF ACCOUNT FOR A COMMERCIAL WEBCASTER
2009 USAGE
INSTRUCTIONS**

1	Enter the month for the most recent usage reported on the statement of account.
2	Enter the "name of service" as listed on the Licensee's Notice of Use filed with the Copyright Office. If you have <i>not</i> submitted a Notice of Use form, please do so immediately. Notices of Use may be downloaded from either www.copyright.gov or www.soundexchange.com .
3	Enter the URL listed on the Licensee's Notice of Use.
4	Enter the applicable station or channel name. For example, if a station has "call letters," they would be entered here. If the statement of account reports the usage of multiple stations or channels, please list them accordingly on page 3.
5-16	For lines 5 through 16, enter the total amount of performances, year to date, for ALL months from January through, and including, the month indicated on Line 1. If there are any adjustments from previously submitted performances, services must complete and submit Worksheet A, available on our website (www.soundexchange.com).
17	Enter the sum of Lines 5 through 16.
18	Multiply Line 17 by \$0.0018. This is the 2009 rate.
19	Enter the total number of stations or channels that are operating under statutory licensing in 2009. If this number includes stations or channels that were not included on previous submissions, please ensure that they are listed on page 3.
20	Multiply Line 19 by \$500. This represents your total current minimum fee liability for 2009.
21	Enter the greater of your usage liability (Line 18) or your minimum fee liability (Line 20). This is the current total 2009 liability for the station or channel.
22	Enter any previous payments to SoundExchange for 2009 liability. This includes any prior minimum fee and/or usage payments. If the statement of account reports multiple stations or channels, please ensure that the previous payments correspond accordingly. Likewise, if the statement of account only represents a single station or channel, please ensure that other payments for other stations or channels or not represented.
23	Enter the amount of Line 22 subtracted from Line 21. This is the total amount that is due. Payments are due within 45 days of the end of each month, and must be accompanied by a statement of account form.

(For more information regarding webcasting rates and terms, including definitions, please see 37 C.F.R. § 380.)

NOTICE

SoundExchange will **not** confirm receipt of payments or statements of account. If a service requires confirmation of receipt, please use registered mail, return receipt requested, or an express/overnight delivery service with tracking ability.

Services that have filed a Notice of Use of Sound Recordings under Statutory License with the Copyright Office are obligated to comply with all requirements of the statutory licenses under Sections 112 and 114 of the Copyright Act. It is the responsibility of each such service to ensure that it is in full compliance with the requirements of the statutory licenses under 17 U.S.C. §§ 112 & 114. SoundExchange is not in a position to determine whether each of the many services that rely on these statutory licenses is eligible for statutory licensing and does not in fact make any such determination. Nor does SoundExchange verify that such services are in full compliance with all applicable requirements of the two statutory licenses. Accordingly, SoundExchange's acceptance of a service's payment does not express or imply any acknowledgment that a service is in compliance with the requirements of the statutory licenses. SoundExchange, its members and other copyright owners reserve all their rights to take enforcement action against a service that is not in compliance with those requirements, regardless of any royalty payments such service may have made to SoundExchange.

**The attachment “SX Rebuttal Ex. 2” is Restricted
(under the Protective Order) in its entirety and is therefore omitted
from this public version of the exhibits binder.**