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for the Written Direct Statement of SoundExchange, Inc.
2009-1 CRB Webcasting III

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

INTRODUCTORY MEMORANDUM TO THE WRITTEN DIRECT CASE OF SOUNDEXCHANGE, INC.

SoundExchange, Inc. ("SoundExchange"), through its undersigned counsel, respectfully submits this Introductory Memorandum to its written direct case in accordance with 37 C.F.R. § 351.4. This Memorandum describes the contents of SoundExchange's written direct case and briefly summarizes the testimony of its witnesses.

CONTENTS OF SOUNDEXCHANGE'S WRITTEN DIRECT CASE

Volume 1 contains: (A) this Introductory Memorandum; (B) SoundExchange's Proposed Rates and Terms; (C) an index of SoundExchange's witness testimony; (D) an index of SoundExchange's exhibits; and (E) a certificate of service.

Volume 2 contains the written direct testimony of SoundExchange's six witnesses and SoundExchange's exhibits.

Pursuant to 37 C.F.R. § 350.4(a), § 351.4(a), and the Court's Order of June 24, 2009, SoundExchange is filing an original, five copies, and an electronic copy of the materials in Volumes 1 and 2.

The written testimony of two of SoundExchange's witnesses and four of SoundExchange's exhibits contain information that SoundExchange has marked as Restricted, as

that term is defined in Paragraph 2 of the Protective Order entered by this Court on September 23, 2009. Pursuant to footnote 1 in this Court's Order Granting Joint Motion to Adopt Protective Order (Sept. 23, 2009), SoundExchange is filing a motion for application of the Protective Order to the portions of the testimony and the exhibits it has marked as Restricted. In connection with that motion, SoundExchange is filing a Declaration and Rule 11 Certification of Michael B. DeSanctis, declarations from the two witnesses in further support of the motion, and a redaction log identifying the page number of each proposed redaction and briefly describing the nature of the Protected Material proposed to be redacted.

As set forth in its motion for application of the Protective Order, SoundExchange requests that, in the event the Court declines to apply the Protective Order to any portion of the information that SoundExchange has marked Restricted, the Court provide SoundExchange the opportunity to withdraw the information from its written direct case, or replace it with publicly available information, before the materials are made publicly available.

SUMMARY OF THE WRITTEN TESTIMONY OF SOUNDEXCHANGE'S WITNESSES

SoundExchange's written direct case includes the written testimony of the following expert and fact witnesses.

A. Expert Witnesses

Michael Pelcovits, Ph.D., is a Principal of the consulting firm of Microeconomic Consulting & Research Associates, Inc. His testimony supports SoundExchange's rate proposal. He analyzes the market for Internet music services and provides his expert opinion on a range of reasonable rates for the compulsory license fee to be set in this proceeding.

First, Dr. Pelcovits considers the license fees for statutory services that were recently negotiated under the Webcaster Settlement Acts ("WSA") between SoundExchange and two

groups of webcasters: broadcasters represented by the National Association of Broadcasters ("NAB"), and commercial webcasters represented by Sirius XM Radio (for its Internet radio service). The WSA agreements are recent and cover precisely the statutory webcasting services at issue here, negotiated on both sides between entities with an important stake in establishing reasonable rates. Second, he considers the license fees negotiated between willing buyers and willing sellers in the market for interactive, on-demand digital audio transmissions. These agreements are between companies that would be actors in the hypothetical market in this proceeding, and involve services that are similar to statutory webcasting, except for the degree of interactivity they offer to consumers.

Dr. Pelcovits recognizes the need for certain adjustments in order to derive a rate for statutory webcasting services. With regard to the WSA agreements, he states that consideration must be given to the fact that the agreements were negotiated in the shadow of a regulatory environment that prohibited the sellers from refusing to grant a license, and allowed the buyers and sellers to seek a rate from this Court if negotiation failed. With regard to the interactive, on-demand agreements, he explains that an adjustment must be made to account for the value that consumers place on the greater interactivity those services offer.

He concludes that this evidence, when properly adjusted, provides a reliable basis from which to derive a range of rates that meet the statutory criteria applicable in this proceeding, and that SoundExchange's proposed rates fall well within this range.

George S. Ford, Ph.D., is the President of Applied Economic Studies, a private consulting firm specializing in economic and econometric analysis. He is also the Chief Economist of the Phoenix Center for Advanced Legal & Economic Policy Studies, a 501(c)(3) research organization that specializes in the legal and economic analysis of public policy issues involving

the communications and technology industries, and is an Adjunct Professor at Samford University in Birmingham, Alabama.

Dr. Ford's testimony supports SoundExchange's rate proposal for ephemeral copies under Section 112(e) of the Copyright Act. Dr. Ford concludes that ephemeral copies clearly have economic value and that, based on economic theory and marketplace evidence, the value of those ephemeral copies is best expressed as a fixed percentage of the overall royalty rate paid by webcasters for combined activities under Sections 112(e) and 114. In turn, Dr. Ford analyzes the unique hypothetical market set up by Sections 112 and 114 whereby payments under Section 112(e) are made directly to the record companies, while payments under Section 114 must be divided evenly between the record companies and the artists. Dr. Ford reasons that the willing buyer, willing seller market appropriate under the unique statutory regime requires consideration of all three interested parties (i.e., the webcaster, the record company and the artist). He concludes that the results of such a voluntary negotiation would be the result determined as between the record companies and the artists, as the only two entities in the negotiation with an interest in the outcome.

B. Fact Witnesses

Kim Roberts Hedgpeth is the National Executive Director of the American Federation of Television and Radio Artists ("AFTRA"). Her testimony supports the designation of SoundExchange as the sole Collective to collect and distribute statutory webcasting royalties. Her testimony also discusses the important contributions of record companies in making sound recordings available to the public.

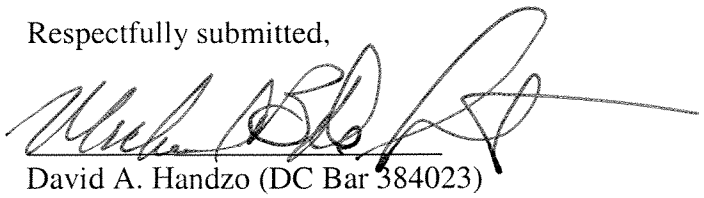
Barrie Kessler is the Chief Operating Officer of SoundExchange. Her testimony provides background information about SoundExchange and its operations; describes SoundExchange's collection and distribution of royalties; explains why SoundExchange should be the sole

collective for collecting and distributing royalties under the Section 112 and 114 licenses; provides information related to SoundExchange's minimum fee proposal; and supports SoundExchange's proposal that the Judges continue the same terms, with certain modifications, for the statutory licenses as they adopted in the Webcasting II proceeding.

Dennis Kooker is the Executive Vice President, Operations, and General Manager, Global Digital Business and U.S. Sales, for Sony Music Entertainment ("Sony"). His testimony explains that record companies like Sony make a substantial investment in the creation, marketing and distribution of music, and that record companies rely on all streams of revenue, including revenues from webcasting and other forms of digital online distribution, in order to recoup those investments. He also explains that despite the growth in digital distribution of music in recent years, the increase in digital distribution is not sufficient to offset the considerable decline in physical forms of distribution, such as CD sales.

W. Tucker McCrady is Associate Counsel, Digital Legal Affairs at Warner Music Group ("WMG"). His testimony discusses the agreements between SoundExchange and certain webcasters negotiated under the Webcaster Settlement Act. He describes the licensing strategy used by WMG in various negotiated marketplace agreements for the use of WMG's copyrighted sound recordings outside the limitations of the statutory webcasting framework. In addition, his testimony supports the designation of SoundExchange as the sole Collective to collect and distribute statutory webcasting royalties.

Respectfully submitted,



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Of Counsel

September 29, 2009

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

PROPOSED RATES AND TERMS OF SOUNDEXCHANGE, INC.

Pursuant to Section 351.4(b)(3) of the Copyright Royalty Judges' Rules and Procedures, 37 C.F.R. § 351.4(b)(3), SoundExchange, Inc. ("SoundExchange") proposes the rates and terms set forth herein for eligible nonsubscription transmissions and transmissions made by a new subscription service other than a service as defined in 37 C.F.R. § 383.2(h) (collectively, "Webcast Transmissions"), together with the making of ephemeral recordings necessary to facilitate Webcast Transmissions, under the statutory licenses set forth in 17 U.S.C. §§ 112(e) and 114 during the period January 1, 2011 through December 31, 2015.

Pursuant to 37 C.F.R. § 351.4(b)(3), SoundExchange reserves the right to revise its proposed rates and terms at any time during the proceeding up to, and including, the filing of its proposed findings of fact and conclusions of law.

I. Proposed Settlements

On June 1, 2009, SoundExchange and the National Association of Broadcasters ("NAB") submitted a Joint Motion to Adopt Partial Settlement requesting that the Copyright Royalty Judges adopt certain rates and terms for "Broadcast Retransmissions" and "Broadcaster Webcasts," as defined therein. On August 13, 2009, SoundExchange and College Broadcasters, Inc. ("CBI") submitted a Joint Motion to Adopt Partial Settlement requesting that the Copyright

Royalty Judges adopt certain rates and terms for eligible nonsubscription transmissions made by noncommercial educational webcasters over the internet, as more specifically provided therein. SoundExchange requests adoption by the Copyright Royalty Judges of the proposed regulations appended to the NAB and CBI motions as the statutory rates and terms for the activities addressed therein. SoundExchange respectfully urges the Copyright Royalty Judges to publish those proposed regulations promptly for notice and comment pursuant to 17 U.S.C. § 801(b)(7)(A) and 37 C.F.R. § 351.2(b)(2), because completing the notice and comment process with respect to those settlements would allow the Copyright Royalty Judges and the parties to know the status of those settlements and hopefully narrow the range of issues potentially at issue in this proceeding.

II. Other Royalty Rates

For all Webcast Transmissions and related ephemeral recordings not covered by its proposed settlements with NAB and CBI, SoundExchange requests royalty rates as set forth below.

A. Commercial Webcasters

1. Minimum Fee

Pursuant to 17 U.S.C. §§ 112(e)(3) and (4) and 114(f)(2)(A) and (B), SoundExchange requests that all licensees (as defined in 37 C.F.R. § 380.2(g)) that are commercial webcasters (as defined in 37 C.F.R. § 380.2(d)) pay an annual, nonrefundable minimum fee of $500.00 for each calendar year or part of a calendar year of the license period during which they are licensees, for each individual channel and each individual station (including any side channel maintained by a broadcaster that is a licensee, if not covered by SoundExchange's proposed settlement with NAB), subject to an annual cap of $50,000.00 for a licensee with 100 or more channels or

stations. For each licensee, the annual minimum fee described in this paragraph shall constitute the minimum fees due under both 17 U.S.C. §§ 112(e)(4) and 114(f)(2)(B). Upon payment of the minimum fee, a licensee would receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

2. Per Performance Rates

For Webcast Transmissions and related ephemeral recordings by commercial webcasters as defined in 37 C.F.R. § 380.2(d), in addition to the minimum fee, SoundExchange requests royalty rates as follows:

Year	Rate Per Performance
2011	$0.0021
2012	$0.0023
2013	$0.0025
2014	$0.0027
2015	$0.0029

B. Noncommercial Webcasters

1. Minimum Fee

Pursuant to 17 U.S.C. §§ 112(e)(3) and (4) and 114(f)(2)(A) and (B), SoundExchange requests that all licensees (as defined in 37 C.F.R. § 380.2(g)) that are noncommercial webcasters (as defined in 37 C.F.R. § 380.2(h)) pay an annual, nonrefundable minimum fee of $500.00 for each calendar year or part of a calendar year of the license period during which they are licensees, for each individual channel and each individual station (including any side channel maintained by a broadcaster that is a licensee, if not covered by SoundExchange's proposed

settlement with CBI). For each licensee, the annual minimum fee described in this paragraph shall constitute the minimum fees due under both 17 U.S.C. §§ 112(e)(4) and 114(f)(2)(B).

2. Per Performance Rates

For Webcast Transmissions and related ephemeral recordings by noncommercial webcasters as defined in 37 C.F.R. § 380.2(h), SoundExchange requests that if, in any month, a noncommercial webcaster makes total transmissions in excess of 159,140 aggregate tuning hours (as defined in 37 C.F.R. § 380.2(a)) on any individual channel or station, the noncommercial webcaster shall pay additional fees for the transmissions it makes on that channel or station in excess of 159,140 aggregate tuning hours at the following rates:

Year	Rate Per Performance
2011	$0.0021
2012	$0.0023
2013	$0.0025
2014	$0.0027
2015	$0.0029

C. Ephemeral Recordings

SoundExchange requests that the royalty payable under 17 U.S.C. § 112(e) for the making of ephemeral recordings used by the licensee solely to facilitate transmissions for which it pays royalties as provided above shall be included within, and constitute 5% of, such royalty payments.

III. Terms

SoundExchange requests that the terms currently set forth in 37 C.F.R. Part 380 be continued, subject to the changes described herein.

A. Server Log Retention

SoundExchange requests that the regulations 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 original server logs sufficient to substantiate rate calculation and reporting, which must be made available to the qualified auditor selected by the Collective in the event of an audit.

B. Late Fees for Reports of Use

SoundExchange requests 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.

C. Identification of Licensees

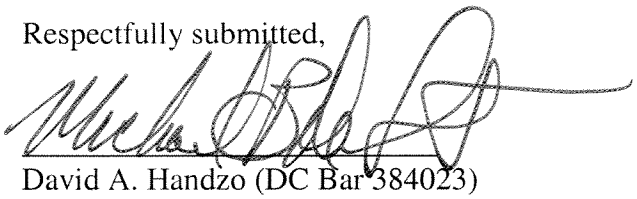
SoundExchange requests that the regulations require statements of account to correspond to notices of use and reports of use by (1) identifying the licensee in exactly the way it is identified on the corresponding notice of use and report of use, and (2) covering the same scope of activity (e.g., the same channels or stations). In addition, SoundExchange requests that the regulations make clear 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 notices of use, statements of account, and reports of use. Finally, SoundExchange requests that the regulations require licensees to use an account number, that is assigned to them by SoundExchange, on their statements of account and reports of use.

D. Technical and Conforming Changes

SoundExchange requests certain technical and conforming changes to the regulations, including ones 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

hereto. Only provisions affected by these technical and conforming changes are included in the redlined attachment.

Respectfully submitted,



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Counsel for SoundExchange, Inc.

September 29, 2009

Attachment
SoundExchange's Requested Technical and Conforming Changes

PART 380—RATES AND TERMS FOR CERTAIN ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS, NEW SUBSCRIPTION SERVICES AND THE MAKING OF EPHEMERAL REPRODUCTIONS

§ 380.1 General.

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

§ 380.2 Definitions.

(g) *Licensee* is a person that has obtained a statutory license under 17 U.S.C. 114, and the implementing regulations, to make eligible nonsubscription transmissions, or noninteractive digital audio transmissions as part of a new subscription service (as defined in 17 U.S.C. 114(j)(8)) other than a Service as defined in § 383.2(h), or that has obtained a statutory license under 17 U.S.C. 112(e), and the implementing regulations, to make Ephemeral Recordings for use in facilitating such transmissions.

§ 380.4 Terms for making payment of royalty fees and statements of account.

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

(c) *Monthly payments.* A Licensee shall make any payments due under § 380.3 ~~by~~on a monthly basis on or before the 45th day after the end of each month for that month, except that payments due under § 380.3 for the period beginning January 1, 2006, through the last day of the month in which the Copyright Royalty Judges issue their final determination adopting these rates and terms shall be due 45 days after the end of such period. All monthly payments shall be rounded to the nearest cent.

(g)(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (g)(1) of this section within 3 years from the date of payment by a Licensee, such ~~distribution may first be applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State~~royalties shall be handled in accordance with § 380.8.

§ 380.6 Verification of royalty payments.

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

§ 380.7 Verification of royalty distributions.

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

Index of Witness Statements

Tab	Witness	Title
1	Michael Pelcovits	Principal, Microeconomic Consulting & Research Associates, Inc.
2	George S. Ford	President, Applied Economic Studies
3	Kim Roberts Hedgpeth	National Executive Director, American Federation of Television and Radio Artists
4	Barrie Kessler	Chief Operating Officer, SoundExchange, Inc.
5	Dennis Kooker	Executive Vice President, Operations, and General Manager, Global Digital Business and U.S. Sales, for Sony Music Entertainment
6	W. Tucker McCrady	Associate Counsel, Digital Legal Affairs, Warner Music Group

Index of SoundExchange Exhibits

Exhibit No.	Sponsored By	Description
SX Ex. 101-DP	W. Tucker McCrady	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	W. Tucker McCrady	Webcaster Settlement Act Agreement for Commercial Webcasters made between SoundExchange, Inc. and Sirius XM Radio Inc.
SX Ex. 103-DP	W. Tucker McCrady	Webcaster Settlement Act Agreement for Noncommercial Educational Webcasters made between SoundExchange, Inc. and College Broadcasters, Inc.
SX Ex. 104-DR	W. Tucker McCrady	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	W. Tucker McCrady	Napster Subscription Earnings Statement for Warner Music Inc., May 2009 (RESTRICTED - not included in public version of direct case)
SX Ex. 106-DR	W. Tucker McCrady	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	W. Tucker McCrady	Napster Bundled Offer Royalty Statement for Warner Music Inc., May 2009 (RESTRICTED - not included in public version of direct case)

CERTIFICATE OF SERVICE

I, Matthew Hersh, do hereby certify that copies of the foregoing WRITTEN DIRECT STATEMENT OF SOUNDEXCHANGE, INC. were sent via e-mail (without exhibits) and overnight mail (with exhibits) this 29th day of September, 2009 to the following:

Thomas G. Connolly Mark A. Grannis Christopher J. Wright Timothy J. Simeone Charles D. Breckinridge Kelley Shields WILTSHIRE & GRANNIS LLP 1200 18th Street, NW Washington, DC 20036 Fax: 202/730-1301 tconnolly@wiltshiregrannis.com mgrannis@wiltshiregrannis.com cwright@wiltshiregrannis.com tsimeone@wiltshiregrannis.com cbreckinridge@wiltshiregrannis.com kshields@wiltshiregrannis.com *Counsel for RealNetworks, Inc.*	Angus M. MacDonald Ara Hovanesian Abraham Yacobian HOVANESIAN & HOVANESIAN 301 E. Colorado Blvd., Ste. 514 Pasadena, CA 91101-1919 Fax: 626/795-8900 hovanesian@earthlink.net David D. Oxenford Adam S. Caldwell Ronald G. London 1919 Pennsylvania Avenue, N.W., Suite 200 Washington, D.C. 20006 Fax: 202/973-4499 davidoxenford@dwt.com adamcaldwell@dwt.com ronaldlondon@dwt.com *Counsel for LIVE365, Inc.*
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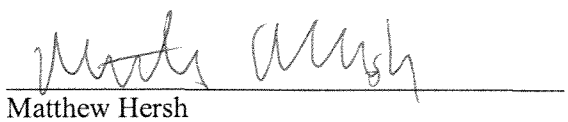

Matthew Hersh

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

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.

III. Background on Section 112

For the convenience of the reader, I will begin by setting forth some basic observations about Section 112's unique design as well as the decisions that have interpreted and applied Section 112 to date.[1]

A. Legislative History of Section 112

As originally enacted, Section 112 of the Copyright Act of 1976 did not provide a statutory license for ephemeral copies. Rather, Section 112 merely provided that anyone

[1] I am not interpreting or opining on the statutes and legal decisions that follow. Rather, because the unique marketplace that I have been asked to analyze here is wholly a creature of the applicable statutes, regulations and legal decisions, they, of course, are critical background for my economic analysis. It is very common — indeed, as here, often essential — in my work that I would begin my study and analysis of an economic issue in a regulated industry by first analyzing the relevant regulatory framework. Thus, in the course of this statement I will refer to and discuss the following published opinions: (1) *Report of the Copyright Arbitration Royalty Panel in the Matter of Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2000-9, CARP DTRA 1 & 2 (Feb. 20, 2002) (hereinafter "Webcaster I CARP Opinion"); (2) *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45240 (Jul. 8, 2002) (hereinafter "Webcaster I Final Rule"); (3) *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 Fed. Reg. 24084 (May 1, 2007) (hereinafter "Webcaster II"); (4) *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 73 Fed. Reg. 4080 (Jan. 24, 2008) (hereinafter "SDARS Opinion"); (5) *Review of Copyright Royalty Judges Determination*, 73 Fed. Reg. 9143 (Feb. 19, 2008) (hereinafter "Register Opinion"); and (6) *Determination of Rates and Terms for Business Establishment Services*, 73 Fed. Reg. 16199 (Mar. 27, 2008) (hereinafter "Business Services Opinion").

authorized to publicly perform or display a work by transmitting it to the public as part of a transmission program, pursuant to a license or transfer of the copyright, is entitled to make a single copy of it in order to facilitate those transmissions.[2] That copy was to be used solely for transmission purposes and was to be destroyed (unless kept for archival purposes) within six months of transmission. *Id.*

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act ("DPRA"), which amended Section 106(6) of the Copyright Act to provide copyright owners of sound recordings with the exclusive right to perform the work publicly by means of a digital audio transmission.[3] Congress also amended Section 114 of the Copyright Act to create a new compulsory license for certain subscription digital audio services that transmit sound recordings on a non-interactive basis.[4] The DPRA also provided that royalties payable under the newly amended Section 114 were to be split 50-50 between copyright owners and performers.[5] Significantly, these allocations are statutory and need not comport with any market outcome.

In 1998, Congress enacted the Digital Millennium Copyright Act ("DMCA"). Among other things, the DMCA amended the Section 114 compulsory license to cover digital transmissions made on a non-subscription, non-interactive basis.[6] Congress also created a new compulsory license in Section 112(e).[7] Under Section 112(e), as amended by the DMCA, webcasters and broadcasters who publicly perform sound recordings

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[2] 17 U.S.C. § 112(a) (1977).

[3] *See* 17 U.S.C. § 106(6); Webcaster I CARP Opinion at 6.

[4] *See* 17 U.S.C. § 114(f)(2) (1997); Webcaster I CARP Opinion at 7.

[5] *See* 17 U.S.C. § 114(g)(2) (1997) (allocating 45% to featured artists, 2.5% to non-featured vocalists, and 2.5% to non-featured musicians).

[6] *See* 17 U.S.C. § 114(f)(2); Webcaster I CARP Opinion at 8.

[7] Webcaster I CARP Opinion at 9; *see also* 17 U.S.C. § 112(e).

pursuant to Section 114 may use the compulsory license process to obtain "no more than 1 phonorecord of the sound recording (unless the terms and conditions of the statutory license allow for more)."[8] Royalties payable under Section 114 are to be split equally between copyright owners and performers, but Congress did not mandate a similar split in Section 112(e) for ephemeral copies. Thus, royalty payments under Section 112(e) are paid directly to copyright owners, who in turn pay performers according to their existing contractual arrangements presumably obtained in an unregulated market setting.

B. Relevant Decisions Applying and/or Interpreting Section 112

Since the addition of the Section 112(e) ephemeral license in the DMCA, the Copyright Royalty Judges ("CRJs") and their predecessor, the Copyright Arbitration Royalty Panel ("CARP"), have taken varying approaches in adopting rates under that Section.

In the first proceeding to set rates and terms for eligible nonsubscription services under Section 114(f) and Section 112(e) (hereinafter *Webcaster I*), the CARP found that an agreement between the RIAA and the Yahoo! service provided an appropriate benchmark.[9] Under that agreement, Yahoo! paid a flat fee for the right to make ephemeral copies under Section 112 that constituted 8.8 % of Yahoo!'s total performance royalty payments.[10] The Webcaster I CARP thus set the rate at 9%, using the 8.8% Yahoo! rate as a baseline and adjusting up slightly to account for the 10% of royalty payments rate found in other marketplace agreements.[11]

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[8] 17 U.S.C. § 112(e)(1).

[9] Webcaster I CARP Opinion at 104.

[10] Webcaster I CARP Opinion at 100-101.

[11] Webcaster I CARP Opinion at 104. The Librarian of Congress, acting upon the recommendation of the Register of Copyrights, later rejected the CARP's upward

In the Webcaster II and SDARS proceedings, by contrast, the CRJs declined to set a separate rate for ephemeral copies. In both of those proceedings, SoundExchange proposed that 8.8% of the overall royalty fees for online and satellite-based streaming should be attributed to the making of ephemeral copies.[12] The CRJs agreed that the ephemeral royalty fee should be included within the overall performance royalty fee, but declined to "ascribe any particular percentage of the section 114 royalty as representative of the value of the section 112 license."[13]

However, the Register of Copyrights has since determined that, if the ephemeral rate is to be included as a percentage of the performance rate, that percentage must be specified.[14] The Register noted that there was an important "practical reason" for doing this, as royalties paid under Section 114 are paid to the performers and copyright owners, while royalties paid under Section 112 are paid only to copyright owners.[15]

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adjustment, and set the rate at the original 8.8% derived from the Yahoo! agreement. Webcaster I Final Rule at 45262. In 2003, SoundExchange and the webcasting services later agreed to "push forward" these rates for subsequent years. However, in their agreement the 8.8% ephemerals rate was not included as an extra charge. Rather, the agreement provided that 8.8% of the total performance fee paid for section 112 and section 114 activities was "'deemed' to comprise the charge for ephemeral recordings." Webcaster II at 24101.

[12] *See* Webcaster II at 24101; SDARS Opinion at 4098.

[13] Webcaster II at 24102; *see also* SDARS Opinion at 4098 (same).

[14] *See* Register Opinion at 9143; 9146.

[15] Register Opinion at 9146.

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

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[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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PUBLISHED RESEARCH:

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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

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.

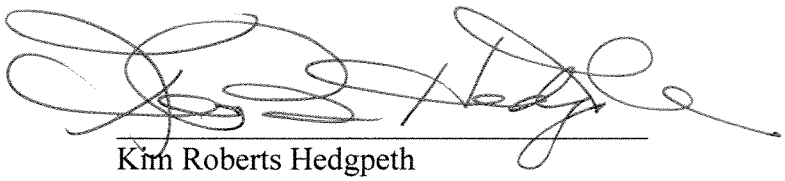
In short, when a webcasting service plays a recording, it is benefiting not only from the hard work and creativity of recording artists, but also from the substantial investments and contributions of record companies.

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 CRB Webcasting III

TESTIMONY OF

BARRIE KESSLER

Chief Operating Officer, SoundExchange, Inc.

September 2009

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 under-counts 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-licensee, 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, SoundExchange had 1,440 licensees (at the statement of account level) of all license types. When SoundExchange's

operating costs are divided by the number of licensees, the result is a per licensee cost of approximately $5,833.

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 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 $833 ($5,833 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.

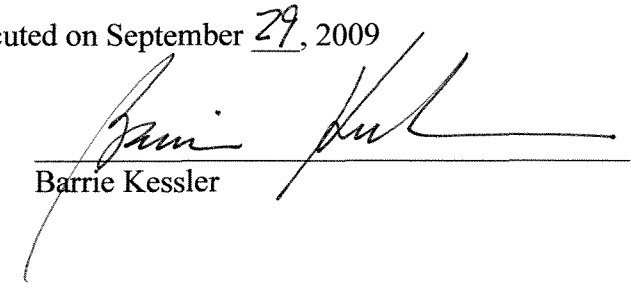
In addition, we would like a regulation requiring licensees to use an account number, that is assigned to them by SoundExchange, on their statements of account and reports of use. This unique identifier would make it easier for SoundExchange to identify each licensee in our system, and to distinguish 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 September 29, 2009



Barrie Kessler

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

DENNIS KOOKER

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

September 2009 **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 [redacted] (including both owned and distributed repertoire), and its year to date digital marketshare for digital albums is approximately [redacted] (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.

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[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 testimony is true and correct.

Date: 9/25/09

Dennis Kooker

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

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]

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

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 [ ] 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 [ ] represent the potential upside for our revenue. Although we negotiate the amounts of the per-play minimums, the [ ] 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]

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

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].

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] 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] 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] 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, [

]

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

]

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

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)

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

MICHAEL D. PELCOVITS

Principal, Microeconomic Consulting & Research Associates

September 2009

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	$.0034
2012	$.0020	$.0034
2013	$.00215	$.0034
2014	$.00225	$.0034
2015	$.00245	$.0034

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.

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;
- 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.

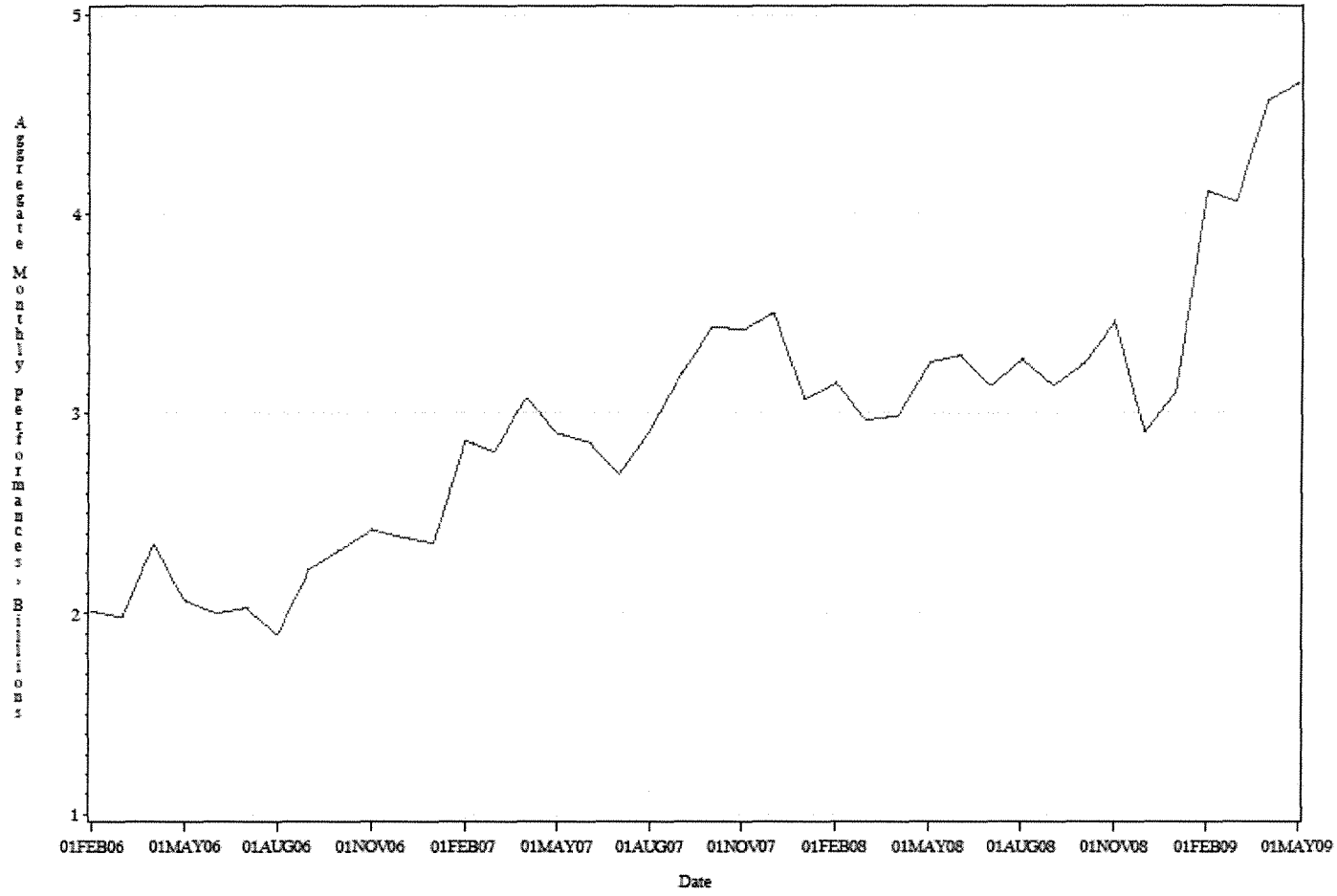
Among other things, I met in person with executives from Sony Music Entertainment, Warner Music Group and EMI who are responsible for digital music markets, and I met by video-conference with an executive from Universal Music Group. I reviewed dozens of recent contracts between the major record companies 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.[2] 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.

[2] JPMorgan, North America Equity Research, "Radio Broadcasting," April 10, 2008.

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

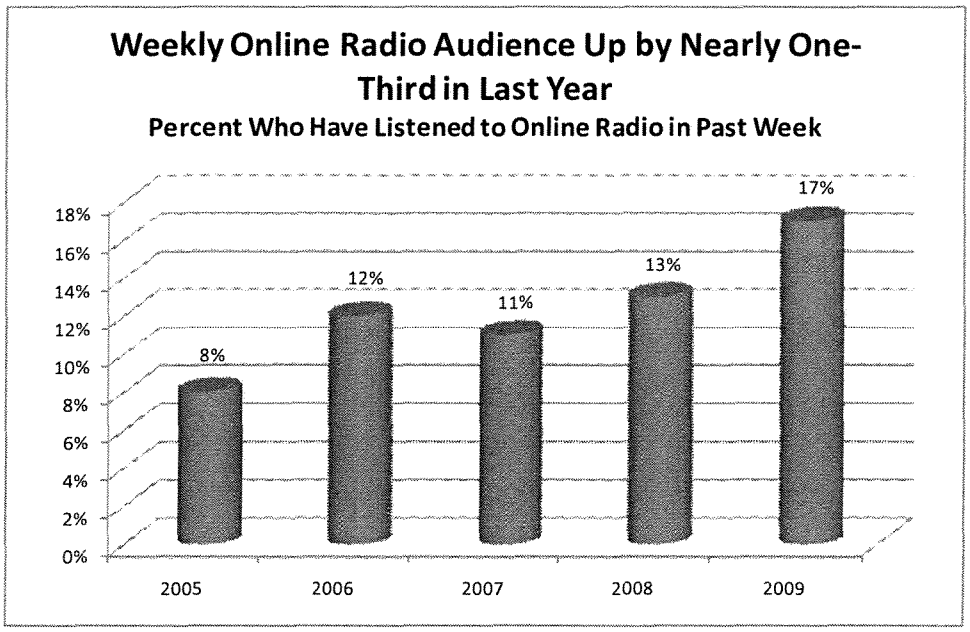


Source: SoundExchange Usage Reports, 2006-2009

The popularity of webcasting was noted in a study by Arbitron and Edison Media Research, 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."[3] 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

[3] Jonathan Paul, "Internet radio is ready for take-off," Strategy Magazine, March 2009, p.39.

2008," thereby boosting current listener rates to 17% of the U.S. population.[4] The trend over the last five years is shown in the table below. [5]



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-educated, upper-income, full-time employed, and technologically savvy individuals.[6]

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

[4] Impact Lab, "Internet Radio Fastest Growing Online Media," September 9, 2009, http://www.impactlab.com/2009/09/09/internet-radio-fastest-growing-online-media/.

[5] 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 0925/09).

[6] Id. pp. 58, 59.

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.[7] In March 2009, Last.fm reported that its number of visitors worldwide had doubled to 30 million from the levels obtained a year before.[8] 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.[9]

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 Slacker Mobile application for the BlackBerry Storm smartphone from Research In Motion."[10]

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

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[7] JPMorgan, North American Equity Research, April 10, 2008, pp. 4-5.

[8] Last.fm blog. "Last.fm Radio Announcement." http://blog.last.fm/2009/03/24/lastfm-radio-announcement (accessed 09/21/2009).

[9] Paidcontent.org, "CBS Pulls Last.fm, Radio into Interactive Music Group." (05/05/2009).

[10] Slacker Personal Radio, Press Release, January 14, 2009.

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.[11] 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.[12] One analysis projects that more than $350 million will be spent on advertising on internet radio as a medium by 2011.[13]

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] Ando Media Press Release, April 1, 2009.

[12] Joe Mandese, "Digital Radio Ad Spending Surges Amid Medium's Downturn," Media Post News (05/22/2009).

[13] 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.[14] 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

[14] http://blog.pandora.com/jobs/ (visited September 13, 2009).

or so-called "smartphones."[15] 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.[16] 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.[17] 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.[18] 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.[19]

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

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[15] The NPD Group, "Feature Phones Comprise Overwhelming Majority of Mobile Phone Sales in Q2 2009," http://www.npd.com/press/releases/press_090819.html.

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

[17] Time Magazine, "Top 10 iPhone Apps," http://www.time.com/time/specials/2008/top10/article/0,30583,1855948_1863793,00.html.

[18] *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.

[19] 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.[20] 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

[20] 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 the 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.[21]

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.

[21] 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).[22] 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.[23] As shown in the table below, the average subscription price adjusted for downloads is $13.30.

Comparison of Subscription Services

Service	**Price per Month**	
Statutory		
Pandora One	$3.00	
Last.fm Premium	$3.00	
Live365 VIP	$6.95	
Sirius XM Radio	$2.99*	
Slacker Radio Plus	$3.99	
Musicovery Premium	$4.00	
Sky.fm/Digitally Imported Premium	$4.95	
Average	**$4.13**	
On-Demand	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

[22] 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.

[23] 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.[24] 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

[24] 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.[25]

[25] 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.

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:

$F_N = F_I \cdot PL \cdot IAF$, 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

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.[26]

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

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

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	$0.02192
Fee After Substitution Adjustment	$0.02030

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 $.0029 and $.0035, as shown below, with a simple average of $.031.

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	0.0203	Comparison of Mean Subscription Rates — Unadjusted Subscription Prices	0.301	0.0034	0.0029
0.02194	0.0203	Comparison of Mean Subscription Rates — Adjusted Subscription Prices	0.311	0.0035	0.0030
0.02194	0.02028	Regression of Subscription Prices	0.359	0.0040	0.0035

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	***SoundExchange Rate Proposal***	Interactive On-Demand Rates (With Substitution Adjustment)	Interactive, On-Demand Rates (No Substitution Adjustment)
2011	$.00175	***$.0021***	$.0031	$.0036
2012	$.0020	***$.0023***	$.0031	$.0036
2013	$.00215	***$.0025***	$.0031	$.0036
2014	$.00225	***$.0027***	$.0031	$.0036
2015	$.00245	***$.0029***	$.0031	$.0036

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

Date: 9/29/09

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, McDonnough 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								
						PRESENT VALUE OF 2009 - 2015 RATES		
	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.[1] 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.

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[1] 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	Effective Date
UMG	MusicNet, Inc.	11/13/04
UMG	MusicNet, Inc.	11/12/05
UMG	MusicNet, Inc.	11/11/07
UMG	MusicNet, Inc.	2/12/08
UMG	MusicNet, Inc.	5/31/08
UMG	MusicNet, Inc.	9/10/08
UMG	MusicNet, Inc.	11/12/08
UMG	RealNetworks, Inc.	7/1/04
UMG	RealNetworks, Inc.	6/16/08
UMG	Last.fm Limited	12/21/07
UMG	Buzznet, Inc.	1/28/08
UMG	Microsoft Corporation	11/7/06
UMG	Microsoft Corporation	8/15/08
UMG	Microsoft Corporation	10/10/08
UMG	Microsoft Corporation	6/10/09
UMG	Brilliant Digital Entertainment, Inc. (Altnet, Inc)	1/3/08
UMG	Slacker, Inc. (BBI Corp)	11/19/07
UMG	Slacker, Inc. (BBI Corp)	12/20/07
UMG	Slacker, Inc. (BBI Corp)	9/11/08
UMG	Slacker, Inc. (BBI Corp)	12/10/08
UMG	Slacker, Inc. (BBI Corp)	3/13/07
UMG	lala media, Inc.	10/22/07
UMG	imeem, inc.	11/26/07
UMG	LiveNation	11/21/07
UMG	NextRadio Solutions, Inc.	2/26/07
UMG	Napster, LLC	1/1/07
UMG	MusicMatch, Inc.	5/14/04
UMG	iMesh, Inc.	9/15/05
UMG	Duet General Partnership	12/21/00
UMG	MusicNow LLC	3/16/05
UMG	Classical Archives, LLC	6/15/07
WMG	BusRadio, Inc.	
WMG	Hotel Digital, Inc.	10/30/00
WMG	la la media, inc.	9/1/07
WMG	Catch Media, Inc.	10/8/08
WMG	Catch Media, Inc.	10/13/08
WMG	Brilliant Digital Entertainment, Inc.	2/7/07
WMG	Napster, LLC	5/18/09
WMG	Napster, LLC	12/11/03
WMG	Microsoft Corporation	10/28/08
WMG	RealNetworks, Inc.	10/1/08
WMG	Myspace, Inc. (within a "Joint Venture")	
WMG	Slacker	
WMG	imeem, inc.	7/6/07

WMG	Akoo International, Inc.	4/1/09
WMG	LTDnetwork, Inc.	8/29/06
WMG	National Radio Holdings, LLC	11/18/03
WMG	MusicNet, Inc.	1/1/05
WMG	Last.fm Ltd.	2/1/07
SONY	MySpace, Inc.	3/1/07
SONY	Brilliant Digital Entertainment, Inc.	7/9/07
SONY	Bus Radio, Inc.	2/20/08
SONY	Classical Archives, LLC	7/18/08
SONY	Dada Entertainment LLC	10/1/07
SONY	Hoodiny Digital LLC	3/28/08
SONY	imeem, inc.	6/30/09
SONY	iMesh, Inc.	1/31/08
SONY	la la Media, inc.	5/21/08
SONY	Last.fm Limited	5/25/07
SONY	Microsoft Corporation	10/10/07
SONY	Musicmatch, Inc.	4/30/04
SONY	MusicNet.com, Inc.	4/4/01
SONY	Napster, LLC	10/1/02
SONY	Project Playlist, Inc.	4/29/08
SONY	Qtrax, Inc.	11/5/08
SONY	RealNetworks, Inc.	4/1/05
EMI	Napster, LLC	8/31/06
EMI	Slacker, Inc.	9/12/07
EMI	imeem, inc.	10/15/07
EMI	RealNetworks, Inc.	4/1/05
EMI	MusicNet, Inc.	11/28/06
EMI	Microsoft Corporation	11/11/08
EMI	Brilliant Digital Entertainment, Inc.	4/26/07
EMI	Classical Archives, LLC	12/17/07
EMI	Akoo International, Inc.	3/1/09
EMI	Dada Entertainment LLC	2/5/09
EMI	Hotel Digital Network, Inc.	3/21/01
EMI	Project Playlist, Inc.	3/9/09
EMI	PluggedIn Media Corp.	12/17/07
EMI	la la media, inc.	5/16/08
EMI	Last.fm Limited	1/22/08
EMI	NextRadio Solutions	1/17/07
EMI	LTD Network, Inc.	6/3/08
EMI	SpiralFrog, Inc.	5/2/08
EMI	Ruckus Network, Inc.	1/25/05
EMI	Listen.com Inc.	
EMI	MySpace, Inc.	9/24/08
EMI	OnLine Entertainment Network, Inc.	

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:

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

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:

Year	Maximum Percentage
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:

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

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:

Year	Rate per Performance
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.

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

SOUNDEXCHANGE'S NOTICE OF FILING AMENDED AND CORRECTED TESTIMONY OF MICHAEL PELCOVITS AND BARRIE KESSLER

SoundExchange hereby submits this Notice of Filing Amended and Corrected Testimony of Michael Pelcovits and Corrected Testimony of Barrie Kessler.

First, pursuant to 37 C.F.R. § 351.4(c), Dr. Pelcovits has amended his written testimony by adding footnote 27 based on information that Live365 produced in discovery.

Second, in preparing for the depositions of Dr. Pelcovits and Ms. Kessler, SoundExchange identified several minor errors in their written direct testimony, which SoundExchange corrected. SoundExchange disclosed these errors and corrections to counsel for the other parties before the depositions of Dr. Pelcovits and Ms. Kessler. In addition, SoundExchange provided opposing counsel with redlined and clean copies of Dr. Pelcovits's corrected written testimony before his deposition which contained all but one of the corrections. The only correction that was not disclosed prior to his deposition was the correction of a minor error that was pointed out by counsel for Live365 during the deposition. The other parties thus had the opportunity to depose Dr. Pelcovits and Ms. Kessler about the corrections to their testimony.

SoundExchange has informed counsel for the other parties of its intention to file this corrected testimony. Counsel for RealNetworks, Inc., Live365, Inc. and Intercollegiate

Broadcasting System, Inc. have all consented to SoundExchange's filing of the corrected Pelcovits and Kessler written testimony. Counsel for the other parties (Royalty Logic, Inc. and College Broadcasters, Inc.) did not respond to requests for consent.

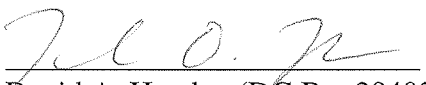
The corrections do not materially change the conclusions reached by either witness. The corrections to Dr. Pelcovits's testimony include the following: (1) a corrected graph of webcasting performances reported to SoundExchange on page 8 of his written testimony, which was corrected based on the determination that the data used by Dr. Pelcovits did not accurately reflect the number of performances reported to SoundExchange by statutory webcasters as of the date his testimony was submitted; (2) corrections to the calculations in Section 6.d of his written testimony related to the effect of substitution on Dr. Pelcovits's recommended rate, which contained a slight mathematical error, reporting the fee after substitution adjustment as $0.02030, when it should have been $0.02031; this correction, which appears on page 35 of Dr. Pelcovits's testimony, required changes to the subsequent calculations in that section of his testimony; (3) a corrected version of the list of Digital Audio Transmission Agreements that Dr. Pelcovits reviewed set forth in Appendix IV, which was necessary to provide a full list of the agreements that were reviewed by Dr. Pelcovits in preparing his testimony; and (4) a correction of an error in the table on page 4 of Dr. Pelcovits's testimony, which opposing counsel pointed out during Dr. Pelcovits's deposition; the final column of that table, labeled "Adjusted Interactive, On-Demand Rates," incorrectly listed $.0034, but should have been $.0036, as explained on pages 33 and 37 of Dr. Pelcovits's testimony.

Ms. Kessler is correcting the reference in the last line of page 23 of her written testimony to the number of licensees in 2008. At the time written direct statements were filed on September 29, 2009, the number of licensees should have been stated as 1,454 (not 1,440 as

originally stated in her written testimony), and it has been corrected accordingly. In her written testimony, Ms. Kessler used the number of licensees to calculate the estimated per licensee cost on page 24 of her testimony, and the average per channel or station cost for webcasters on page 25 of her testimony. Using the correct number of licensees in these calculations changes the estimated per licensee cost from $5,833 to $5,777, and changes the average per channel or station cost for webcasters from approximately $833 to approximately $825. These changes are reflected on pages 24 and 25 of her corrected written testimony.

SoundExchange is submitting the corrected versions of the Pelcovits and Kessler testimony to correct these minor errors.

Respectfully submitted,



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Of Counsel

February 16, 2010

CERTIFICATE OF SERVICE

I, Albert Peterson, do hereby certify that copies of the foregoing SOUNDEXCHANGE'S NOTICE OF FILING AMENDED AND CORRECTED TESTIMONY OF MICHAEL PELCOVITS AND BARRIE KESSLER, the CORRECTED TESTIMONY OF BARRIE KESSLER, and the AMENDED AND CORRECTED TESTIMONY OF MICHAEL D. PELCOVITS were sent via email and overnight mail this 16th day of February, 2010 to the following:

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Albert Peterson

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.

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 under-counts 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-licensee, 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.

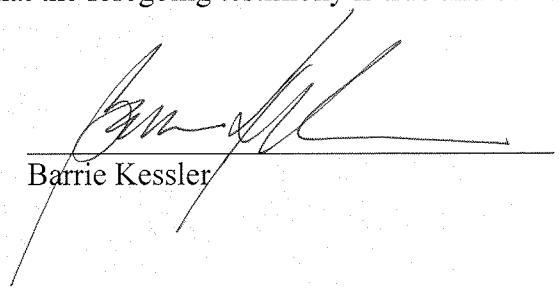
In addition, we would like a regulation requiring licensees to use an account number, that is assigned to them by SoundExchange, on their statements of account and reports of use. This unique identifier would make it easier for SoundExchange to identify each licensee in our system, and to distinguish 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

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

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

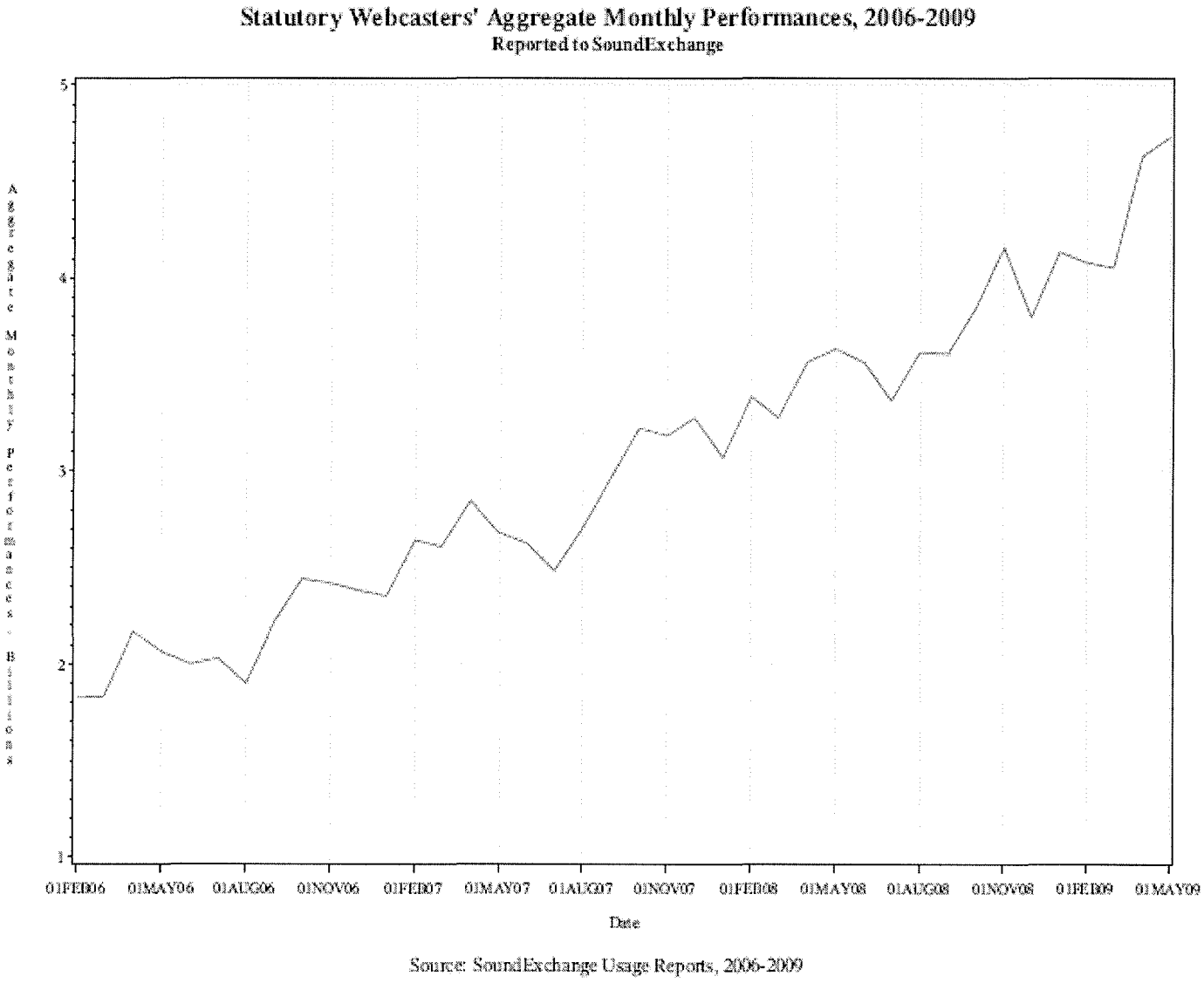
I developed considerable familiarity with the market for statutory webcasting and other digital music services in connection with my work for SoundExchange in the Web II and SDARS matters. In preparing this testimony, I took a number of steps to update my knowledge of the relevant markets, and I studied 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.

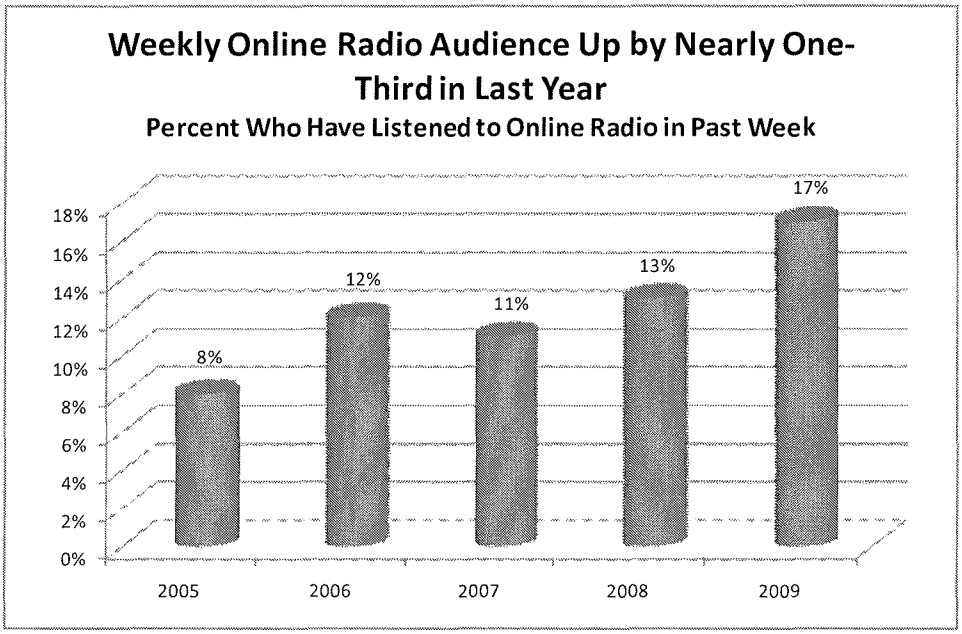


Source: SoundExchange Usage Reports, 2006-2009

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 0925/09).

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.

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[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

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[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 the 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**	
Statutory		
Pandora One	$3.00	
Last.fm Premium	$3.00	
Live365 VIP	$6.95	
Sirius XM Radio	$2.99*	
Slacker Radio Plus	$3.99	
Musicovery Premium	$4.00	
Sky.fm/Digitally Imported Premium	$4.95	
Average	**$4.13**	
On-Demand	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:

$F_N = F_I \cdot PL \cdot IAF$, 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	***SoundExchange Rate Proposal***	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

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, McDonnough 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.

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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								
						PRESENT VALUE OF 2009 - 2015 RATES		
	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